Response to Compulsory Purchase - Compensation Reforms Consultation by the Highbury Group on Housing Delivery

The Highbury Group comprises an independent group of specialists from the public, private and independent sectors with a membership drawn from housing, planning and related professions; it offers advice and makes representations to Government and other agencies on a variety of subjects, with the aim of maintaining and increasing the output of housing, including high quality affordable housing.

Background

The government has made the levelling up of economic opportunities across the country one of its key policy objectives. As the Levelling Up White Paper recognises, increasing the rate of investment in infrastructure and affordable housing is essential to reduce regional economic disparities. But local government largely lacks the capacity needed to lead large scale infrastructure and housing investment. Individual local authorities lack the human and financial capital to set up and deliver such projects, and there is inadequate strategic planning between multiple authorities or across functional economic areas. The government has recognised this drawback and the Levelling Up and Regeneration Bill 2022 provides a pathway for greater devolution of powers to city regions and counties in order to create greater scale in local government.

But a further, major constraint on the UK's ability to increase investment in infrastructure and affordable housing is the cost of land. This is borne out in surveys of local authorities and of SME builders which identify high land costs as a major impediment to development. Land values are often inflated well above agricultural or industrial values due to hope value: the value that attributed to the hope that land could be awarded planning permission for new housing. Hope value is problematic firstly because high land values often make projects financially unviable, which is one reason why levels of investment in infrastructure and affordable housing are not as high as they might be.

Secondly, hope value is based on the assumption that each plot of land will maximise short-term profitability, incentivising short-term business strategies rather than the longer-term value generation needed to build great places and tackle the housing crisis. A landowner whose land might be suitable for affordable housing, specialist housing for older or disabled people, or other uses poorly served by the market, can always choose to hold their land back from development in the hope of receiving a better price tomorrow for a standard scheme dominated by market sale homes at current prices, and build out as slowly as necessary to maintain those prices.

The *Myers vs Milton Keynes Development Corporation* 1974 ruling (in which the Court of Appeal upheld Myers' claim for hope value at 20% of residential value based on the 1961 Land Compensation Act) set a precedent for hope value to be awarded for potential alternative schemes. Prior to this ruling, the new towns development corporations had typically acquired land at around 2.5 times agricultural values. Since the Myers ruling no new towns have been commissioned, and levels of infrastructure investment and housing delivery have fallen significantly: changes to the opportunities for land value capture are one important reason for this.

The recent White Paper on planning reform recognised that less than half of the uplift in land values created by the grant of planning permission was being captured by communities to help pay for infrastructure and affordable housing (Planning for the Future, p61). Given the ever-increasing demands on improving local infrastructure and building more affordable housing, it is sensible for the government to assess how more of the uplift in land value might be captured for communities.

In this context, the government's new interest in reforming the land compensation arrangements is very welcome.

Objections to Reform

The European Convention on Human Rights and proportionality

The way in which the law approaches the computation of market value for compensation purposes has potential ramifications for Article 1, Protocol 1 (A1P1) of the European Convention on Human Rights (EHRC), which enshrines the need to compensate those who are deprived of their property. Policy decisions that result in particular factors being included or excluded from a valuation need to take account of the public interest, and to ensure that compensation is proportionate to that public interest.

Some argue that A1P1 effectively requires a maximal view of hope value to be paid to landowners. However, case law related to A1P1 affirms that the national authorities have a wide discretion to take account of the public interest when determining how market value is to be represented in an assessment of compensation. That is so even where compensation is payable at a level below the price that would actually be obtained on a commercial sale, where a seller might take into account a variety of speculative elements of value (such as future revenue or development profit) which the state is entitled to exclude from the market value assessed for compensation purposes.

As highlighted in *Jahn vs Germany 2006* (an ECHR case relating to the acquisition of unclaimed agricultural land following the reunification of Germany), the terms under which compensation is payable is an important factor in determining whether a fair balance has been struck. In addition, the case confirmed that states enjoy a wide margin of appreciation as to the proportionality of the means employed and the aim pursued, particularly if the objective is to achieve greater social justice.

