

## APPENDIX D

### ELEPHANT AND CASTLE SHOPPING CENTRE - COMPULSORY PURCHASE ORDER

#### THE COUNCIL'S POWERS AND THE LEGAL AND POLICY GUIDANCE FRAMEWORK

1. It has been made clear repeatedly by the courts over the last few decades that special care needs to be undertaken when considering the justification for compulsory acquisition of land, given the draconian nature of the process of state appropriation of private property against the will of the owner. Compulsory purchase of land involves a serious invasion of the private proprietary rights of citizens. The power to dispossess a citizen of his land against his will is clearly not a power which should be exercised lightly and without good and sufficient cause. The use of statutory authority for the destruction of property rights in this way requires must be based on the right legal principles, adequate evidence and proper consideration. A CPO can only be confirmed when it is necessary in the public interest to do so and the public interest must demand the acquisition decisively. There must a clear case to justify depriving an owner of his land in the public interest.
2. Of central importance to the issue of whether CPO powers should be used are the provisions of Section 226(1)(a) of the 1990 Act, which give the Council power to acquire compulsorily any land in their area if the Council thinks that the acquisition will "facilitate the carrying out of development/re-development, or improvement on, or in relation to, the land". In exercising this power, the Council must have regard to Section 226(1A) of the 1990 Act and must not exercise the power unless it thinks that the development, re-development or improvement is likely to contribute to the achievement of any one or more of the following objects:
  - (a) The promotion of improvement of the economic well-being of the area;
  - (b) The promotion or improvement of the social well-being of the area;
  - (c) The promotion or improvement of the environmental well-being of the area.
3. Section 227 of the 1990 Act gives the Council the power to acquire by agreement any land which it requires for any purpose for which it may be authorised to acquire land under section 226.
4. Acquisitions of land under section 226 or 227 engage the provisions of sections 203-205 of the Housing and Planning Act 2016 ("the 2016 Act"). Section 203 enables third party rights over that land (such as easements, restrictive covenants and rights of light) to be overridden so that development may proceed (provided it is carried out in accordance with planning permission), with the third parties who hold the rights being entitled to compensation under section 204 of the 2016 Act, based on the diminution in value of their property once their rights have been infringed. These provisions prevent the third party who holds the rights from preventing development from proceeding, because their right to obtain an injunction is translated into a right to compensation only.
5. Section 203 enables a development to proceed in accordance with a planning permission even though in doing so rights over the development site which benefit adjacent properties may be infringed. The pre-conditions to the engagement of section 203 are (i) there is planning consent for the development, (ii) the land on which the development takes place has at any time on or after 13 July 2016 become vested in or acquired by the local authority for planning purposes, or been

appropriated to planning purposes, (iii) the authority could acquire the land compulsorily for the purposes of the development and (iv) the work is for purposes related to the purpose for which the land was vested, acquired or appropriated. The rights which the adjacent properties enjoy over the proposed development site are overridden under section 203 and under section 204, the holders of the rights are entitled to statutory compensation based on the loss in value of their land as a result of the infringement. The claim for compensation would be against the person who infringed the rights but under section 204 the acquiring local authority has a residual liability to pay that compensation.

6. Where rights are overridden, the right to compensation for interference with the rights does not occur until the right is actually interfered with, which (depending on the nature of the right) is usually at some point in the construction process and not when the acquisition is made by an acquiring authority.
7. This is a powerful tool in enabling developments as it means that third party holders of the rights cannot prevent the development proceeding (by way of an injunction) - their right to obtain an injunction is translated into a right to compensation only. It also provides certainty for a developer in estimating the basis upon which any compensation is due, as the compensation will be based on a loss in value basis of the property which has the benefit of the right, rather than on any other basis which might fall to be negotiated i.e. it stops the developer being held to ransom or having to pay a share of the development profits.
8. Section 13(1) of the Local Government (Miscellaneous Provisions) Act 1976 provides that a local authority which may be authorised by a Minister of the Crown, by means of a CPO, to purchase any land compulsorily for any purpose may be authorised by that Minister, by means of such a CPO, to purchase compulsorily for that purpose such new rights over the land as are specified in the CPO; and "new rights" means rights which are not in existence when the CPO specifying them is made.
9. Once land has been acquired by the Council for planning purposes under section 226 or 227 of the 1990 Act, the land may then be disposed of to a third party pursuant to section 233 of the 1990 Act. Section 233(1) permits the Council to dispose of the land to such persons, in such manner and subject to such conditions as appear to the Council to be expedient in order to:
  - (a) secure the best use of that or other land and any buildings or works which have been, or are to be, erected, constructed or carried out on it (whether by the Council or by any other person), or
  - (b) secure the erection, construction or carrying out on it of any buildings or works appearing to the Council to be needed for the proper planning of its area.

In this case it is section 233(1)(a) that is relevant.

10. The consideration received by the Council for such disposals must be "the best consideration that can reasonably be obtained", unless the Secretary of State's consent is obtained to the contrary or unless the disposal is the grant of a lease of seven years or less or the assignment of a lease with seven years or less unexpired at the date of assignment. In judging what consideration can be achieved, account must be taken of the expediency as referred to in section 233(1).

