# **PEBA** The Planning & Environment Bar Association

## **RESPONSE TO DLUHC CONSULTATION ON**
## **"COMPULSORY PURCHASE – COMPENSATION REFORMS"**

### **Introduction**

1. This paper is the response of the Planning and Environment Bar Association (PEBA) to the consultation on "Compulsory Purchase – compensation reforms".

2. PEBA comprises practicing barristers who specialise in planning, local government, environment and related subjects including compulsory purchase and compensation. In connection with compulsory purchase and compensation, PEBA members advise and act for both acquiring authorities and landowners / occupiers and are able to provide views based on considerable knowledge and experience. PEBA does not represent any sectional interest. This response to consultation has been prepared with the assistance of members who are editors of the leading law text book on compulsory purchase and compensation[1].

3. This paper addresses those parts of the consultation paper that describe the proposals for "Further Reform". A separate paper is provided dealing with the proposals described in paragraphs 16-19 to amend sections 14 and 17 of the Land Compensation Act 1961.

4. Answers to the Questions in the consultation paper are provided below, but PEBA considers that there are fundamental issues which need to be considered but are not raised by the Questions. Consequently, in addition to answering the Questions, we provide the following text. In summary, the proposals are misconceived and create substantial and unjustified unfairness in the operation of compulsory purchase. They would be counter-productive and unworkable, and would fail to achieve the policy objectives set out in the consultation document.

5. The subject of compensation for compulsory purchase was comprehensively reviewed by the Law Commission as recently as 2003. It was fundamental to the Commission's report that the objective of compensation was "equivalence", that is, the right of a dispossessed landowner to receive a money payment which was the financial equivalent of what had been taken from him. There was no suggestion from the Government in its terms of reference to the Commission nor from any of the consultees that the Commission should consider recommending that

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[1] The Law of Compulsory Purchase and Compensation: Bloomsbury Professional.

compensation be restricted in any circumstances to a figure less than the landowner would receive if the land were to be sold in the absence of compulsory purchase.

**Land Value Capture in principle**

6. Paragraphs 20-21 explain that the objective is to "capture" land value and to apply it to pay for "public benefits". Reference is made to paragraphs 91-109 of the Select Committee Report on Land Value Capture.

7. The existing rules for the assessment of compensation[2] already have the effect of achieving land value capture. If land is acquired compulsorily, the existing rules will exclude any value attributable to the scheme for which the land has been acquired. The difference in the compensation assessed in accordance with those rules and the value of the land when used for the scheme is "captured" for the benefit of the scheme.

8. The objective of the proposals is not to "capture" value which is generated by the scheme, but rather to "capture" a proportion of the compensation which would be payable under the normal compensation rules. Putting it another way, since the normal compensation rules are designed to ensure so far as possible that the amount of compensation is what the landowner would have received if he had sold his land on the open market in the absence of the compulsory purchase, the effect of the proposals would be that the compensation paid to a landowner within the area to which a direction applies would be less than the amount which he could have expected to receive if he had sold his land on the open market in the absence of the scheme.

9. This proposal would in effect impose upon persons who happen to own land within the area to which a direction applies a tax in order to apply the proceeds to a purpose characterised as public benefit. Those landowners will receive less than fair compensation as a result. It is not in the public interest for landowners not only to have their land taken from them by the state against their will but also to be paid less than the true value of the land taken from them. This would not only be unfair but it would make it much harder to make the case for compulsory purchase. One reason why compulsory purchase is justified today is because landowners will receive fair compensation, including the market value of the land taken. If landowners will in future receive less than fair compensation, it will be harder to justify the taking of land and will open the exercise of compulsory purchase powers to more (and more successful) legal challenges.

**"Fair value" in principle**

10. Paragraph 12 says that "the Government is clear that those affected by compulsory purchase should be entitled to a fair value for their interest", and paragraph 26 says that, if a direction

[2] The Land Compensation Act 1961 sections 6 (as amended in 2017) and section 14 (as amended in 2011).

were to be made, landowners would be entitled to a "fair price" which is explained to be the existing use value (or possibly existing use value plus an additional capped amount).

11. The principle which underlies the law of compensation is the principle of equivalence, that is, that the compensation payable to a person whose land is acquired compulsorily should be the financial equivalent to what has been taken from him. This principle has been recognised and applied in numerous cases in the courts since at least the middle of the nineteenth century[3]. In *Transport for London v Spirerose Ltd* [2009] UKHL 44, Lord Walker (at para 36) referred to "the underlying aim of fair compensation – compensation neither obviously in excess, nor obviously falling short, of what the claimant would have received in a no-scheme world". This approach to the assessment of compensation is consistent with other branches of the law and in particular the law of damages.

