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Committee
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ECONOMY, INFRASTRUCTURE AND SKILLS COMMITTEE

Submission to Inquiry on Compulsory Purchase

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1. Introduction

1.1 I am a solicitor and the Lead Partner – Public Law at Geldards LLP. I have been practicing the law relating to compulsory purchase and land compensation since the early 1980's when I was involved in promoting CPO's for highway schemes for the Mid Glamorgan County Council. After joining Geldards in 1987 I advised the Cardiff Bay Development Corporation on several compulsory purchase orders such as those for Penarth Haven and the Ferry Road area and on the CPO provisions of the Cardiff Bay Barrage Act. I have also advised local authorities in both Wales and England on regeneration and highway schemes, for example the Wrexham Industrial Estate Access Roads, Friars' Walk, Newport and Markham Vale (a coalfield regeneration scheme adjoining the M1) in Derbyshire. I am currently actively involved in the CPO's for two highway schemes in NW England and in relation to the CPO elements of the M4 Corridor around Newport scheme. I have also advised on compensation claims in the Upper Tribunal (Lands Chamber), notably the claims relating to the acquisition of multi storey car parks in central Cardiff required to make way for the St Davids' 2 Shopping Centre scheme where I acted for the Welsh Ministers.¹ I was a member of the Planning and Environment Committee of the Law Society from 2003 – 2016 and continue to contribute to that Committee's Welsh work as a member of the Law Society's Wales Committee. I am a member of the Compulsory Purchase Association.

1.2 I am pleased that the Committee has decided to conduct this inquiry. The law relating to compulsory purchase and compensation lies at the heart of the ability of public bodies and other undertakings granted special powers by legislation ("statutory undertakers") to deliver infrastructure and other schemes considered to be in the public interest. Virtually the whole of our transport network, utilities and much of the public realm has been developed over almost 200 years with the benefit either of explicitly exercised CPO powers or with recourse to powers available "in the background". The system we have today is still essentially that devised to facilitate the construction of railways and canals in the 19th century and adapted to creating a national road network and for post war reconstruction and urban regeneration in the 20th. The use of CPO powers is therefore a creative instrument which should be viewed in a positive light as the means to realise in a timely fashion development that is determined through democratically accountable and evidence-based decision-making to be in the wider public interest. The courts have recognised this, for example:

*"... compulsory purchase of property is an essential tool in a modern democratic society. It facilitates planned and orderly development. Hand in hand with the power to acquire land without the owner's consent is an obligation to pay full and fair compensation."*²

1.3 Nevertheless, the Courts have also always been vigilant in keeping the use of CPO powers within strict limits, recognising the infringement of individual rights of occupation and ownership that is inherent in compulsory purchase and which is only acceptable because a compelling case in the public interest has been demonstrated and because fair compensation is payable with recourse to independent adjudication of disputed claims. This well-established approach is now further reinforced by the

¹ Reported as *Bishopsgate Parking (No2) Ltd v Welsh Ministers* [2012] UKUT 22 (LC)

² Lord Nicholls in *Waters v. Welsh Development Agency* [2004] 1 WLR 1304

right to respect for family life and of property established in UK law by the Human Rights Act 1998.³ There are many judicial pronouncements to this effect, both pre and post the Human Rights Act, for example:

“In the sphere of compulsory land acquisition, the onus of showing that a CPO has been properly confirmed rests squarely on the acquiring authority and if he seeks to support his own decision, on the Secretary of State. The taking of a person's land against his will is a serious invasion of his proprietary rights. The use of statutory authority for the destruction of those rights requires to be most carefully scrutinised. The courts must be vigilant to see to it that that authority is not abused.”⁴

