Striking a balance in CPOs

Michele Vas assesses whether regeneration is all when it comes to compulsory purchase orders

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'Compulsory acquisition will not always be endorsed simply in the name of regeneration. There is a balance to be struck between the benefits a scheme may deliver against the wider local interests of the area and those affected by the compulsory purchase order (CPO).'

Regeneration is one of the government's priorities; it continues to make grants and loan funding available to deliver infrastructure which will aid the delivery of regeneration. Compulsory purchase is one of the tools available to the public sector to secure the regeneration of its areas. It is unusual for compulsory purchase orders (CPOs) not to be confirmed by the Secretary of State. CPOs are judged to facilitate regeneration, which then satisfies the requirement that there is a compelling case in the public interest for making and confirming a CPO. However, is regeneration in any form, regardless of the qualitative merits of the scheme, enough to meet the public interest test?

Section 226(1)(a) of the Town and Country Planning Act 1990 is the power favoured by acquiring authorities seeking to promote and secure redevelopment and regeneration in their area.

This section of the Act permits the compulsory purchase of land where an acquiring authority is satisfied it will facilitate the 'development, redevelopment or improvement' of land within its area. When exercising powers under s226(1)(a), the acquiring authority must be satisfied that such development, redevelopment or improvement will:

- promote or improve the economic well-being of its area;
- promote or improve the social well-being of its area; or
- promote or improve the environmental well-being of its area.

Compulsory purchase powers should only be used as a last resort to acquire the land required. However, it is becoming more commonplace for CPOs to be made with relatively 'light' attempts at private treaty negotiations having first been made by the acquiring authority or developer promoting the redevelopment scheme, particularly where there are a number of interests to be acquired. It is not until the CPO has been made that there tends to be a real focus on seeking to acquire the land required by private treaty. CPO guidance recognises that acquisition by private treaty can take time and that it is acceptable to carry out such negotiations in parallel with the CPO process.

The compulsory purchase process does not start and end simply with the making of the CPO. Following the making of a CPO, the acquiring authority is required to serve notice of the making of the order on all of those individuals and companies affected by the CPO, to publicise the making of the order in a statutory form and to submit the order to the Secretary of State for confirmation. There is then a minimum statutory period of 21 days for those affected (or not directly affected) by the order to make representations to the Secretary of State. Where objections are made, a public inquiry will be held to enable the Secretary of State to consider if the CPO should be confirmed.

The compulsory purchase guidance (re-issued in October 2015) sets out at para 76 the factors that the Secretary of State will take into account when deciding whether to confirm a CPO (see box on p17).

When a CPO is made, it is not unusual for objections to be made that relate to the scheme underlying the CPO. The standard position is that where there is an up-to-date adopted policy framework, or a planning permission in place, it is not for the inquiry to interrogate further the details of the scheme underlying the CPO. The CPO guidance supports this position and there is a commonplace acceptance that where a planning permission is already in place this satisfies part of the case for confirmation of a CPO. It is often argued that there is no need for the Secretary of State to consider whether the scheme for which the CPO is being promoted meets a certain qualitative threshold to justify the confirmation of the CPO.

Large-scale regeneration and development schemes will normally be the subject of outline planning permission. Save for general parameters setting the development envelope, the details of the scheme will often be contained in illustrative material, with planning conditions and obligations imposed to control how the details are brought forward. Another common element for large-scale redevelopment schemes is the inevitability of the scheme being amended through the use of applications under s73 and s96A of the Town and Country Planning Act 1990. There is no guarantee that the scheme proposed at the point at which a CPO is made and confirmed will be the same scheme that is constructed once land has been vested under a confirmed CPO. In *Alliance Spring Co Ltd v The First Secretary of State* [2005], the courts recognised it would not normally be appropriate for an inspector/Secretary of State to take a different view on a planning application that had already been granted planning permission. However, the courts did acknowledge that a fresh approach could be taken where there is evidence to show certain matters were not taken into account, or were not fully considered.

If a scheme significantly changes between the point of making the CPO and the point of confirmation, it raises the question of whether there should be further scrutiny when deciding whether to confirm the CPO to consider if the underlying scheme is of good enough quality to deliver the level of regeneration needed, and whether there are sufficient controls in place to ensure that the scheme delivered will be of sufficient quality.

