

# NEIGHBOURHOOD PLANNING BILL 2016

## EUROPEAN CONVENTION ON HUMAN RIGHTS

### MEMORANDUM BY THE DEPARTMENT FOR COMMUNITIES AND LOCAL GOVERNMENT

1. This memorandum addresses issues arising under the European Convention on Human Rights ('ECHR') in relation to the Neighbourhood Planning Bill 2016, introduced in the House of Commons on 7th September 2016 ('the Bill'). The memorandum has been prepared by the Department for Communities and Local Government for the Joint Committee on Human Rights. The Secretary of State for Communities and Local Government has made a statement under section 19 (1) (a) of the Human Rights Act 1998 that, in his view, the provisions of the Bill are compatible with the ECHR, on introduction of the Bill in the Commons.

#### **Overview of the Bill**

2. The Bill is in 3 parts:

- Part 1 makes provisions relating to neighbourhood planning, planning conditions and the planning register;
- Part 2 makes provisions relating to compulsory purchase; and
- Part 3 makes final provisions.

Detailed information on each of these parts can be found in the explanatory notes published on introduction of the Bill. The provisions of the Bill which raise issues under the ECHR are those about compulsory purchase, which are at Part 2 of the Bill.

3. The law relating to compensation payable as a result of compulsory purchase is, at present, a complex mix of statute law and judicial interpretations. It has therefore been the subject of comprehensive review<sup>1</sup>. The Bill provisions are intended to deliver the second phase of reform of the compulsory purchase regime. A number of changes have been made to improve the system in recent years and the Government consulted on a package of reforms in March 2015<sup>2</sup> which have been taken forward in the Housing and Planning Act 2016<sup>3</sup>. Responding to that earlier consultation, a number of respondents expressed the view that there was a need for yet further reform and put forward a range of ideas for further reform of the compulsory purchase system. This second phase of reform takes forward some of those suggestions and adopts recommendations from the Law Commission<sup>4</sup> intended to clarify the way in which compensation is assessed. Further detail of the measures is set out below. The Government considers that any other clauses, parts and schedules

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<sup>1</sup> See the [Law Commission Consultative Report \(Towards a compulsory purchase code - compensation\) 2002 and](#)

<sup>2</sup> Technical consultation on improvements to the compulsory purchase processes ([https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/413866/Technical\\_consultation\\_on\\_improvements\\_to\\_compulsory\\_purchase\\_processes.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/413866/Technical_consultation_on_improvements_to_compulsory_purchase_processes.pdf))

<sup>3</sup> c. 22

<sup>4</sup> See the [Law Commission Final Report \(Towards a compulsory purchase code - compensation\) 2003.](#)

in the Bill which are not mentioned in this memorandum do not give rise to any issues under the ECHR.

### **Compulsory Purchase**

4. Compulsory purchase powers are an important tool to use as a means of assembling the land that is needed for regeneration. They allow a person's interest in land to be acquired, extinguished or overridden by public authorities which have the power to acquire land for a public purpose. For example, local authorities have the power to acquire land for the purposes of development which will contribute to economic, social and environmental change.<sup>5</sup>
5. The provisions in part 2 of the Bill reform some of the principles of assessing compensation where land is compulsorily acquired, as well as dealing with procedure. These follow on from the reforms in the Housing and Planning Act 2016, which included the introduction of a general power for acquiring authorities to enter and survey land, requiring the Secretary of State to publish a timetable for confirming a compulsory purchase order ('CPO'), and clarifying the time limits for implementing CPOs.
6. Convention rights are engaged by the current reforms because the way compensation is assessed may affect the amount of compensation payable to those deprived of their interest in land.
7. In addition to reforming some of the ways compensation is assessed, Part 2, Chapter 1, of the Bill creates a new compulsory right to take temporary possession over land (clause 9). This power will be available to authorities who have the power to compulsorily acquire land and it will enable them to use land for purposes in connection with the development for which land is being compulsorily acquired. For example, the authority could take temporary possession of land in order to store construction materials. Clause 10 provides that the land affected by the temporary possession must be identified in the same instrument required for the compulsory acquisition (for example, the CPO), and the same consultation and public inquiry procedures necessary for compulsory acquisition, will apply before the power can be authorised. Exercise of this power also engages Convention rights, and the analysis of this is set out below.
8. This memorandum does not consider Article 6 rights. This is because the mechanisms under the compulsory purchase regime for determining rights over land and any suitable compensation, which ensure a fair hearing, are unaffected by the measures in the Bill.