- 1.4 The current case of the statute book relating to CPO and land compensation is unsatisfactory and scattered across numerous statutes from the Lands Clauses Consolidation Act 1845 to the Neighbourhood Planning Act 2017. A major Law Commission project⁵ to reform, restate and consolidate the law relating to compulsory purchase carried out under Carnwath J⁶, a notable authority on this area of law, was not implemented. The most significant recommendations for reform have, however, been implemented more recently. Although this is to be welcomed, the piecemeal nature of the reforms has been to further complicate the statute book. There four main CPO statutes, namely the Land Compensation Act 1961, the Compulsory Purchase Act 1965, the Land Compensation Act 1973 and the Acquisition of land Act 1981 and have all been amended significantly over the years.
- 1.5 The powers to acquire land compulsorily are generally to be found in statutes relating to specific areas of public service. Thus, for example, the Highways Act, the Education Acts and the NHS (Wales) Acts all contain CPO powers. In addition, general powers to acquire land for development can be found in the Town and Country Planning Act 1990 Part XI and the in the Welsh Development Agency Act 1975.
- 1.6 The position in Wales is further complicated by the reservation of powers in this subject area under the Wales Act 2017. The power to create statutory powers to CPO land for devolved purposes and CPO procedure are devolved to the National Assembly. Land compensation, presumably because it is seen as being closely related to land law which is another reserved topic, remains reserved.⁷

2. Barriers to the use of CPO powers

- 2.1 While the legislation relating to the use of CPO powers is in an unsatisfactory form, the fundamental features of the system are sound, especially since the Planning and Housing Act 2016 and the Neighbourhood Planning Act 2017 have implemented key reforms recommended by the Law Commission.
- 2.2 The main barriers are ones of confidence, training and resources.
- 2.3 The use of CPO, while it is rightly seen as the last step in a process that should always encourage voluntary agreement, should always be part of the planning for any public project that involves land acquisition. However, many public bodies see CPO as a last

³ Incorporating Article 8 and Article 1 of the First Protocol to the European Convention on Human Rights

⁴ Watkins LJ (Sir Tasker Watkins VC) in *Prest v. Secretary of State for Wales* [1982]

⁵ <https://www.lawcom.gov.uk/project/towards-a-compulsory-purchase-code/>

⁶ Now Lord Carnwath of Notting Hill JSC

⁷ See Government of Wales Act 2006 (as amended) Schedule 7B, section M3, para 185.

resort and do not factor into their project planning the possible use of CPO powers from inception. Having to initiate a CPO “from scratch” when a project is otherwise well advanced is a source of delay and also loses the acquiring authority the initiative in negotiations with recalcitrant landowners.

- 2.4 In general, the one area where it is accepted that CPO action is integral to the project is in relation to highway schemes. The nature of linear projects where hundreds of owners and occupiers may be affected is such that there is never any hope of securing agreement from all landowners and the use of CPO is therefore seen as inevitable and is planned for accordingly from the outset.
- 2.5 On the other hand, the position with regeneration schemes is sometimes less clear cut, especially if a relatively small number of interests are involved, where there may be a natural inclination to try and negotiate a deal. Difficulties can also arise with sites in single ownership where the owner/developer’s aspirations and those of the public sector differ. There may also be cases, such as the type of schemes highlighted by Sustrans, where CPO powers are considered too resource intensive and disproportionate to justify their use.
- 2.6 The reluctance to integrate the possible use of CPO into project planning is the result of a lack of experience and familiarity within the public sector in how to build the case for a CPO and to administer the process. While the legislation and the associated rules and guidance are complex, the confidence of acquiring authorities and officers will grow with familiarity. In Wales, the relatively small size of Welsh local authorities is undoubtedly a factor as is the loss of the centres of expertise that were to be found in bodies such as the Land Authority for Wales, CBDC and the WDA. To provide some context: when I headed the team responsible for the legal work on highway CPO’s at the Mid Glamorgan County Council in the early to mid 1980’s, the capital programme was geared to starting a major road scheme every other year, as well as smaller schemes, so there was a continuous stream of CPO and compensation work generated. Even today, a major local authority such as Birmingham City Council with a large capital and regeneration programme can sustain a very experienced in-house cross disciplinary scheme capable of running several orders simultaneously.
- 2.7 A Welsh local authority seeking to embark on a CPO will currently receive little support from Welsh Government. There are three matters I would mention:
 - (a) Guidance on project managing the CPO process was identified as a weakness some years ago as in a report by the Compulsory Purchase Policy Review Advisory Group in 1999.⁸ A very useful “CPO Manual” was subsequently issued by the DCLG in 2006. Written by a team of leading CPO and compensation surveyors and lawyers,⁹ it contained an “end to end” description of best practice. Unfortunately, DCLG has failed to fund the updating of the manual, which was in loose leaf format, since 2009 and it is now out of date.
 - (b) An important element in the CPO process is the central government guidance on CPO powers. England now benefits from comprehensive Guidance