Against this background it is worth exploring how the Secretary of State has taken into account the extent to which the planning merits of a scheme (or potential amendments to the scheme underlying the CPO) are considered when determining whether to confirm a CPO.

The compulsory purchase guidance

Factors considered by the Secretary of State in deciding whether to confirm a compulsory purchase order include (para 76):

(a) 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 Plan and the National Planning Policy Framework;

(b) 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;

(c) 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.

Southall Gasworks

The recent Secretary of State decision confirming the GLA's CPO for the regeneration of Southall Gasworks considered some of these issues. The GLA has different powers available to it for CPOs (these are included in s333ZA of the Greater London Authority Act 1999), but the purpose is nonetheless to regenerate its area. The order was made on 23 September 2014. An opportunity area framework had been adopted by the London Borough of Ealing as a supplementary planning document and by the GLA as supplementary planning guidance. Planning permission for the scheme underlying the CPO had a contentious history. The applications, spanning the administrative areas of the London Boroughs of Ealing and Hillingdon, had been recommended for refusal. The Mayor intervened, recovering the applications and subsequently granting planning permission on 29 September 2010. At the time the inquiry was held a revised master plan proposing minor changes was due to be submitted to the local planning authority for approval. The London Borough of Hillingdon (a landowner of part of the CPO lands) objected to the making of the order. Some of the arguments advanced at the public inquiry in opposition to the confirmation of the order included:

- there had been a lack of meaningful engagement to acquire the land by agreement; and
- there had been a change in economic circumstances since planning permission was issued in 2010, which meant the original affordable housing provision of 30% was inadequate. While the developer was proposing to make changes to the consented scheme, this did not include any uplift to affordable housing. This was despite an improvement in economic conditions, a more acute shortage of affordable housing, and the London Plan requiring consideration of review mechanisms where policy-compliant affordable housing is not being provided. The council sought to advance the approach acknowledged in

the *Alliance Spring* case that a change in circumstances and/or fresh material necessitated a reconsideration of the planning considerations.

The inspector concluded that a CPO 'is not the forum for discussing the merits of the Permissions which were granted (and not challenged) for the Scheme' and reached the view that the issue raised on the failure to readdress the affordable housing provision was one of degree rather than principle. There was no evidence to suggest the GLA's consideration of the planning application was flawed or that circumstances had changed which justified revisiting the planning considerations. That the London Borough of Hillingdon was relying on the improved economic circumstances was treated by the inspector largely as an irrelevance. The inspector took the view that for a scheme which had a 20-25 year build-out period (which this had), the planning system should provide a 'degree of certainty for all concerned' and accordingly it would be unreasonable for the planning merits of the permitted scheme to be reviewed in light of the improved economic circumstances. That the CPO related to a scheme which had the benefit of extant planning permissions and complied with the adopted and up-to-date planning framework led the inspector to conclude there was no need to revisit any planning considerations.

On the issue of engagement, the inspector was satisfied that there had been adequate engagement. That this had proceeded in tandem with the CPO was not of concern to the inspector on the basis that the CPO circular (in force at that time) permitted this approach. The inspector concluded that the only reason agreement had not been reached between the parties related to the issue of valuation and that this was a matter for the Upper Tribunal (Lands Chamber) rather than an issue relating to confirmation of the CPO. Accordingly it was not an impediment to confirmation.

The inspector concluded that there was a compelling case in the public interest for the CPO; the regeneration of the area and benefits that flowed from the scheme justified its confirmation.

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Analysis

It is interesting that the inspector took an approach of 'degree' rather than principle to the issue of whether there was information or evidence which permitted a reconsideration of the planning considerations. It raises the question whether a regeneration project that is expected to be constructed for, say, five years would be treated differently, as the need for planning certainty is more manageable over a shorter period of time. The inspector also noted that the planning permissions had not been subject to challenge at the time of issue in order to justify further the need for revisiting the planning merits of the permissions, despite the *Alliance Spring* decision confirming that it would be possible to do so.