12. It would not be "fair" to pay a price (compensation) which was less than the amount which the landowner would have received if he had sold his land on the open market in the absence of the compulsory purchase.

13. It would also not be "fair" to pay a price (compensation) which was less than the amount which the owner of comparable land located outside the area to which the direction applied would receive if the land was sold.

14. Further, where a person had, before the scheme was known about, purchased land in the open market at a price in excess of existing use value (whether that reflected hope value or some other factor), it would be not be "fair" to restrict compensation for compulsory purchase of that land to existing use value. The proposals appear to be based on the false premise that paying existing use value would represent open market value, which is wrong. The open market value of land is often more than existing use value. Paying only existing use value would often mean paying less than open market value and therefore less than fair value.

**What exactly is to be "captured"?**

15. The broad objective of the proposals is to "capture" the difference between the amount of compensation payable if a direction is made and the amount which would otherwise be payable under the normal compensation rules. The consultation paper does not define properly the basis upon which compensation would be assessed when a direction had been made. It seems to be assumed (incorrectly) that excluding AAD would lead to compensation equivalent to existing use value. For example, paragraph 20 refers to acquiring land at or close to "existing use value", whereas paragraph 29(b) envisages that a direction might have the effect of either taking no account of AAD in a valuation or limiting the effect of AAD to no more than a percentage over existing use.

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[3] For example: *Horn v Sunderland Cpn* [1941] 2 KB 26, at p49; *Director of Buildings and Lands v Shun Fung Ironworks* [1995] 2 AC 111 at p125; *Transport for London v Spirerose Ltd* [2009] UKHL 44, at paras 36 and 89.

16. "AAD" refers to 'Appropriate Alternative Development' as defined in s.14(4). It is (in short) development for which the grant of planning permission could (on the date of valuation) be reasonably expected to be granted either on the valuation date or at a future date. If a direction were to be drafted simply to exclude AAD, the assessment of compensation would nevertheless include all other factors such as any value attributable to any planning permissions which had already been granted before the valuation date, any planning permissions deemed to have been granted without the need for a specific application,[4] and any hope of a future valuable use which is not sufficiently defined or certain to fall within the definition of AAD (or which does not depend on planning permission).

17. It the intention is to limit compensation to existing use value, it will be necessary to define with precision "existing use value". While the general aim might be to value the land for the purpose to which it is being put on the relevant date, in practice this is likely to lead to complications which need to be properly understood and taken into account before, rather than after, any legislation is enacted. For example, where an existing building is let and occupied, the value of the freehold will reflect partly the right to receive the rents over the remaining period of the lease and partly the value of the reversion. The value of the reversion may well include what some would regard as a form of hope value because the building may need refurbishment or even demolition and rebuilding for the same or a different use.

**Justifying a direction by reference to public benefit**

18. Paragraph 23 explains that a direction might be made where the Secretary of State thinks that capping the compensation would be justified in the public interest. Paragraph 29(c) explains that an authority, when applying for a direction, would need to supply a detailed estimate of the land value likely to be captured and to provide evidence on how that land value would be applied for the public benefit. No indication is provided as to how the Secretary of State (or a person appointed to advise him as indicated in paragraph 29(d)) would judge whether the benefit to the public is sufficient in nature and scale to justify capping the compensation payable to individual landowners. There is no objective criteria by which it could fairly be judged that reducing compensation below market value payable to persons who happened to own land within the area of a direction would be justified by factors thought to benefit the public.

**Providing certainty**

19. Paragraph 25 says that the proposals would provide "upfront certainty as to the levels of hope value" payable for the scheme leading to "more certainty in their property cost estimates and

[4] For example permissions granted by the Town & Country Planning (General Permitted Development) Order and the Town & Country Planning (Use Classes) Order.

consequently more certainty over the viability of the scheme". This advantage of the proposal is overstated.

20. The ability to provide public benefits will depend upon the difference between the total cost of development (of which land acquisition will merely be one component) and the total revenue (sales and rents) of the completed development. If a direction is made which restricts compensation to existing use value, it does not follow that significantly greater certainty will be obtained about the ability to afford public benefits. Even when hope value has been excluded as a component of the cost of land acquisition, considerable uncertainties as to the costs of carrying out development and the revenues to be produced by the completed development will remain. The land acquisition component would continue to be uncertain due to differing views about existing use value and disturbance payments which are notoriously difficult to estimate.