⁸ Compulsory Purchase Policy Review Advisory Group (CPPRAG); Interim Report, DETR, Jan 1999

⁹ *Compulsory Purchase Procedure Manual* (2 vols) DCLG,
<https://www.tsoshop.co.uk/parliament/bookstore.asp?Action=Book&ProductId=7003095>

updated as recently as February 2018.¹⁰ This replaced guidance issued by DCLG in 2004. The relevant guidance in Wales, however, dates from 2004.¹¹ An update was subject to consultation but never issued. I understand that work to produce a new Welsh circular may be in hand.

(c) Until stopped as an economy measure in the 1980's central government departments were prepared to conduct a technical review of CPO's in draft before they were made and submitted formally for confirmation by Ministers. The Welsh Government continued to do this on an informal basis until more recently if requested but it is believed that the official who had the experience to undertake this has now moved on. This was a useful service which gave confidence to acquiring authorities that orders would not be rejected for technical defects (as opposed to the merits of the proposals). Significantly the current DCLG Circular has reinstated this service in cases of difficulty.¹²

2.8 In summary, an up to date Welsh Circular, supplemented by a technical manual and the reinstatement of pre-submission technical checking, would undoubtedly give local authorities and public bodies the resources to consider the use of CPO with greater confidence.

2.9 I recognise that there are also arguments for re-establishing centres of excellence in land assembly and the use of CPO powers to achieve this. This could be in the form a shared service for local authorities and, perhaps, other public authorities. Such an approach could also justify investment in the specialised mapping and word-processing systems that are now essential for the making of a CPO of any scale nowadays. This existed, to an extent, in the former Land Authority for Wales in relation to the assembly and acquisition of development sites. However, the Authority's remit to be self-financing, meant that the legal, surveying and administrative skills that it developed were not made available to the wider public sector. However, I recognise that this is a proposal that would need to be considered in the context of the forthcoming local government reform and public land asset management agenda.¹³

2.10 The efficient use of CPO powers requires affected persons to have access to experienced professional advice in connection with their rights to object and to claim their due entitlement to compensation. The Compulsory Purchase Association¹⁴ established some fifteen years ago is a not for profit body that promotes best and most effective practice in compulsory purchase and draws its membership from surveyors, lawyers and planners. This has been a welcome development and the CPA now runs an effective training programme to develop relevant professional skills. However, one of the problems with CPO skills is that the flow of work has been erratic

¹⁰ Guidance on Compulsory purchase process and The Crichel Down Rules, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/684529/Compulsory_purchase_process_and_the_Crichel_Down_Rules_-_guidance_updated_180228.pdf

¹¹ The National Assembly for Wales *Revised Circular on Compulsory Purchase Orders* NAFWC 14/2004 [https://gov.wales/about/open-government/publications-catalogue/circular/circulars04/NAFWC14\(1\)2004?lang=en](https://gov.wales/about/open-government/publications-catalogue/circular/circulars04/NAFWC14(1)2004?lang=en) and [https://gov.wales/about/open-government/publications-catalogue/circular/circulars04/NAFWC14\(1\)2004?lang=en](https://gov.wales/about/open-government/publications-catalogue/circular/circulars04/NAFWC14(1)2004?lang=en)

¹² See para 24

¹³ In this regard I have commented elsewhere on the desirability of a public sector wide approach to land asset management. See Geldards response dated 10th April 2017 to Q9 of the Government's Reforming Local Government; Resilient and Renewed consultation.