For example, the compulsory transfer of property under the Leasehold Reform Act 1967 ignored the value of the buildings to determine the value of the land, thereby reducing compensation payments to freeholders. Similarly, under the Listed Buildings and Conservation Areas Act 1990, compensation should disregard hope value if the owner has allowed the building to deteriorate, as this behaviour is deemed to have damaged the public interest. Moreover, in *Lithgow vs UK 1986*, the nationalisation of aerospace and shipbuilding industries for national security was deemed to be a sufficient reason for paying less than market value.

In contrast, the payment of compensation at less than half the market rate for the compulsory purchase of land for housing was held to be disproportionate where it was not carried out as part of a process of economic or social reform as in the ECHR case *Scordino vs Italy 2007*.

These decisions in European and UK courts reflect the underlying principle in the case law of the ECHR that "possession" for A1P1 purposes must be an existing asset. The speculative possibility of receiving an asset or income in the future is not a "possession" protected by A1P1, and insofar as those elements form part of the present "value" of the asset, the State is entitled to disregard them when compensating the owner for its acquisition.

Fairness and equity

An additional argument that has been used against reform is that it will create a 'two tier land market'. The argument is based on the assumption that landowners who sold their land to local authorities might receive less money than those who sold their land to private developers.
But an important characteristic of land is that each piece is unique due to its location, which include the existing assets on the land and the different planning policies that may apply to it. In particular,

current section 106 agreements and CIL are applied locally, and hence there are already significant differences in the rewards that landowners may receive, depending on where their land is located. While Cherwell District Council requires 35% affordable housing to be delivered via section 106 on schemes on 11 homes or more in most areas, those building in neighbouring Buckinghamshire Council face a minimum requirement of just 25% affordable housing, with higher profits filtering through to landowners as a result. **A world in which market values ignore hope value would therefore be no different in principle to the current system.**

Proposed reforms

Proposals

The consultation states that it is the government's intention to '*rebalance the position on costs and compensation between landowner and acquiring authority to a fairer one*' by amending sections 14 and 17 of the Land Compensation Act 1961, which relate to planning assumptions.

The government's proposal aims to eliminate the concept of prospective planning permission embedded in the 1961 Act, which is one of the sources of hope value. This proposal will leave the concept of Alternative Appropriate Development (AAD) as the only potential future source of hope value that would be awarded if a Certificate of Alternative Appropriate Development (CAAD) is issued. Hence, hope value would only be awarded on the basis that a CAAD has been issued. The government is also proposing to shift the cost of applying for a CAAD from the local authority to the landowner.

The government's approach is to alter the planning assumptions embedded in sections 14 and 17 which impact the way in which market values are determined. This approach is no different to the way in which other planning assumptions related to section 106 payments or CIL impact the market values for land.

Expected outcome

We expect the outcome of these proposed reforms to be vary, depending on whether a Certificate of Alternative Development is reasonably likely to be awarded.

First, for developments where a CAAD is unlikely to be awarded (e.g. where it is unlikely that land would be judged suitable for development in the absence of the proposed land pooling scheme or CPO), the land pooling and assembly process is likely to be much faster. As landowners will have to pay for a CAAD, if they believe that AAD is unlikely to be awarded they will be more likely to accept a commercial offer for their land from the local authority. As the valuation of the land in question would now be much clearer - as it will not be obfuscated by hope value - the landowner is likely to prefer an offer marginally above current market value based on the existing planning status of the land, rather than face a CPO dispute with the local authority. **Hence, the proposed reform will not only expedite development, it will also make many more developments financially viable – reducing the need for subsidy or other public interventions.**

Second, where an AAD is likely to be awarded landowners will still have an incentive to seek a CAAD given the potential reward from compensation stemming from the 1961 Act. **This will clearly slow down the development process and may impact many projects given that few developments are likely to be entirely free of land that may be awarded AAD.** In the event that a landowner has received a CAAD, the need to award compensation based on hope value will also impact the financial viability of the project, and hence may not permit development to proceed.
In recognition of this issue, the government is also proposing to allow acquiring authorities to request from the Secretary of State that, for a specific scheme, payments in respect of hope value

may be capped at existing use value or an amount above existing use value, where it can be shown that the public interest in doing so would be justified. The theory is that by providing certainty as to what the government is prepared to pay in hope value, based on a public interest test for a specific scheme, a local authority would have more confidence in their cost estimates and greater certainty on the viability of the project.

