Land Value Capture – not quite there

Richard Harwood OBE QC

The Housing, Communities and Local Government has just published its report on Land Value Capture. It makes welcome comments on planning, viability assessment and strategic infrastructure tariffs. It does though dip into questions of compulsory purchase and compensation. Its proposals are less dramatic than political chatter on the topic had proposed, and less of a change than the committee suggest. They do though rest on several misapprehensions.

Compensation

The Committee's principal recommendation on compensation for compulsory purchase was:

> "111. In addition, we believe that the Land Compensation Act 1961 requires reform so that local authorities have the power to compulsorily purchase land at a fairer price. The present right of landowners to receive 'hope value'—a value reflective of speculative future planning permissions—serves to distort land prices, encourage land speculation, and reduce revenues for affordable housing, infrastructure and local services. ...
>
> 112. We believe that increases in the value of privately-owned land arising from public policy decisions should be shared with the local community. The compensation paid to landowners should, therefore, reflect the costs of providing the affordable housing, infrastructure and services that would make a development viable, as well as capturing a proportion of the profit the landowner will have made."

The proposed changes to compensation therefore comprise two elements:

- to 'reflect the costs of providing the affordable housing, infrastructure and services that would make a development viable';
- 'capturing a proportion of the profit the landowner will have made'

The Land Compensation Act 1961 section 5 rule 2 is to the effect that compensation is paid on what the land would have sold for in the open market. That price may be affected by planning permissions on the site or assumptions about the planning permissions which would be granted. Those planning assumptions would invariably be based on a policy-compliant scheme which provided whatever affordable housing, infrastructure and services were necessary. Valuation judgments would be made in the 'no scheme world', asking whether the land would have come forward for development and what it would have been worth if not acquired by authorities with statutory powers. Any effect of new town designation or transport improvements designed to promote regeneration would be ignored.[1]

[1] Land Compensation Act 1961, sections 6A to 6E.

The first element in the Committee's proposals is already the law and has been for over 50 years. The report does not say what provision in the Land Compensation Act should be amended or how that should be done. It may be because in this respect the Act already does what the Committee want.

The proportion of profit appears to be an additional reduction in compensation, beyond valuing on the basis of a policy compliant scheme. What would be treated as the 'profit' and what proportion would be taken is not explained. It is not said whether this would be higher than the existing taxes on the profits of disposing of property in capital gains tax and corporation tax or whether it would be additional to these. If the proposal is for a further reduction in the compensation payable, it would see the reintroduction of a two price system in land values, the problems with which I discuss below.

There are though some positives. The debate seems to have moved away from an attempt to confine compensation to existing use value or some figure based on it. Indeed, many of the proponents of the removal of development potential from compensation appear to have significantly softened their position.[2] Shelter and policy writers Daniel Bentley and Tom Aubrey supported compensation on the basis of policy-compliant planning permissions.[3] As I have explained above, that is what the current law requires.

The two price system

Compulsory purchase contributes only a very limited part of the land supply for development. Around 100 compulsory purchase orders are made each year for planning or housing purposes.[4] Whilst some will deal with major sites or estate regeneration, many concern small groups of existing properties or individual dilapidated houses. Most will be assessed on existing use value and losses rather than development value in any event. Reducing the compensation paid will have little effect on land value capture as a whole.

The Committee expressed the view that their compensation proposals:[5]

> **"**would also serve to lower land prices traded within the private sector, ensuring that developers are able to meet their local plan obligations in full."

The view that changes to the compensation rules would affect the prices agreed in the open market is nonsense. Unless there is a realistic threat of compulsory purchase, a market transaction, whether or not involving a public authority, will be based on what is necessary to incentivise the current owner and occupiers to go and what the land is worth to the prospective developer. Such prices are not determined having regard to the compensation code.