¹⁴ <http://www.compulsorypurchaseassociation.org/>

over the past twenty years. Overall, the 2008 crash and resulted in a slow down in development activity with a consequent loss of CPO skills. In Wales this compounded be abolition of the WDA and the shift in economic development strategy away from land development. The situation now is that the demands of scheme such as HS2 and the accelerated local authority and trunk roads programme in England is leading to a shortage of experienced CPO practitioners, but is also providing opportunities for young practitioners to move into the field.

- 2.11 Another constraint is the availability within the Planning Inspectorate of sufficient Inspectors trained in CPO work. There is currently s shortage, with the time from the making of a CPO to public inquiry currently around 12 months.

3. The use of CPO for urban regeneration

- 3.1 It is testimony to the robustness of the foundations of the CPO system laid down in the 19th century that is has evolved and adapted from the needs of the canal and railway pioneers to facilitating sophisticated urban regeneration schemes and the advent of the modern planning system and its more recent adjunct, environmental assessment.
- 3.2 It is essential that the purposes for which a CPO is made are clear and this is normally to be done through the prior grant of planning permission. The decision-maker will also expect evidence that the scheme has been funded or that there are reasonable grounds to assume that it will be funded if the CPO is approved. Evidence should also be available that there are no other impediments to development.
- 3.3 That said, the is no statutory requirement for planning permission to be in place and it is, as a matter of law, possible for a CPO to be confirmed if the evidence presented amounts to a “compelling case” that land should be developed and that acceptable proposals within the purposes for which the CPO is sought will come forward if the CPO is approved.¹⁵
- 3.4 The latest DCLG Circular emphasises the need for the planning framework justifying the CPO to be set out in some detail as well as the needs for evidence that there are no physical or legal impediments and no obvious reasons why planning permission should not be upheld. However, the circular also recognises that it may not always be sensible or feasible for full details to have been worked up, especially where a proposed acquisition is part of a longer-term strategy and that it is up to an acquiring authority to present a compelling case for acquisition in advance of resolving all the uncertainties.¹⁶
- 3.5 This position echoes, but not quite to the same broad extent, advice contained in a now cancelled circular relating to use of the CPO powers of urban development corporations which recognised the role of site assembly in giving the market

¹⁵ For an account of the current law relating to the use of CPO powers for regeneration see the paper by David Elvin QC of landmark Chambers, presented to the 2017 Conference of the UK Environmental Law Association <http://www.landmarkchambers.co.uk/userfiles/documents/resources/CPO%20Paper%20DEQC%20UKELA%202017%20FINAL.pdf>

¹⁶ See paragraphs 15, 74 and 75

confidence to bring forward development proposals in areas where land was derelict, contaminated or under used creating “market failure”.¹⁷

3.6 The CPO process, in the hands of an experienced and skilled multi-disciplinary team is well understood in terms of the planning and interaction with the development industry and can achieve impressive and positive change through large scale comprehensive schemes.¹⁸ However, the challenge now facing local authorities is at different scale and relates to the adaptation of the urban fabric to take account of the changing nature of retailing and leisure activities, the need to move to sustainable modes of transport and getting around and the reintroduction of residential uses within town centres.