21. An application for a direction would have to be accompanied by details of the estimated land value that would be captured. So, it appears to be anticipated that the hope value which would be excluded from compensation and therefore captured within the scheme can be estimated at an early stage (paragraph 29(c)(b)) with sufficient precision to enable the Secretary of State to decide whether a direction should be made.

**Public sector entities**

22. Paragraph 27 explains that a direction would only be granted to a "public sector entity", such as a local authority, but not to private companies that have compulsory purchase powers. The differences may be more apparent than real. However, a large number of compulsory purchase orders made by public sector entities assemble land which is then handed over for development by private sector companies, and especially the well-known developers. These proposals will be seen as a mechanism for reducing compensation paid to landowners in order to facilitate the profits of such developers.

**Procedural considerations**

23. The proposal envisages that a direction would only be applied for, and only granted, when the acquiring authority's estimate of land value that would be "captured" would be sufficiently large to justify making the direction. It follows that a direction would only be made where the compensation payable to landowners would be very much less than would be payable under the normal rules.

24. Paragraph 29(c) identifies what an acquiring authority would have to demonstrate but fails to state whether a landowner would be given an opportunity to make representations and to question the basis upon which the application had been made. Bearing in mind the effect of a direction, we consider that it would be essential on the general grounds of fairness and the need to comply with the Human Rights Act to provide potentially affected landowners with an opportunity to be heard (including the right to challenge the information submitted to the Secretary of State with the application) prior to a decision to make a direction. The making of

a direction would need to be subject to at least the same procedural safeguards as for a compulsory purchase order. Whilst a CPO would have the effect of depriving a person of their land, a direction would have the effect also of depriving a person of fair and proper compensation for that land, ie double deprivation of property.

25. Bearing in mind the implications of a direction for landowners, one can expect that an application for a direction to be highly contentious. The process would include notifying landowners of an application for a direction, giving them an opportunity to be heard, (possibly) the making of a recommendation by a person appointed for that purpose and the reaching of a decision by the Secretary of State. The whole process would be likely to add considerably to the time and cost of compulsory purchase. We have considered whether time and cost could be saved by conducting the process of applying for and determining an application for a direction in parallel with objections to the compulsory purchase order, but we understand that it is an important feature of the proposals that the question whether a direction is to be made should be determined before the acquiring authority makes a compulsory purchase order. Additionally, because the direction process as described in paragraph 20(c)(c) would involve consideration of the "public benefit" for a scheme, all those opposed to a scheme – whether or not to be subject to a direction – would be likely in practice to wish to oppose the direction, as the direction would to an extent pre-judge the case for the subsequent CPO.

26. If a direction is made with the consequence that compensation will be less than under the normal rules, it can be expected that objections to compulsory purchasers will be vigorously pursued incurring delays and costs. Even where directions are made, they can be expected to be subject to judicial review challenges. And even where directions survive such challenges, they will have the consequential effect of making it harder to justify the case for the compulsory purchase order, because the case for the compulsory purchase would need to be so strong that it would justify compulsory purchase in circumstances where the affected landowner(s) would not get fair compensation as a result of the acquisition. With these changes, it would generally be harder to justify the exercise of compulsory purchase powers, with the result that more CPOs would fail or would be subject to successful legal challenge.

**<u>Avoiding high levels of costs in debating value</u>**

27. Paragraph 26 contends that a direction would "provide certainty to parties in determining that value and potentially avoid high levels of costs in debating value". This is very unlikely to be correct in practice. Even if hope value is completely excluded from compensation, existing use value will still have to be determined, as well as disturbance compensation. These can be complex to assess and highly contentious. Disputes will incur costs. If a capped proportion of hope value is included in the compensation, the hope value will have to be determined in order to arrive at a figure to which the cap can be applied. In addition, since a direction will only be granted where significant hope value can be captured, hope value will have to be debated at the stage of an application for a direction.

**Planning (Listed Buildings and Conservation Areas) Act 1990, section 50**

28. Paragraph 31 of the consultation paper draws a parallel between the reduction of compensation as a result of a proposed direction and a direction for minimum compensation under section 50 of the Planning (Listed Buildings and Conservation Areas) Act 1990. This comparison is not valid.

29. Under section 46 of the Planning (Listed Buildings and Conservation Areas) Act 1990, there is power to acquire a listed building compulsorily where reasonable steps are not being taken to ensure its preservation. Compulsory purchase must be preceded by service of a repairs notice which lists what needs to be done to ensure preservation of the building. Compensation is payable under section 49, which will follow the normal rules under a direction is made under section 50. Section 50 authorises a direction to be made in very limited circumstances: a repairs notice must have been served so the owner of the building has the option of doing the works, and there would need to be evidence that the building has been allowed to fall into disrepair "deliberately". This is totally different from making a direction which excludes from the compensation payable an element of value which the market would pay if sold in the absence of compulsory purchase.