The only time compensation values were set at below market value was in the 1950s. That approach lasted five years before there was all party support for its scrapping. In broad terms the Town and Country Planning Act 1947 had introduced a development charge, levied on the increase in the value

---

[2] Report, para 94 to 98.
[3] Report, para 97.
[4] See *Compulsory Purchase Orders: 2017 update* Womble Bond Dickinson https://www.womblebonddickinson.com/sites/default/files/2017-11/BON0011A_CPO_Report_171128_V3_1.pdf Compulsory acquisition will also be sought under infrastructure (Planning Act 2008) and highways powers.
[5] Report, para 112.

of land due to the grant of planning permission.[6] This was set at 100% of the uplift. The Act also restricted land value for compulsory purchase purposes to existing use value.[7] These provisions did allow for the replacement or modest enlargement of buildings which were existing (or had existed in the previous 10 years) and certain limited changes of use,[8] which was of considerable practical importance given the amount of war damage. However the effect was to confiscate increases in land value due to planning permission for greater development either by the 100% tax if the land remained private or by removing it from the assessment of compensation. Either way, landowners lost out and had no incentive to bring land forward.

The development charge was abolished by the Town and Country Planning Act 1953 but, notwithstanding limited changes the following year, compensation was still restricted. This created a two price system: development land would be sold for more on the open market than if there was an actual or seriously threatened compulsory purchase. This was seen as grossly unfair on landowners subject to compulsory acquisition. It also encouraged landowners to object to compulsory purchase. The Franks Committee considered that there would be 'far fewer' objections if compensation was based on market value.[9]

Consequently the Conservative Government, with support from the Labour Party, restored land compensation to market values, with exclusions for changes in values due to the scheme, in the Town and Country Planning Act 1959. These provisions were then consolidated in the Land Compensation Act 1961, and subject to recent clarifications of the 'no scheme' world, reflect the present law.[10]

The profit-taking change proposed by the Select Committee would re-introduce a two price system, encourage resistance to compulsory purchase and be seen as unfair and unsustainable. It also has to be accepted that changes to compulsory purchase compensation have no real bearing on land value capture as the vast majority of development will take place on land valued on the ordinary market basis.

Another lesson from history – the new towns

The Committee said:[11]

> "The first generation of New Towns owed much of their success to the ability of Development Corporations to acquire land at, or near to, existing use value and capture uplifts in land value from the infrastructure they developed and subsequent economic activity to reinvest in the local community."

It not two clear what the committee mean by 'the first generation'. The Select Committee's notice of its inquiry said:

---

[6] Town and Country Planning Act 1947, section 69.
[7] Town and Country Planning Act 1947, sections 51(2),(4), 55.
[8] Town and Country Planning Act 1947, Third Schedule.
[9] Franks Report on Administrative Tribunals and Enquiries, 1957, at para 278.
[10] The change in the legislation from 1953 to 1959 is set out in the Departmental history *Environmental Planning*, Volume IV, Land Values, Compensation and Betterment, chapter 6 'The return to market value', by J.B. Cullingworth and more shortly in the Second Reading debate on what became the 1959 Act (Hansard, House of Commons, 13 November 1958).
[11] Report, para 113.

> "The recent history of the building of the post-war new towns provide a lesson here. These new towns would never have been built without buying land at existing use value."

Whilst the first ten new towns were designated between 1946 and 1950 and were able to take advantage of the restricted compensation regime between 1947 and 1958[12] the remainder were not. The next wave of five were designated between 1961 and 1964. The final six towns, including Milton Keynes, were only designated between 1967 and 1970.[13] So half of the new towns were built without being able to exclude hope value. Land acquisitions for new towns from 1958 were judged in the 'no scheme world', excluding the effect of the new town designation,[14] as would be the case for any future new town projects.

The history of the new towns is not an explanation of the need for change but why the present compensation arrangements facilitate development.

How much is there to take?