3.7 These pressures will change to nature of land assembly to a need to stimulate the redevelopment and re-use of sites scattered through an urban area or along a street to remove pockets of “market failure” and therefore stimulate the regeneration and improvement of the well-being of the area. There is no reason why the existing powers to develop land for “planning purposes”¹⁹ should not be used for such a purpose. A strategy based on:

- (a) The survey of under used or derelict properties,
- (b) a “master planning approach” to design, the identification of development constraints and well-being benefits for a wider area of a co-ordinated programme of acquisitions, accompanied by public and stakeholder engagement and consultation and
- (c) a structured approach to negotiations with landowners to identify those willing to sell and those unwilling to do so or with unrealistic expectations as to value of future acceptable uses, and it being known that a CPO was in preparation in the background

should a establish a case for acquisition which tilts the balance in favour of the public interest in regeneration when weighed against the constitutional right to individual property, thereby amounting to a compelling case for CPO action.

3.8 New, up to date, Guidance taking account of case law and legislative changes over the last fourteen years, would be a good start in reviving the skills and confidence of public bodies to use CPO and, most importantly, to factor the possibility of its use into their project planning and to prepare accordingly. The up to date DCLG Guidance, at

¹⁷ UDC's have broad CPO powers under s.142 of the Local Government Planning and Land Act 1980. The commentary on this provision in the Encyclopaedia of Planning Law notes at section 2-1609.1: “This section confers a broad land acquisition power on urban development corporations. Guidance as to the use of these powers was contained in DOE Circular 23/88 which emphasised (para. 5) that the powers are expressed in wide and general terms, reflecting both the national importance of the task of urban regeneration and the practical problems of returning wide areas of severe urban dereliction to beneficial use. In the special circumstances in which UDCs operate it would not always be possible or desirable for them to have specific proposals for the land concerned beyond their general framework for the regeneration of the area. And where there was a defined end use, such as strategic infrastructure, it would not be essential for the proposals to have full planning permission, nor for all other statutory procedures to have been completed at the time of submission of the compulsory purchase order, or even at the time of the Secretary of State's decision on it.”

¹⁸ See the evidence submitted by to the inquiry by Mr Stan Edwards

¹⁹ Town and Country Planning Act 1990 s.226

paragraph 2 recognises the balance to be struck between negotiation and the need for certainty and progress:

Compulsory purchase is intended as a last resort to secure the assembly of all the land needed for the implementation of projects. However, if an acquiring authority waits for negotiations to break down before starting the compulsory purchase process, valuable time will be lost. Therefore, depending on when the land is required, it may often be sensible, given the amount of time required to complete the compulsory purchase process, for the acquiring authority to:

- *plan a compulsory purchase timetable as a contingency measure; and*
- *initiate formal procedures*

This will also help to make the seriousness of the authority's intentions clear from the outset, which in turn might encourage those whose land is affected to enter more readily into meaningful negotiations.

3.9 In addition, it needs to be recognised that a Welsh Government procedural Circular whose requirements are accorded significant weight by the Courts in CPO cases, notwithstanding its non-statutory status²⁰ must necessarily be circumspect to a degree due to the decision-making role of Ministers in confirming CPO's. I think that there is strong argument, therefore, for the Welsh Ministers to consider issuing alongside a new Circular, a "CPO Manual" highlighting good practice and addressing specific situations calling for CPO action, such as the urban regeneration scenario described above and the requirements of active travel schemes. The Local Development Plans²¹ and Development Management²² Manuals issued by the Government to supplement Planning Policy Wales, provide an example of this approach in a related field.

3.10 However, any new Welsh Circular this needs to be accompanied by further training and support for acquiring authorities along the lines already discussed. While I recognise that this will have financial and resource implications, I think that overall there would be valuable time and resource savings overall, not to mention, well-being benefits through the CPO system being used more effectively and skilfully to bring about development and change in a timely manner.

4. Active Travel

4.1 Active travel schemes, although generally on a smaller scale to schemes for motorised traffic, give rise in legal terms to the same potential issues. In any linear infrastructure project, a single landowner who is unwilling to sell or has unrealistic expectations as to price can frustrate progress of the scheme in the absence of CPO action. In preparing my evidence, I have had the benefit of reading the evidence put in by Sustarans and I recognise the issues.