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<sup>5</sup> Section 226 Town and Country Planning Act 1990 (<http://www.legislation.gov.uk/ukpga/1990/8/section/226>) Further information about the compulsory purchase process can be found in DCLG guidance at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/475271/cpo\\_guidance.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/475271/cpo_guidance.pdf)

## Article 1 Protocol 1 of the ECHR

9. The Convention right in issue is Article 1 of Protocol 1 (“A1P1”)<sup>6</sup>.
10. Land (or an interest in land) is property and the ECHR guarantees the right to peaceful enjoyment of that property. Compulsory deprivation of or interference with land will engage A1P1 but will not involve an infringement of A1P1 rights as long as:
  - a. The interference is subject to conditions provided by the law;
  - b. The interference is in the public interest; and
  - c. There is a balance between the general interest and the requirements to protect an individual’s fundamental rights. This means that there has to be proportionality between the means employed and the aims pursued by the State.<sup>7</sup>
11. Although there is no explicit reference to compensation within A1P1, the European Court of Human Rights (‘ECtHR’) has held that:

*“As far as Article 1 is concerned, the protection of the right of property it affords would be largely illusory and ineffective in the absence of any equivalent principle. Clearly, compensation terms are material to the assessment whether the contested legislation respects a fair balance between the various interests at stake and, notably, whether it does not impose a disproportionate burden on the applicants”*.<sup>8</sup>
12. Therefore, the amount of compensation paid as a result of compulsory acquisition (which engages A1P1) must be proportionate and strike a fair balance between the private interests of those affected, and the public interests underlying the acquisition.
13. The State has a wide margin of appreciation in implementing social and economic policies that have the effect of interfering with the right to property<sup>9</sup> because of its direct knowledge of its society and its needs. Therefore it also has a wide margin of appreciation in establishing in law the basis upon which compensation is assessed. Notwithstanding this, for the deprivation of property by the State to be proportionate, the compensation should be of “an amount reasonably related to its value”<sup>10</sup> and it

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<sup>6</sup> A1P1 (protection of property) provides that “Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

<sup>7</sup> *James v United Kingdom* A 98 (1986); 8 EHRR 123 PC, 50.

<sup>8</sup> *Ibid*, 54.

<sup>9</sup> *Ibid*, 46.

<sup>10</sup> Although not proposed in these measures, legitimate objectives of public interest may justify reimbursement at less than the financial equivalent to what the claimant has lost – *Lithgow V United Kingdom* A 102(1986); 8 EHRR 329 PC

will be relevant (as noted above) whether or not the property owners have had to bear a “disproportionate and excessive burden”.<sup>11</sup>

### **The principle of equivalence**

14. The principal statutory sources of compensation law are:

- a. **The Land Compensation Act 1961 (‘the 1961 Act’)**: provides the current statutory rules for assessing compensation (known as the compensation code) including the market value principle (section 5 (2)), establishes what must be disregarded in assessing compensation (section 6) and what planning permissions must be assumed (sections 14 and 15) when determining the value of land compulsorily acquired.
- b. **Compulsory Purchase Act 1965 (‘the 1965 Act’)**: includes the provision that persons with a minor tenancy are entitled to compensation for the value of the unexpired term or interest in the land and for any loss or injury sustained as a result of the compulsory acquisition; and
- c. **Land Compensation Act 1973 (‘the 1973 Act’)**: includes the provision that certain persons with no interest in the land being compulsorily acquired (and therefore no entitlement to compensation) should be entitled to disturbance payments.