The Committee say:[15]

> "According to Government statistics published in February 2015, the average figure for England (excluding London) is that agricultural land, which is granted planning permission for residential use, would, on average, increase in value from £21,000 per hectare to £1.95 million per hectare. The amounts involved with respect to brownfield sites vary considerably, although the same Government figures estimated the value of a typical industrial site to be £482,000 per hectare"

The figures are taken from *Land value estimates for policy appraisal,* published periodically by what is now the Ministry of Housing, Communities and Local Government, although curiously the committee use the February 2015 version, rather than the later December 2015 or May 2018 reports. Every version of the paper says that they 'should not be seen as estimates of market value' and 'it is strongly recommended that they are not used for any other purpose'.[16] These warnings have been overlooked. The report continued 'Commenting on the size of the average uplift in land values subsequent to the granting of planning permission, Councillor Tett from the Local Government Association said, "To find it is quite such a large uplift even surprised me, but that was a Government statistic, so it must be correct"'. The councillor was right to be surprised, because put in that way, the figure was not correct.

The committee did however recognise that estimates of how much landowners retained of land value increases due to the grant of planning permission were highly uncertain. They plumped for 50% of

---

[12] Stevenage, Crawley, Hemel Hempstead, Harlow, Newton Aycliffe, Peterlee, Welwyn Garden City and Hatfield, Basildon, Bracknell and Corby were designated between 1946 and 1950.

[13] Skelmersdale, Telford, Redditch, Runcorn and Washington were in the second wave with Milton Keynes, Peterborough, Northampton, Warrington, Telford and Central Lancashire the final towns to be designated.

[14] It is useful to read the various new town compensation cases to see how the 1961 Act works: *Myers v Milton Development Corporation*[1974] 1 W.L.R. 696 at 705 and *Domestic Hire v Basildon Development Corporation* (1970) 21 P. & C.R. 299 along with the expansion of Basingstoke under the Town Development Act 1952: *Viscount Camrose v Basingstoke Corp* [1966] 1 W.L.R. 1100; *Kaye v Basingstoke Corporation* (1969) 20 P. & C.R. 417.

[15] Report, para 16.

[16] Page 4 see https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/407155/February_2015_Land_value_publication_FINAL.pdf

the difference between the existing value and what the value would be with a planning permission shorn of affordable housing, infrastructure contributions and Community Infrastructure Levy. Whilst that is a proportion of an unreal, theoretical figure, the 50% appears on the high side. The evidence before the committee indicated that this was for a straightforward greenfield site and other situations would be reduced.[17]

The ability to resist a compulsory purchase order

The committee say:[18]

> "The Government should … consider ways in which the process can be further simplified, to make it faster and less expensive for local authorities, whilst not losing safeguards for those affected. We heard that the requirement for the Secretary of State to confirm CPO submissions causes unnecessary delays. Such decisions should be made locally, including by local authority-led New Town Development Corporations."

Compulsory purchase was not one of the topics of the inquiry and this recommendation would have benefited from being informed by a wide range of evidence. Compulsory purchase is incredibly invasive. It involves taking someone's land off them without their consent. Whilst compensation is ultimately paid, no landowner will end up making a profit from being CPO'ed and most will feel shortchanged. It is a trying and disruptive experience. The personal effects can be very considerable. Residents can be forced to leave their homes, and often live in a rundown estate until that happens. Businesses may be closed down and the staff laid off or forced to move with inevitable losses, which would not be fully recovered in practice.

Policy[19] requires there to be a compelling case in the public interest for compulsory purchase to take place. Objectors are entitled to be heard before a Planning Inspector before a decision is made by the Secretary of State. This is a vital safeguard. Compulsory purchase has to be justified, with the evidence tested, in public and with an independent decision made. Compulsory purchase orders are made by local authorities and rejected by Ministers because the justification is inadequate, for example plans to demolish hundreds of houses in the Welsh Streets in Liverpool. Compulsory purchase is sometimes pursued for schemes which are proved at the inquiry not to be viable: a major compulsory purchase order in Brighouse, West Yorkshire was rejected after the developer's own viability witness conceded that his client would be 'bonkers' to proceed with the project.

Independent examination of a compulsory purchase order and decision making outside the local authority making the order is vital to ensure that the power is only used responsibly.

[17] Report, para 28. The committee also incorrectly discounted corporation tax from the taxes which apply to increases in land value.
[18] Report, para 88.
[19] And legislation for nationally significant infrastructure projects (see the Planning Act 2008).