Welsh Streets, Liverpool

One case which goes against the grain that 'regeneration is all' when considering whether to confirm a CPO is the Secretary of State's decision relating to the Liverpool City Council (Welsh Streets Phases 1 and 2) Compulsory Purchase Order 2015. The CPO inquiry was conjoined with the called-in planning application for the redevelopment of the Welsh Streets, comprising the demolition, site clearance and construction of new dwellings. The Secretary of State decided not to confirm the CPO and also refused planning

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References

'Compulsory purchase process and the Crichel Down Rules: guidance', Department for Communities and Local Government (October 2015) – www.legalease.co.uk/crichel-down

Southall CPO, Greater London Authority – https://www.london.gov.uk/node/29147

Welsh Streets appeal (ref APP/Z4310/V/13/2206519), Planning Inspectorate Appeals Casework Portal – www.legalease.co.uk/welsh-streets

permission for the scheme on which the CPO had been promoted; of significance is that both the refusal of the planning permission and decision against confirmation of the CPO were contrary to the inspector's recommendation.

Save Britain's Heritage (SAVE) objected to the CPO; the Secretary of State agreed with SAVE that the Welsh Streets were of significant historical and social interest, and that the order scheme conflicted with local plan policies to protect the local character of the area. Part of a row of terraces in Madryn Street which contained the birthplace of Ringo Starr would be retained; however, the demolition of the remainder of the terraces in the street was considered to significantly harm the ability to appreciate Liverpool's Beatles heritage, which was of importance to the city, including the tourism potential of the street. It was also concluded that there were other alternatives which had not been explored to retain and refurbish the existing dwellings with more selective demolition. The Secretary of State therefore concluded that there was not a compelling case in the public interest to confirm the order.

This is in contrast to the inspector's conclusion on the issue of alternatives. The inspector was of the view that while suggested alternatives were put forward by objectors, the acquiring authority did not have alternative schemes that were funded and/or were likely to be delivered within a reasonable timescale. The poor condition of many of the existing properties and non-heritage designation of the area, in the inspector's view, meant that the economic, social and environmental well-being which the CPO and scheme would bring about significantly weighed the argument in favour of confirming the CPO – there was a compelling public interest argument. This followed on from the inspector's decision that planning permission for the scheme should also be granted.

It is clear in this case that the Secretary of State, by calling-in the planning application, considered it was not appropriate the application be determined at a local level. Retaining control of determining the planning application is more likely to have influenced the outcome of the CPO inquiry than if planning permission had been granted at a local level.

The redevelopment of the Welsh Streets will have inevitably brought about significant regenerative benefits, however, this decision illustrates that compulsory acquisition will not always be endorsed simply in the name of regeneration. There is a balance to be struck between the benefits a scheme may deliver against the wider local interests of the area and those affected by the CPO.

Conclusion for practitioners

It seems that there is little opportunity to object, meaningfully, to a CPO on the basis that there has been inadequate negotiation. This is an area that the Secretary of State and the courts will need to police. Efforts to acquire privately are becoming increasingly cursory and often seek to leave all risk with the affected landowner.

There is a need to ensure that the CPO process is not hijacked as another avenue for those opposed to redevelopment to continue to resist development, as they are two separate administrative processes. The local plan and planning application processes afford the public an opportunity to make representations. As the inspector noted in the Southall Gasworks decision, there has to come a point at which the planning process provides a degree of certainty that what has been applied for, and consented, cannot be revisited by other means (ie a CPO inquiry).

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There are, however, going to remain questions about whether the fact that a scheme has planning permission and is likely to deliver regeneration, on some level, means that there should be no or limited interrogation of the quality of the scheme, better alternatives or regenerative benefits when determining whether to confirm a CPO to facilitate that scheme. The *Alliance Spring* principle suggests that this is capable of being revisited. A genuine change in circumstances is likely to be needed before the Secretary of State considers that the underlying scheme requires further interrogation, before determining whether a CPO should be confirmed. One way of demonstrating this may well be the development of a credible alternative – but that requires real resource on the part of the objector and an unusually open-minded local planning authority. ■

Alliance Spring Co Ltd v The First Secretary of State [2005] EWHC 18 (Admin)