15. The fundamental principle underlying the assessment of compensation has been described as the “principle of equivalence” i.e. the right of the owner to be put, so far as money can, in the same position as if their land had not been taken from them. In other words, the owner gains a money payment which is not less than the loss imposed on them in the public interest, but on the other hand, no greater.<sup>12</sup> The equivalence principle underpins current compensation law in the compensation code.

### **Creating a new statutory power to compulsorily create a right of temporary possession - (Clauses 9-21)**

16. Currently, where land is required on a temporary basis, the acquiring authority must either obtain a permanent right compulsorily over the land they need (usually providing an assurance letter to the landowner confirming that the land will only be required for a certain period of time) or enter into a commercial agreement with the landowner concerned. This can result in delay in the implementation of a scheme while negotiations take place.

17. Clause 9 will create a new compulsory right of temporary possession. As explained above, this power will allow acquiring authorities to take possession of land on a temporary basis, for example, in order to store materials needed for the development. This might be necessary, for example, where there is insufficient space for storage on the land which the acquiring authority intends to compulsorily purchase but the acquiring authority doesn’t want or need to compulsorily purchase additional land for this temporary purpose.

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<sup>11</sup> *Scordino v Italy (No.1)* (2007) 45 E.H.R.R. 7, 99.

<sup>12</sup> *Horn v Sunderland Corp* [1941] 2 KB 26, 42, *per* Scott LJ.

18. Although not a compulsory acquisition of land or interest in land, the Government considers that the compulsory possession of land on a temporary basis would engage A1P1 because it would result in interference with peaceful enjoyment of the property.
19. The judgment in *Sporrong and Lönnroth v Sweden*<sup>13</sup> provides authority for this analysis. In that case, whilst the state's expropriation permits over private assets left the owner of those assets able to dispose of the asset, it restricted the possibility of disposal and the owner's ability to use the asset. So although the owner was not deprived (under A1P1) of the asset, the state's interference reduced the possibility of the rights over the assets being exercised.
20. The ECtHR held that A1P1 requires a fair balance between the protection of the right of property and the requirements of the general interest, which the long combined use of the expropriation permits and prohibition on construction upset. They also imposed an excessive burden on the owner of the assets, which could only be rendered legitimate if Swedish law allowed the applicants to seek a reduction of the time limits for expropriation or to claim compensation. As it did not, this was a violation of A1P1 (paragraphs 73 and 74).
21. The Government considers that the new statutory power to compulsorily create a right of temporary possession is for a legitimate purpose in the general interest – it will allow acquiring authorities to use land on a temporary basis in order to facilitate development in the public interest.
22. The way these provisions will operate will also reflect a fair balance between public and private interests. The public interest in each case will be the development in connection with which the temporary possession is required. The private interests of those over whose land the temporary possession power can be exercised will be met by the entitlement to compensation, which will be based on the principle of equivalence.<sup>14</sup> This ensures that a disproportionate burden is not imposed on landowners.
23. The new temporary possession power must be described in and authorised through a CPO or other statutory order through which compulsory acquisition is authorised. Before the temporary possession power can be exercised, the relevant order must be confirmed by a non-ministerial authority or minister of the Crown. Before deciding whether or not to confirm the order the decision-maker must have regard, among other things, to the requirements of A1P1, which allows private interests to be further considered. Consideration of A1P1 may lead to, depending on the particular facts of each case, the decision-maker authorising temporary possession as a proportionate alternative to compulsory acquisition, because there is usually less interference with peaceful enjoyment of property due to its transient nature.

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<sup>13</sup> (1983) 5 E.H.R.R. 35

<sup>14</sup> Any compensation payable must reflect the value of a leasehold interest in the land for the period of the temporary possession and can include compensation for loss and damage and for any loss which the person sustains by reason of the disturbance of trade or business.

24. Alternatively, temporary possession may involve such a substantial interference that it could not be justified by the decision-maker and so acquiring authorities will instead need to compulsorily acquire the land in question. This will still be fair as it will carry the right to compensation for the market value of the land taken (together with the other heads of compensation under the compensation code).
25. The Government therefore considers that the right to compensation and the procedural protections in these clauses (“conditions provided by law”) will ensure that this measure is a lawful interference which does not infringe A1P1.