As the Secretary of State will have to directly intervene to remove certain factors from the valuation for compensation purposes in individual cases, each case will need to be treated on its merits. Hence it is not possible to generalise about the approach to the computation of market value for projects, or about the levels compensation that might be assessed. Such an approach will inevitably result in delays and uncertainty until an agreement is reached between both sides as to what a proportionate payment might be in relation to the public interest argument. If an agreement is not reached then CPO powers will need to be applied which is expensive and time consuming as noted by Barry Denyer-Green of Falcon Chambers at the 2018 Land Value Capture Inquiry. The CPO process also carries litigation risks through judicial review challenges.

Given these risks, the proposed new process may work reasonably well for projects that are backed by central government, as this gives all sides confidence that delays are unlikely to derail the project, and that in the event that higher that expected compensation has to be paid, central government will provide additional funds. Examples where such an approach might have been applied in relation to a strong public interest case include the 2012 London Olympics. In terms of future projects, Crossrail II with its 200,000 housing units and the Oxford to Cambridge Arc stand out. In these instances, ensuring that market value is not inflated by including hope value is likely to have a significant bearing on the financial viability of the schemes, and might be justified as being proportionate given the substantial public interest case.

The challenge is to what extent such an approach might work for local or Mayoral authorities or development corporations at a smaller scale. If central government was willing to back these schemes financially to the extent that it would provide funds to help manage delays and potentially cover higher compensation payments, then it is more likely to work. If central government was **not** willing to financially back this discretionary approach then it is less likely to work, due to the increased risks for local authorities if agreement is not reached on appropriate compensation levels. Local authorities would need to have sufficient liquidity to manage the uncertainty of the project if the compensation payment is not considered sufficient, and ultimately might result in the non-viability of the project.

Alternative reforms

Disapplying Section 17

The proposal in paragraph 29 is that a local authority may apply for a direction from the Secretary of State that it should not take account of an AAD in the market valuation. This in effect is a disapplication of section 17 of the 1961 Act, **for a single scheme**. In view of the points made above it would be more effective section 17 to be disapplied **in relation to a category of projects defined in primary legislation**. That would not displace the assessment of compensation on the basis of the evidence provided in each case. But it would remove an element of discretion that might otherwise become a focal point for costly and time-consuming challenges. A disapplication of section 17 can be understood as being related to the planning assumptions.

Planning Assumptions and Market Value

In addition to the proposed discretionary system for removing hope value on a case by case basis, the government should also consider an alternative approach to addressing the balance of compensation towards the community to increase the viability and speed of development. This

could be achieved by focussing on planning assumptions, much as the proposed reforms do by removing section 14 of the 1961 Act.

Market values are framed by public policy, and market values are therefore influenced by planning assumptions related to government legislation. For example, the introduction of Section 106 and CIL payments impact market values. There is no concept of land values transacting at less than market value because of these payments. **Instead, market land values adjust to take account of these public policy factors by falling in value.** This is also the case for the No Scheme World principle where any increase in the value of the land arising from the project is to be discarded in assessing the value of the land being acquired. Market land values take account of this and fall to an appropriate value. Removing prospective planning permission from section 14 will have a similar effect on market values in those instances where an award of compensation would previously have been inflated by hope value.