**Lack of evidence that the proposal would achieve the objective**

30. The theory underlying the proposals is that, by artificially reducing the cost of land acquisition: (a) schemes which would otherwise be unviable would become viable, and/or (b) funds would become available for public benefits. Plainly, as a matter of arithmetic, if land is acquired at a lower cost, the gap between the total costs which would have to be incurred to bring a scheme to fruition and the total revenue when the development is completed would be widened (to some extent). However, it does not follow that the amount by which the cost of land acquisition would be reduced would necessarily make a significant difference to the viability of the scheme or the nature or quantity of public benefits. It could not properly be concluded that capping compensation as proposed would generally result in a significant difference to the viability of schemes or the nature or quantity of public benefits, unless this was demonstrated by reliable detailed evidence drawn from actual schemes or at least theoretical schemes worked up to a suitable degree of detail; we are not aware of any such evidence.

31. The only support for the proposals cited in the consultation paper is the Report of the Select Committee on Land Value Capture in which paragraphs 91-109 summarise views expressed the Committee by a number of persons and organisations both for and against "Reform". In relation to those who expressed views in support of excluding "hope value" from compensation, two points stand out: (a) none produced any detailed evidence to demonstrate how this would operate and practice and how it would with any degree of certainty capture sufficient funds to make a significant difference; and (b) none offered an explanation as to why it would be justified to pay a landowner less than he could get if he sold his land on the open market in the absence of the scheme.

## The Land Compensation Act 1961

32. The Report of the Select Committee on Land Value Capture records criticisms of the Land Compensation Act 1961, for example (paragraph 95) that the LCA 1961 is "a fundamentally outdated piece of legislation". These criticisms are not justified. Sections 5, 6, 14-18 of the LCA 1961:
    a. taken together comprise a comprehensive code for assessing the value of land which is designed to arrive at a figure representing as nearly as possible what the landowner would have achieved in the open market in the absence of the compulsory purchase. The critics are really saying that compensation for compulsory purchase should not seek to achieve financial equivalence; and
    b. Following a report by a Government appointed Committee, these statutory provisions were reviewed by the Law Commission which, following extensive consultation, made recommendations for reform (Law Commission Report No.286). Those recommendations were widely welcomed and supported. Although it took some time before those recommendations were enacted, section 6 was amended in accordance with the recommendations in 2017, and sections 14-18 were amended in accordance with the recommendations in 2011. It is therefore incorrect to characterise this legislation as outdated.

July 2022

ANSWERS TO CONSULTATION QUESTIONS

Question 1:

- Mark Davies, Secretary
- Planning and Environment Bar Association (PEBA)
- Email: mark.davies@6pumpcourt.co.uk
- Tel: 020 7797 8400

Question 2:

- Professional Association

Question 3:

- No. We are not aware of any reliable evidence which demonstrates that the amount of "hope value" would be sufficient to make a significant difference to the viability of a scheme or to the provision of public benefits. We do not find the proposition advanced in Question 3 to be at all convincing.

Question 4:

- Please see our full comments. We do not consider that there is any justification for reducing the compensation payable for land acquisition below the amount which a landowner could reasonably have expected to achieve if they had sold their land on the open market in the absence of the scheme. The consultation proposals would create a situation which was not proportionate. Capping or removing the compensation paid would in our experience make no material difference to the delivery of public benefit, given the other costs and issues arising in relation to developments relying on the use compulsory purchase powers. We have not encountered situations in practice where the public benefits would be such that it would be proportionate to remove some element of compensation otherwise payable for the value of land taken.

Question 5:

- We do not keep records which would enable us to answer this question in quantitative terms. The open market value of land is often above existing use value, but often this is not dependent on the grant of planning permission (or assumptions about AAD).

Question 6:

- The ability to provide measurable public benefits is more likely to derive from the values generated by the nature and scale of the development comprised in the scheme than from any capping of the compensation paid for the land.

Question 7:

- No: please see the text of our paper.

Question 8:

- No. We do not agree with any form of capping which has the effect of reducing compensation below the amount which a landowner could reasonably have expected to achieve if they had sold their land on the open market in the absence of the scheme.