**Codification of the “no scheme” world by adopting the Law Commission’s recommended rule 13 in the 1961 Act and extending the scheme to include relevant transport projects by amendment to the 1961 Act (clause 22)**

26. The 1961 Act sets out the rules and principles which apply for the purposes of assessing compensation for compulsory acquisition. These rules can be summarised as follows:
- a. “the market value rule”- the starting point is that the land being acquired is to be taken to be the amount which, if “sold in the open market by a willing seller”, it might be expected to realise<sup>15</sup>.
  - b. “hope value”- when assessing the value of the land, consideration needs to be given to the value that may be attributed from any existing or prospective planning permissions (“hope value”) which might be available if the land were not being compulsorily acquired.<sup>16</sup> ; and
  - c. “the no-scheme rule”- when determining the value of the land, any increase or decrease in value which is due to the scheme underlying the acquisition, and (in specific cases)<sup>17</sup> any increase or decrease in value due to the development of the wider area or “scheme” (of which land being acquired is part), is to be disregarded<sup>18</sup>.
27. The “no-scheme rule” approach to compensation is justified as being in the public interest because “the increases in value are brought about, not only by the operation of the ordinary market, but by action carried out in the public interest”.<sup>19</sup> Establishing such statutory compensation principles is within the UK’s reasonable margin of appreciation as provided for by the case of *Lithgow V United Kingdom*, cited at paragraph 14 above, where the ECtHR considered an amount of compensation reasonably related to market value was appropriate.

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<sup>15</sup> See Rule 2 in section 5 of the 1961 Act.

<sup>16</sup> These are the “planning assumptions” and at present are to be found in sections 14 and 15 of the 1961 Act.

<sup>17</sup> The specific cases include development in urban development areas or new towns.

<sup>18</sup> See section 6 of the 1961 Act.

<sup>19</sup> See paragraph 6.39 of the Law Commission’s Consultation Paper No 165 “TOWARDS A COMPULSORY PURCHASE CODE: (1) COMPENSATION A Consultative Report”, accessible here:

[http://www.lawcom.gov.uk/wp-content/uploads/2015/03/cp165\\_Towards\\_a\\_Compulsory\\_Purchase\\_Code\\_Consultation1.pdf](http://www.lawcom.gov.uk/wp-content/uploads/2015/03/cp165_Towards_a_Compulsory_Purchase_Code_Consultation1.pdf).

28. Based on the Law Commission’s recommendations, the provisions in clause 22 of the Bill rationalise and clarify the scope of the “no scheme rule” by creating a new statutory “disregard” rule based on the Law Commission’s rule 13 modified as appropriate.
29. It is already possible for acquiring authorities to argue that the scheme underlying the acquisition is wider than the immediate acquisition proposal but the lack of clarity can lead to different outcomes when disputed compensation is determined by the Upper Tribunal (see the Law Commission example at paragraph 6.2.3 (3) of the Consultation Report<sup>20</sup>). This clarification should produce time and cost savings for claimants and acquiring authorities.
30. It is also proposed to include provision for the extension of the no-scheme principle through the new section 6D and 6E which will be inserted into the 1961 Act. This will define (subject to conditions) the wider statutory scheme so that it can include prior transport schemes where land is acquired for regeneration or redevelopment which is made possible by a relevant transport project. This will mean that compensation for the compulsory purchase of land to facilitate regeneration or redevelopment that has been enabled by earlier transport projects should not be inflated by the increase in land values caused by those transport projects.
31. However, the legal clarity that clause 22 brings to the identification of the “underlying scheme” or project, along with the extension of the underlying scheme may result in some claimants being entitled to less compensation than they might otherwise have expected. The new provisions for assessment of compensation in section 6D to the 1961 will mean that compensation for the compulsory purchase of land to facilitate regeneration or redevelopment that has been enabled by earlier transport projects will not take account of any increase in land values caused by those transport projects.
32. This could impact on those who have bought land after a transport scheme had been announced, but before the publication of these proposed measures with the introduction of the Neighbourhood and Planning Bill. There may have been an expectation that if the land were compulsorily acquired for a regeneration scheme compensation would reflect any uplift in value caused by the transport scheme, which these provisions now remove. To address this potential unfairness, the new section 6E provides that the assessment of compensation for compulsory purchase of any land (required for a relevant regeneration/development scheme) which was acquired by the owner after the announcement of the relevant transport project, but before the publication of the Neighbourhood Planning Bill, will be able to take into account any uplift in value created by the transport scheme.