In the same way, a simple additional planning assumption that could be applied is to remove CAAD from the compensation rules, meaning that only land with planning permission would receive much higher levels of compensation. This is how the German land compensation scheme functions, which is compliant with A1P1. Section 194 of the Baugesetzbuch (Federal Building Code) notes that standardised market values is:

"*Defined as the price which would be achieved in an ordinary transaction at the time when the assessment is made, taking into account the* ***existing*** *legal circumstances and the actual characteristics, general condition and location of the property or other object of assessment without consideration being given to any extraordinary or personal circumstances*"

The decision to include speculative value as part of market value was the basis of the 1845 Land Clauses Consolidation Act related to railway development. One factor that contributed to this approach was the fact that these investments were undertaken by the private sector and not the public sector. But there is nothing inherent about speculative values that requires them to be taken into account in a definition of market value. As such removing section 17 and CAAD in relation to the compensation laws would merely bring England and Wales in line with countries such as Germany. Moreover, the principle of removing CAAD from the compensation arrangements is the same principle used by the government to remove section 14 and prospective planning permission.

Applying a definition of market value which excludes section 17 to specific schemes using the section 5 rule 2 framework would be entirely consistent with the removal of section 14 and would reflect the strong public interest in ensuring a scheme that includes the relevant transport project can proceed viably.

Answers to Consultation Questions:
Question 3: *Do you agree that there are schemes where capping or removing the payment of hope value will increase the viability of certain schemes and/or increase the public benefits delivered through the schemes? Please provide details and where possible examples of schemes.*

The new towns development corporations acquired land at close to use value which was central to their viability. Hence, it is a reasonable assumption to make that enabling projects to acquire land more cheaply would make a difference to viability.

One recent example which highlights the opportunity costs of the Land Compensation Act 1961 in its current form is the recent Garden Village at Welborne. Fareham Borough Council tried for years to get two landowning families to bring forward their sites at Welborne as a single development. However, arguments between the families about their respective site values held the scheme up. One of the landowners consistently argued for a sum which is well beyond what the council was willing to pay and is based on some speculative future use of the site. After years of negotiation the council finally took the decision to compulsorily acquire the site in 2016 because it had no other options, producing lengthy delays to a much-needed 6,000 home development. As a result, £25m of funding to improve the M27 junction from the Solent Local Enterprise Partnership expired in 2020, and expected affordable housing levels on the scheme were slashed from 30% to 10%.

Had a combined authority had stronger compulsory purchase powers then it would have been in a stronger position to negotiate with the landowners early on. The level of compensation achievable would be clearer to all parties from the outset. This would have made it less likely that the authority had to use compulsory purchase as an option, because the landowners would have been more inclined to come to a reasonable voluntary arrangement to combine their sites, maximising their own return and the public benefit.

Question 4: *Please provide any comments you may have as to the proportionality of capping or removing the payment of hope value balanced against the delivery of public benefits. Please provide any examples you have where you believe the public benefits would be such that it would be proportionate to impose such a cap or removal of hope value to a scheme.*

Given that each case will need to be assessed on its own merits, it is difficult to provide an answer to this question. *Sordino vs Italy* indicated that less than half market value for housing was disproportionate. But in *Jahn vs Germany* full market value was not paid for agricultural land that was not in use, related to the reunification of Germany.

Question 5: *Do you have evidence of the extent to which hope value is currently claimed/paid generally in compulsory purchase situations? Please provide details and where possible any evidence that you have as to whether hope value is more likely to be paid on particular types of schemes, for example from urban regeneration schemes to greenfield schemes or from housing schemes to transport schemes.*

The current CPO compensation code acts as a barrier to building an evidence base on the workings of the land market that demonstrates the need for reform, as the effect of the current system is to disincentivise many transactions, planning applications and developments from ever taking place. Evidence of problems with the current CPO compensation code tends to come from major projects with central government backing, where political prioritisation has been sufficient for CPOs to progress in spite of inflated costs resulting from 'hope value'.

One prominent recent case concerns land purchased for the HS2 Curzon Street terminus in Birmingham. Various property owners all claimed development value for student housing and received CAADs to this effect. In the real planning world, the positive CAADs, if converted to planning consents, would far outweigh demand for student housing in the area. The probability of all claimants receiving planning consent was therefore well below 50%. However, in the 'compulsory acquisition world', each building is valued in isolation. The buildings were each granted positive CAADs as if each building had 100% probability of obtaining planning consent in the real world, and full development value was claimed. The government lost its appeal in *Secretary of State for Transport v Curzon Park Ltd and others* in 2021.