Question 9:

- The justification advanced in the consultation paper for making a direction to cap compensation is to enable the funds so "captured" to be applied to public benefits. Paragraph 29(c) explains that an application for a direction would have to be accompanied by details of the estimated land value captured and evidence as to how that would be applied for the public benefit. Consequently, an authority applying for a direction would have to identify the public benefits. So, the whole process would only function satisfactorily if the public benefits are identified when the application is made and if evidence can be produced which demonstrates that the funds "captured" by capping the compensation would be sufficient to deliver those benefits. The benefits would presumably depend upon the needs of the area and the design of the scheme. We do not consider that the proposals are workable in practice.

Question 10:

- Yes. In addition, the Secretary of State should provide an opportunity for affected landowners to respond to the application and to be heard. Those with an interest in the scheme underlying the proposed CPO other than affected landowners should also be consulted and be entitled to be involved in a hearing, as they will be affected by a direction, albeit less directly.

Question 11:

- Yes. However, since many CPOs made by public sector entities are intended to assemble land which will be made available to the private sector for development, the distinction between public and private is blurred. This does not mean that directions should be available to all bodies having compulsory purchase powers. It means that the perception will be that individual landowners are being prejudiced in order to make private development more profitable.

Question 12:

- No. We have made clear that we do not support the proposal to pay compensation for land acquired by compulsory purchase at an amount lower than the owner could reasonably have expected to obtain on a sale in the open market in the absence of the scheme. Question 12 only arises for consideration if (contrary to the views expressed in this paper) the proposal is to be implemented. It is extremely unlikely that planning permission would be granted after the launch date for development which would be inconsistent with the scheme. If planning permission were to be granted for some form of development, it would be because the local planning authority was satisfied that there were sound reasons to do so notwithstanding the scheme, for example, to enable expansion of an existing business. It would be wrong to exclude such a planning permission.

Question 13:

- Please see the full text of our paper. In short, the proposals are misconceived and are highly unlikely to work in practice as envisaged.

Question 14:

- No. There is no justification for limiting compensation below the figure which could reasonably be expected to be achieved on an open market sale in the absence of compulsory purchase. The principle of equivalence has always been the foundation of compensation in UK since at least the middle of the nineteenth century except for a short period 1947 to 1959 when there was a complex statutory regime nationalising development value which was abandoned for numerous reasons.

Question 15:

- Yes. We disagree with the proposition in paragraph 39 that there is equal potential for adverse and beneficial effects for persons with protected characteristics. The impact on a person of having land taken from them without full or fair compensation would be far greater than any benefits a scheme might have for them. In our experience, for both regeneration and infrastructure schemes, compulsory purchase disproportionately affects persons with protected characteristics, as the owners and occupiers of land viewed as suitable for such schemes tend to be those from under-represented groups in terms of race and religion/belief. Taking land from such persons, and then paying them less than fair compensation, requires proper consideration at this policy-making stage pursuant to s149 of the Equality Act 2010.

July 2022

**Response to consultation on "Compulsory Purchase – compensation reforms"**

**ANNEX ON SECTION 3 OF THE CONSULTATION PAPER**

## Introduction

1. This annex is PEBA's response to the proposals to amend sections 14 and 17 of the Land Compensation Act 1961 summarised in section 3 of the Consultation Paper "Compulsory Purchase – Compensation reforms".

2. PEBA comprises practicing barristers who specialise in planning, local government, environment and related subjects including compulsory purchase and compensation. In connection with compulsory purchase and compensation, PEBA members advise and act for both acquiring authorities and landowners/occupiers and are able to provide views based on considerable knowledge and experience. PEBA does not represent any sectional interest. This response to consultation has been prepared with the assistance of members who are editors of the leading law text book on compulsory purchase and compensation[5].

3. The changes outlined in section 3 are said to be proposed because the Government wishes to see a faster, more efficient compulsory purchase system (paragraph 3), and the Government is clear that those affected by compulsory purchase should be entitled to a fair value for their interest (paragraph 12). As we explain below, the main proposals outlined in section 3 of the paper are not consistent with those objectives. The proposals will slow down the system, and make it more cumbersome, and will also penalise people whose land has been taken from them by the state against their will when they seek to establish what amount represents fair compensation.

4. The present form of sections 14 and 17 derive from the Report of the Law Commission[6] in 2003 (although they were not enacted until 2011). The Law Commission report was preceded by a review of the subject by a Government appointed Committee and by extensive consultation undertaken by the Law Commission itself. The Law Commission's recommendations were widely supported and welcomed. Given the care and consultation which resulted in the present form of these sections, further changes should not be made unless there is cogent and persuasive evidence that they are essential. It is important to understand the origin of sections 14 and 17

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[5] The Law of Compulsory Purchase and Compensation: Bloomsbury Professional.