11. The Council is required to exercise its powers of disposal under section 233 in a manner which, so far as practicable, secures that relevant occupiers of that land are provided with a suitable opportunity to obtain accommodation (section 233(5)). Relevant occupiers for these purposes means residents and those carrying on business on the land who wish to obtain accommodation on such land and are willing to comply with any requirements of the authority as to the development and use of such land (section 233(6)). A suitable opportunity for accommodation means, in relation to any person, an opportunity to obtain accommodation on the land in question which is suitable to his reasonable requirements, on terms settled with due regard to the price at which any such land has been acquired from him (section 233(7)).
12. As regards human rights, the Human Rights Act 1998 incorporates into domestic law the European Convention on Human Rights. Article 1 Protocol 1 Convention rights have to be considered: every natural or legal person is entitled to the peaceful enjoyment of his possessions. This can cover, for example, enjoyment of existing assets with economic value, such as the marketable goodwill of a business. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. This does not impair, however, in any way the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties. In respect of this right under Article 1 of the Protocol, a fair balance must be struck between the public interest and private rights.
13. Article 8 Convention rights also apply and are engaged i.e. everyone has the right to respect for his private and family life, his home and his correspondence; there shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. Any interference with this right must be proportionate. Article 8 covers family life and private social life enjoyed at a place of work or in professional, business or commercial activities. If children could be affected, then the best interests of the child shall be a primary consideration.
14. Article 6 Convention rights are also relevant: in the determination of his civil rights and obligations, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.
15. Consideration may also need to be given as to whether other Articles of the Convention are engaged, for example: Article 9 (freedom of thought, conscience and religion; Article 11 (freedom of peaceful assembly and association) and Article 14 (freedom from discrimination).
16. Section 149 of the Equality Act 2010 imposes a general equality duty on public sector authorities ("the PSED"), in the exercise of their functions, to have due regard to the need to:
  - Eliminate discrimination, harassment and victimisation and any other conduct that is prohibited by or under the Act.
  - Advance equality of opportunity between people who share a relevant protected characteristic and people who do not share it.

- Foster good relations between people who share a relevant protected characteristic and those who do not share it.
17. Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard to the need to:
- remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
  - take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
  - encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.
18. For the purpose of the PSED the following are "protected characteristics":
- Age
  - Civil partnership
  - Disability
  - Gender reassignment
  - Pregnancy and maternity
  - Race
  - Religion or belief
  - Sex and sexual orientation.
19. Case law has distilled a number of principles as regards the PSED. The duty is a continuing one.. "Due regard" in the context of the PSED means the regard that is appropriate in all the particular circumstances, including the importance of the areas of life of the members of the protected group that are affected and the extent of the effects and such countervailing factors as are relevant to the function which the decision maker is performing. The PSED is not a duty to take specific steps - indeed the courts have warned against micro management of the PSED process - nor is it a duty to achieve results. It is a duty to have regard to the need to achieve the various objectives referred to above. A public body needs to be satisfied that it has sufficient information available to it to make informed decisions. It must be clear precisely what the equality implications are; there must be conscious directing of its mind to the obligations in the PSED, which requires consideration of the specific goals in play and consideration of the relevant materials with those goals in mind; and the "due regard" duty requires a proper and conscientious focus on the statutory criteria, which is more than simply giving consideration to the issue.
20. Policy guidance on the use of compulsory purchase powers is set out in the Minister for Housing Communities and Local Government's July 2019 Guidance on Compulsory Purchase Process and The Crichel Down Rules ("the Guidance"). In the document's General Overview it provides the following:

- Compulsory purchase powers are an important tool to use as a means of assembling the land needed to help deliver social, environmental, and economical change;
  - Acquiring authorities should use compulsory purchase powers where it is expedient to do so;
  - However, a CPO should only be made where there is a compelling case in the public interest;
  - Compulsory purchase is intended as a last resort; but
  - It may be sensible for the acquiring authority to plan a compulsory purchase timetable as a contingency measure and initiate formal proceedings to mitigate loss of valuable time and to encourage those whose land is affected to enter into meaningful negotiations; and
  - When making a CPO acquiring authorities should be sure that the purposes for which the CPO is made justify interfering with the human rights of those affected.
  - In order to reach early settlements, public sector organisations should make reasonable initial offers, and be prepared to engage constructively with claimants about relocation issues and mitigation and accommodation works where relevant.
21. The Guidance advises that the acquiring authority must be able to demonstrate that there are sufficiently compelling reasons for the powers to be sought at this time and should have a clear idea of how it intends to use the land which it is proposing to acquire. It should be able to show that all necessary resources are likely to be available to achieve that end within a reasonable time-scale.
22. The Guidance also makes clear that an acquiring authority should provide substantive information about the sources of funding for acquiring any land and new rights and for implementing the scheme for which the land is required and that funding should be available now or early in the process.
23. The Guidance advises that acquiring authorities will need to demonstrate that the scheme for which a CPO is made is unlikely to be blocked by any physical or legal impediments. These include:
- the programming of any infrastructure accommodation works or remedial works which may be required; and
  - the need for planning permission for the scheme (or where planning permission has yet to be granted an acquiring authority should demonstrate that there are no obvious reasons why it might be withheld) or other consent or licence.
24. Paragraph 106 of the Guidance also gives an indication of those factors the Secretary of State can be expected to consider if the Council made a CPO and the Secretary of State was asked to confirm it. These include:

- whether the purpose for which the land is being acquired fits in with the adopted Local Plan for the area or, where no such up to date Local Plan exists, with the draft Local and the National Planning Policy Framework
- the extent to which the proposed purpose will contribute to the achievement of the promotion or improvement of the economic, social or environmental wellbeing of the area
- whether the purpose for which the acquiring authority is proposing to acquire the land could be achieved by any other means. This may include considering the appropriateness of any alternative proposals put forward by the owners of the land, or any other persons, for its reuse. It may also involve examining the suitability of any alternative locations for the purpose for which the land is being acquired
- the potential financial viability of the scheme for which the land is being acquired. A general indication of funding intentions, and of any commitment from third parties, will usually suffice to reassure the Secretary of State that there is a reasonable prospect that the scheme will proceed. The greater the uncertainty about the financial viability of the scheme, however, the more compelling the other grounds for undertaking the compulsory purchase will need to be.