Another case was on the Olympic Park at Carpenter's Estate in Stratford. In 2007, a goods depot owned by building contractor Rooff Ltd was compulsorily purchased for the Olympic Park. There was no outstanding planning permission or plan allocation for development on the site at the time of the purchase. A Newham Council certificate had ruled that planning permission would only have been awarded on the site for B1 (business) and B2 (general industrial), informing the values that the London Development Agency sought to attach to the land when acquiring it under CPO. The then owners of the site argued that because of the public investment in regeneration in the area, the land had the potential to be developed as a lucrative mix of residential and business uses, and sought a Section 17 award. Rooff was ultimately successful in its litigation, receiving a much higher value of compensation for their land, and in 2012 the Secretary of State supported this decision. Basing the appropriate level of compensation on existing planning permissions would have been much clearer, saving considerable legal costs and time. The amount of compensation would have matched the value of the land to Rooff at the time, rather than a speculative sum based on an unplanned possible future development, leaving the public purse more to invest in regeneration.

Question 6: *Do you think the public benefits of capping or removing hope value is more likely to arise in particular types of scheme? Do you think any solution to this issue should be limited to particular types of scheme or apply across all types of compulsory purchase situations? Please provide details in support of your answers.*

The leasehold reform Act of 1967 was based on providing greater social justice, but *Sordino vs Italy* highlighted that buying land for housing was not considered sufficient reason to pay less than market value. Developments that include an integrated housing and transport plan are far more likely to be given a greater public interest weighting.

Question 7: *Do you agree with the proposal to address this through the issue of directions for specific schemes as set out in this consultation?*

This approach has particular merit for schemes that central government is keen to support given that it is better suited to managing litigation risks. For individual local authorities to embark upon such an approach without the financial backing from central government is less likely to result in a successful outcome as the risks in many cases are likely to outweigh the benefits.

Question 8: *Do you agree with the proposal that the directions could cap the payment of compensation at existing use value or at a percentage above existing use value (excluding the payment of compensation under other heads of claim)?*

As per Question 7

Question 9: *Please provide any comments you may have as to: (1) whether it will be possible to identify certain, deliverable public benefits in applying for directions; (2) how it will be possible to link those public benefits to value captured.*

Each case will need to be taken on its own merit.

Question 10: *Do you think that an acquiring authority should have to consult with affected landowners before seeking a direction from the Secretary of State?*

No, acquiring authorities should not have to consult with affected landowners before seeking a direction. It is frequently difficult to determine who the owners of land are, as they are often

obscured by layers of structures, many of them held off-shore. In these cases a requirement to consult would impose a serious barrier to a purchasing authority, and create additional incentives for landowners to obscure their ownership. A less damaging alternative would be to require the authority to make reasonable efforts to consult.

Question 11: *Do you agree that issuing directions should only be to schemes where the acquiring authority is also a public sector entity?*

Yes.

Question 12: *It might be possible for landowners to seek a planning permission so that development value applies under section 14(2)(a) LCA 1961 circumventing any cap applied under a direction. Do you think it should be possible for the directions to cap development value for any planning permission which falls under section 14(2)(a) where that planning permission is made after the "launch date" of the scheme or after the date the directions are issued if later? The launch date is defined by section 14(6) LCA 1961.*

NA

Question 13: *Do you have any further comments as to how the process of seeking and issuing directions might work?*

NA

Question 14: *Do you think the proposals should go further and automatically limit the payment of hope value in compulsory purchase more generally or in relation to specific types of schemes? Please provide details and justification as to why you think it would be in the public interest to go further and what public benefits could be delivered if hope value was limited. Examples of types of schemes, for example regeneration, you think any further general application should apply to would also be helpful.*

Yes, for the reasons set out in the section on Alternative Reforms above, the government should go further and automatically limit the payment of hope value in compulsory purchase more generally or in relation to specific types of schemes. Providing a statutory definition of types of scheme in which hope value would be limited would provide greater certainty for all actors. Types of scheme could include regeneration, transport infrastructure, and affordable housing, as the public interest in these types of scheme is clear and well established.

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