4.2 Notwithstanding the differences in scale it is relevant to note that some active travel schemes such as cycleways will have land takes that are not very different to that

²⁰ See, for example *The Queen on the Application of Baker v. Secretary of State* [2018] EWHC 2099 para. 24

²¹ <https://gov.wales/topics/planning/policy/policy-and-guidance-on-development-plans/ldpmanual/?lang=en>

²² <https://gov.wales/topics/planning/policy/development-management-manual/?lang=en>

required for long stretches of a single track light rail or tramway scheme, where the use of CPO powers will usually form part of the planning and design programme.

- 4.3 In my view, for general reasons already discussed, the difficulties raised by Sustrans are not problems with the CPO system itself but rather arise from not taking account of the requirements of the CPO process in project planning from the outset. As the DCLG Guidance makes clear seeking to negotiate acquisition is not incompatible with making preparations for the timely deployment of CPO action. The willingness to do so comes down, as I have said, to confidence, training and resources.
- 4.4 In terms of the specific problems Sustrans identify:
- (a) In terms of the CPO system, the purpose of identifying owners and occupiers is to ensure that they receive notice of the making a CPO and have an opportunity to exercise their rights to object and, prior to that, to enable the acquiring authority to open voluntary negotiations. Absence of ownership information following “diligent enquiries” should prevent or delay CPO action.²³
 - (b) An acquiring authority should always have carried out an assessment of alternatives as part of their planning process and, if an alternative is proposed in the context of an objection to a CPO, the decision-maker must consider the alternative put forward. However, a decision-maker is not bound to favour an alternative on the basis that it is less intrusive than the scheme proposed.²⁴ An alternative proposal is not a basis for defeating a CPO, it is uncertain in its delivery of the public interest objectives of the CPO (e.g. encouraging active travel), will delay implementation or will not deliver the public interest benefits as well or as effectively.²⁵
 - (c) In terms of funding the generally recognised position is that the decision-maker in deciding to confirm a CPO should be satisfied of the likelihood of funding to enable a scheme to proceed in a reasonable time. The current DCLG Circular deals with this point. New Welsh guidance should consider being more explicit on the type of statements of funding that the Ministers, as decision-makers on a CPO, would expect to see from other department of the Government or its agencies to enable the Ministers to have sufficient assurance on funding, if the CPO is made, to enable a decision to approve the CPO.

5. Legislative Codification

- 5.1 Finally, I would draw the Committee’s attention to the Welsh Government’s legislative codification proposals, currently being legislated for in Part 1 of the Legislation (Wales) Bill and the Law Commission’s forthcoming report on its project on Welsh Planning Law which has been identified as the subject of the first Welsh Law Code.²⁶
- 5.2 Codification will ultimately require consideration of how to re-enact the main planning and regeneration CPO and related powers in Part XI of the Town and Country

²³ See the current DCLG Guidance at paragraphs 208 and 209 which sets out the position.

²⁴ See *R. (Clays Lane Housing Co-operative Ltd) v. Housing Corp* [2005] 1 WLR 2229 at para. 25

²⁵ See the discussion in Elvin *op. cit.* at paras. 34 – 40.

²⁶ <https://www.lawcom.gov.uk/project/planning-law-in-wales/>

Planning Act 1990. This will provide an opportunity to consider whether there should be a single Welsh Land Acquisition and Development Act which would bring together into a single Code all the purposes for which CPO powers were available in support of devolved functions along with the procedural provisions related to CPO. Recommendations along these lines were put forward by the Independent Advisory Group on Planning in 2012. ²⁷

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²⁷ Towards a Welsh Planning Act: Ensuring the Planning System Delivers Report to the Welsh Government by the Independent Advisory Group June 2012 p.113 *et seq.*