[6] Towards a Compulsory Purchase Code: (1) Compensation" Law Com No.286.

and the reasons why they were amended in 2011, which are conveniently described in the Law Commission's Consultation Paper[7] and its final report[8].

5. We now refer to the proposals outlined in the five bullet points in paragraph 16 of the consultation paper.

**Bullet point 1:**
**"reflect normal market conditions in compensation payments by only allowing the equivalent of planning certainty for appropriate alternative development if a CAAD is obtained in relation to that AAD**

**Bullet point 2:**
**"establish a single route for determining hope value based on the likelihood of AAD taking into account the assumptions in section 14(5) LCA 1961"**

6. We deal with these two bullet points together because they seem to be linked. Unfortunately, it is not at all clear exactly what changes to section 14 are proposed. We understand that the intention is to repeal section 14(3), although this is not expressly stated in the paper.

7. Paragraph 16 of the paper says that the proposals are intended to correct a feature of section 14 which paragraph 15 alleges "artificially inflates compensation" by allowing "100% certainty when the planning likelihood is only 51%". This reflects a misunderstanding of section 14 and how it is intended to operate. There also seems to be confusion between "hope value" and "AAD".

8. No evidence is identified from which it can be concluded that section 14 has the "perverse" effect mentioned in paragraph 15 to a sufficient degree and in a sufficient number of cases to justify changes being made to legislation recently enacted on the basis of a Law Commission recommendation.

9. Section 14(3) maintains the certainty originally created by section 15(5) of the LCA 1961 (as it was prior to 2011). This was not new in 2011 but has been a feature of the statutory provisions for 60 years. It has not previously been asserted, so far as we are aware, that this certainty is "perverse" because it "artificially inflates compensation".

*Distinguishing between AAD and Hope Value*

10. The second bullet point refers to "determining hope value based on the likelihood of AAD". This confuses "hope value" with "AAD". They are not the same and different considerations apply to each of them. AAD is specifically defined in section 14(4) and refers to circumstances

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[7] Law Commission's Consultation Paper No.165, paragraphs 7.30-7.49.

[8] Paragraphs 7.50—7.63.

in which it could be expected on the valuation date that, in the absence of the compulsory purchase, planning permission would have been granted for some form of development either on the valuation date or at a later date. In contrast, hope value is any value which is attributable to the possibility in a purchaser's mind that the land at some time in the future could be put to a more valuable use than the existing use. Hope value may derive from the possibility that planning permission might be granted in future (but not necessarily derived from a specific and defined form of development) but may also exist without anticipating the grant of any planning permission at all (for example, when it is anticipated that something may happen in the future which will make the property more valuable, for example finding a new tenant prepared to pay more or intensifying the use of the property). Section 14 only addresses hope value to the extent that it derives from the possibility that planning permission might be granted at some future time. Section 14 distinguishes (correctly) between value which derives from AAD (section 14(3)(b)) and value which does not derive from AAD but which the market nevertheless recognises by paying more than existing use value (section 14(2)(b)) for the possibility that planning permission might be granted in future.

11. The second bullet point says that it is intended to "establish a single route for determining hope value based on the likelihood of AAD" which suggests that (unexplained) changes are proposed which would eliminate this distinction. This would be a great mistake: it is essential that the statutory provisions retain the distinction described above.

*Mechanisms to establish AAD*

12. Bullet Point 1 states the intention to reflect "normal market conditions", but, so far as the planning status of land acquired by compulsory purchase is concerned, normal market conditions cannot apply. In the absence of a scheme for which the land is acquired compulsorily, a landowner wishing to sell his land could do whatever was thought to be necessary to establish the best value for his land including applying for planning permission before the sale. That course is not open to an owner whose land is to be, or has been, compulsorily purchased. Moreover, a landowner who wanted to seek planning permission prior to the compulsory purchase will often be unable to obtain it due to the shadow of the scheme and the local planning authority seeking to safeguard the land for the scheme rather than a development which might make compulsory purchase more difficult to secure for the land. This can happen from an early stage, and is well recognised in the statutory provisions and case law in the concept of blight. Consequently, for either or both of these reasons, it is essential that there should be a mechanism by which it can be determined whether or not planning permission would have been granted for AAD in the absence of the compulsory purchase.