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<sup>20</sup> In *Bolton MBC v Tudor Properties* [2000] RVR 292, the Council had compulsorily acquired freehold land in the Tonge Valley on the outskirts of Bolton for leisure development by a selected development partner. The Council argued that the underlying scheme went back to the initial regeneration project for the Tonge Valley area, begun in 1980, which included public infrastructure and reclamation works carried out in the 1990s at public expense; the increases in value due to these improvements should be disregarded.<sup>36</sup> The Tribunal and the Court of Appeal rejected this argument:<sup>37</sup> the scheme was limited to the leisure development, preparation for which began in 1995.

33. Further safeguards in the new sections 6D and 6E will apply, namely, that in order for the new approach to compensation to apply;
- a. Regeneration or redevelopment has to be part of the published justification for the relevant transport project. This means that regeneration must have been contemplated as a reason for undertaking the relevant transport project at the outset. It will not be possible for opportunistic schemes to claim that the scheme includes the relevant transport project where there was no mention of regeneration when the relevant transport project was announced;
  - b. The instrument authorising the compulsory acquisition of land for the regeneration/redevelopment scheme has to be made on or after commencement of the provision;
  - c. The compulsory purchase of land for the regeneration scheme must be authorised within 5 years of the relevant transport project being first open for use. This means that schemes coming forward later, even if regeneration was part of the published justification for the relevant transport project, would not qualify for the extended definition of the scheme, as they would be too remote;
  - d. The regeneration or redevelopment must be in the vicinity of the relevant transport project. This is to ensure that regeneration schemes which are distant from the relevant transport project cannot qualify for the extended definition of the scheme;
  - e. A relevant transport project is only one that opens for use 5 years or longer after commencement of these provisions;
  - f. Provisions are provided to ensure fairness to parties during this 5-year period if the opening date changes from that expected which would mean that a different approach to compensation would apply. Claimants would be protected whether the transport project opened earlier or later than expected.
34. In conclusion, the codification of the “no scheme rule” principle and the extension of it to include relevant transport projects does not affect the equivalence principle and it does not change the rule in section 5(2) of the 1961 Act that compensation must still reasonably relate to the market value of the land acquired. This reform may in some circumstances tip the balance towards favouring the public interest over the interest of an individual landowner. However, the Government has built in safeguards which will minimise the possibility of unfairness to a particular class of claimant and considers that this proposal is proportionate, justified in the general interest (because it will facilitate urban regeneration schemes promoted by public authorities by protecting them from increases in value caused by their own activities) and within the reasonable margin of appreciation.
35. In conclusion, this reform does not change the assessment of compensation to an extent that would render deprivation of property (through compulsory acquisition) an unlawful breach of A1P1.



### **Repeal of Part IV of the 1961 Act (Clause 23)**

36. Part IV (comprising sections 23-26) of the 1961 Act contains provisions dealing with the right to claim additional compensation in certain circumstances where planning permission for additional development is granted after compulsory acquisition. They apply, in summary, where, within ten years of the completion of purchase by the authority, a planning decision is made granting consent for “additional development” on the subject land. The person to whom compensation was paid is entitled to claim the additional amount that would have been payable if the planning consent had been available when the land was valued.

37. The Law Commission thought the provisions were anomalous:

*“Compensation under the ordinary rules is intended to reflect the full market value of the land at the valuation date, with all its present and future potential, including any hope value for future development. The claimant is then free to use the money for alternative investments (any delay in payment being compensated by interest). There is no obvious reason why he should be treated as though he had retained his investment in the acquired land, until any potential value had become a certainty. No such expectation would arise on an ordinary sale in the private market, in the absence of a specific provision in the contract of sale for “clawback” of future development value”.*<sup>21</sup>

38. This right to claim additional compensation, although rarely used, introduces an element of unknown risk and uncertainty for acquiring authorities in certain CPO cases, which can result in increased costs (such as the payment of insurance premiums).

39. Clause 23 therefore adopts the Law Commission’s recommendation and repeals Part IV. Although the repeal removes a right to additional compensation, the fundamental principle of equivalence will not be affected. Compensation under the compensation code in the 1961 Act would continue to reflect the full market value of the land at the valuation date, with all its present and future potential, including any hope value for future development. This means the claimant will still not be any better or any worse off than if their land had not been compulsorily acquired. It is therefore proportionate and in the wider public interest to repeal Part IV of the 1961 Act to remove the risk and uncertainty that this anomalous right creates. The Government considers that this repeal also falls within the wide margin of appreciation afforded to member states established in case law.

40. In conclusion, this measure does not lead to any changes in the right to or assessment of compensation which would render deprivation of property (through compulsory acquisition) an unlawful breach of A1P1.

### **Amending the Bishopsgate<sup>22</sup> principle (Clause 25)**

41. Persons in lawful possession of, but without any further interest in, land to be compulsorily acquired (licensees) are entitled to compensation for disturbance

<sup>21</sup> See paragraph 8.36 of the Law Commission’s Final Report, accessible here: [http://www.lawcom.gov.uk/wp-content/uploads/2015/03/lc291\\_Towards\\_a\\_Compulsory\\_Purchase\\_Code1.pdf](http://www.lawcom.gov.uk/wp-content/uploads/2015/03/lc291_Towards_a_Compulsory_Purchase_Code1.pdf)

<sup>22</sup> *Bishopsgate Space Management v London Underground* [2004] 2 EGLR 175

representing the losses caused by reason of losing possession of the land. Where the person is carrying on a trade or business, regard is had, in calculating their losses, to the period for which the land occupied by the person might reasonably have been expected to be available for the purpose of his trade or business.

42. For secure tenancies (those with the protection of Part 2 of the Landlord and Tenant Act 1954), the right of a tenant to apply for a new tenancy is taken into account in the assessment of compensation for the acquisition of the interest of the landlord or tenant.
43. Disturbance payments for licensees and secure tenancies is to be contrasted with the current position for minor tenancies (a tenancy with less than a year left to run, or a tenancy from year to year) and for unprotected tenancies (those without the protection of Part 2 of the Landlord and Tenant Act 1954). Case law (*Bishopsgate Space Management v London Underground* [2004] 2 EGLR 175) held that for these purposes it has to assumed that the landlord would terminate the tenant's interest at the first available opportunity following notice to treat, whether or not that would happen in reality.
44. Therefore, at present people who either have a licence (and not a legal interest), or a secure tenancy in the land to be compulsorily acquired are entitled to more generous compensation than short term tenants, including those with less than a year left to run on their tenancy and lessees with a break clause in their leases.
45. Clause 25 ensures that, in calculating the loss arising from disturbance for the purposes of assessing compensation due to those with minor tenancies, regard should be had to the likelihood of the continuation or renewal of the tenancy, the period for which the tenancy might reasonably have been expected to be available for the purpose of his trade or business, and the terms and conditions on which a tenancy may reasonably have been expected to be renewed or continued. This means that the compensation assessment could take into account the possibility that the tenancy might be renewed and this might increase the amount of compensation payable because the loss to the tenant would be greater.
46. Again, this measure does not lead to any changes in the general right to compensation, which would render deprivation of property (through compulsory acquisition) an unlawful breach of A1P1. Although the effect of clause 25 is that acquiring authorities may be required to pay more compensation to certain categories of claimant, the Government believes that this will address a perceived unfairness under the current law, and thus further promote the principle of equivalence.
47. Therefore, there is no unlawful breach of A1P1.

**Department for Communities and Local Government**

**September 2016**