13. Prior to 2011, the only method by which it could have been established whether or not planning permission would have been granted for AAD, was to apply for a CAAD. One of the significant improvements made by the amendments enacted in 2011 was the introduction of the ability to take this issue straight to the Upper Tribunal (Lands Chamber) on a reference to determine the amount of compensation payable without first and separately applying to the local planning authority for a CAAD. This change was entirely logical and widely welcomed because section

18 (appeals against CAADs issued by local planning authorities) was amended at the same time so that appeals against CAADs now go to the Upper Tribunal (Lands Chamber). Thus, since 2011, there are two routes by which AAD may be determined: (i) a reference to the Tribunal to assess the value of the land, and (ii) an application for a CAAD followed by an appeal to the Tribunal (if necessary).

14. If the reference in Bullet Point 2 to "a single route" means that it is proposed to revert to the situation prior to 2011 so that the grant of planning permission could not be assumed for valuation purposes unless a CAAD is obtained, PEBA would strongly oppose such a change. It would in any event be counter-productive in relation to the objectives of achieving a faster, more efficient compulsory purchase system. The current flexibility in establishing AAD via different routes ensures that applications for CAADs are only made where necessary, thus minimising the number of CAAD applications which must be dealt with by local planning authorities (and on appeal under s18). If the statute is changed so that a CAAD is the only way to establish AAD, then there will be far more CAAD applications (and appeals) than there are currently, putting a material additional burden on local planning authorities in dealing with them.

*AAD and certainty*

15. The definition of AAD is development for which the grant of planning permission "could reasonably have been expected". The objective is to provide the landowner with what he should have had in the absence of compulsory purchase. Because, as a result of the scheme, he would be unable to obtain the grant of a real planning permission, it is necessary to determine what planning permission should have been obtained in the 'no-scheme'[9] world. Since the determination inevitably has to be made in hypothetical (no-scheme) circumstances, the exercise of judgment is inevitable. The phrase "could reasonably have been expected" describes how the judgment is to be made. It does not imply uncertainty; it means that the decision-maker must determine what would have happened in the absence of the scheme, but, being based on a hypothesis, that determination can only be made on the basis of what the decision-maker could reasonably have expected. Having reached a determination that the grant of planning permission could reasonably have been expected, it is entirely right and fair that section 14(3) requires that the grant of such permission be treated for valuation purposes as certain on the valuation date (or a later date). Any other arrangement would fail to give the landowner the financial equivalence of what he has lost and would be unfair to those whose land has been taken from them against their will.

16. Paragraph 15 of the consultation paper asserts that section 14(3) provides 100% planning certainty when the "planning likelihood" is only 51%. This is not a correct or fair characterisation of how section 14 as a whole operates. While it is correct that section 14(3)

[9] Strictly speaking, this means on the basis of assumed cancellation of the scheme rather than no scheme ever proposed.

enables it to be assumed with certainty that planning permission will be granted for AAD (either on the valuation date or a later date, as the case may be), it is not correct that AAD may be determined to exist where there is only 51% "planning likelihood". The question whether the grant of planning permission could reasonably have been expected has to be determined on the basis of the civil law standard of proof: the balance of probability. The balance of probability is not correctly characterised as "planning likelihood". It is wrong to suggest that a decision that the grant of planning permission "could reasonably have been expected" could be reached when there is between 51-100% planning likelihood. It means that the grant of planning permission could reasonably have been expected. The proposals for reform are therefore based on a false premise.

*AAD and timing*

17. The value of land with development potential will be influenced by a number of factors and especially (a) whether or not planning permission exists or is likely to be granted and (b) the timing of the grant of planning permission for AAD. Section 14 (4)(b) expressly addresses the question of timing of the grant of planning permission by enabling the decision-maker to decide whether planning permission would have been granted on the valuation date or a later date.

*Hope Value and "Planning Likelihood"*

18. Separately from AAD, section 14 recognises that land may have value attributable to a prospect of development which does not qualify as AAD. Section 14(2)(b) provides that the "prospect" of planning permission being granted may be taken into account. The word "prospect" intentionally infers a range of possibility without attempting to define the range. "Prospect" is sometimes discussed in terms of a percentage chance, but this is only a loose and imprecise way of describing the degree of possibility. A percentage chance is not a percentage that can be applied directly to a valuation. For example, if it were concluded that there is a 40% chance of planning permission being granted, it does not follow that a purchaser in the open market would pay a price discounted to 40% of the value if planning permission was certain, nor should the value of the land be assessed as 40% of its value with planning permission.

*Conclusion in relation to Bullet Points 1 and 2*

19. PEBA is not aware of any evidence that section 14 as amended in 2011 is in practice resulting in "inflated" or "perverse" awards of compensation. It is the product of careful drafting following the Law Commission's recommendations which were widely welcomed and supported. The changes enacted in 2011 brought about considerable improvements which must not be lost. The reform proposals are in any event based on false premises and will be counter-productive in practice.

**Bullet Point 3:**
**Costs of seeking a CAAD**

20. Bullet Point 3 says that it is proposed "to remove the requirement that acquiring authorities must pay the cost of landowners in seeking a CAAD". This does not accurately describe the current position. In addition, the consultation paper does not make clear whether the proposal relates only to the application stage or also to appeals. The paper gives no reason at all for proposing to deprive a landowner of the ability to recover these costs. Although paragraph 17 says that this change will "rebalance the position on costs… to a fairer one", the opposite is the case. It will ensure that, even where a landowner was entirely justified in seeking a CAAD as part of establishing the fair value of its interest in land which has been appropriated by the state, they will not be reimbursed the cost of doing so. That is unfair.

21. The ability of a landowner to recover the costs of a CAAD application is currently governed by section 17(10) which provides that "expenses reasonably incurred in connection with the issue of a certificate" (including an appeal but only to the extent that the issues are determined in the appellant's favour) must be "taken into account" in assessing compensation. Section 17(10) is consistent with the principle of equivalence and the well settled principle that a person whose land is acquired compulsorily is entitled to be reimbursed all costs reasonably incurred in consequence of the compulsory purchase and, in particular, the costs of preparing his claim for compensation. However, section 17(10) does is not amount to a requirement that the acquiring authority must always pay the full costs of a CAAD application. The requirement is to "take into account" such costs when assessing compensation; this provides a sensible degree of flexibility. While in most cases such costs would and should be recoverable from the acquiring authority, in cases where a CAAD which has been obtained provides no assistance in valuing the land, it would be appropriate not to include such costs in the compensation awarded. Similarly, if the amount claimed is unreasonable, the amount allowed for in the award of compensation can be adjusted accordingly.

22. With regard to costs incurred in making an application for a CAAD, it may be thought that a claimant should not to be able to recover such costs because, in the absence of the scheme, it would have been necessary to incur the costs of applying for planning permission. However, the costs of making a CAAD application are not a suitable proxy for the costs of making a planning application. The costs that would have been incurred to obtain planning permission should be taken into account in assessing the value of the land.

23. With regard to the costs of an appeal under section 18, if a land owner appeals and is successful, there is absolutely no justification in principle for preventing him from recovering the reasonable costs of the appeal. Under section 17(10), such costs are to be "taken into account" in assessing compensation which provides the flexibility described above.

**<u>Bullet Point 4:</u>**
**<u>CAADs to be issued only for the AAD applied for</u>**

24. This proposal is intended to make the "ask" on local planning authorities simpler and clearer. Although it has been a requirement since 1959 that a CAAD should specify all types of development which qualify as AAD whether or not specified in the application, after some 60 years, we are not aware of any real evidence that this imposes such an onerous burden upon local planning authorities that it needs to be removed.

25. PEBA considers that, if any changes are made to the powers to determine CAADs, it is essential, in order to ensure fairness to applicants and avoid unnecessary appeals, that the local planning authority (or the Tribunal on appeal) should retain the power to provide a certificate which differs from the application. For example, if the application specified a 10-storey block of flats which the local planning authority would refuse but would permit 5 storeys, then the local planning authority should not be prevented from saying so in the certificate.

**<u>Bullet Point 5:</u>**
**<u>The issue in *Lockwood v Highways England*</u>**

26. PEBA acknowledges that, in *Lockwood v Highways England*, the Upper Tribunal (Lands Chamber) identified a problem which needs to be resolved. The problem in that particular case occurred in these circumstances: following a blight notice, there was a deemed notice to treat but possession of the land had not been taken. An application for a CAAD had been made and the matter reached the Tribunal as an appeal under section 18 separate from a reference to determine the value of the land. Section 14(4) required the Tribunal to determine whether there was AAD on the "relevant valuation date". However, under the definition of "relevant valuation date", this date had not yet arrived. Although this case happened to arise following a blight notice, this problem could arise in any case in which one of the parties makes a CAAD application to determine planning questions before either possession is taken of the land or before the land is valued.

27. Unfortunately, the consultation paper does not state how it is proposed to resolve this problem. The Tribunal in *Lockwood* adopted a pragmatic solution by making the determination as to AAD at the date of the determination on the basis of the facts and policies at that date. This approach would only be a problem in other cases if, during the period between the determination of the CAAD and the subsequent assessment of value, there was a change of planning policy or other relevant factors. Since it is not feasible to anticipate all eventualities, we suggest that the approach adopted by the Tribunal should be the one enacted.

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