RE: NORTH ESSEX PLAN, SECTION 1

ADVICE ON PAPER EXD/073

INTRODUCTION

1. I am asked to comment on paper EXD/073 in relation to the examination in public for Section 1 of the North Essex Local Plan. The paper in question deals with issues arising from the proposed acquisition of land using compulsory purchase orders ("**CPO**").

2. My view is that while, in theory, a sequential approach can be adopted (in which the no scheme principle will apply uniformly and the level of compensation for later CPO will not be impacted by the development that has already occurred), there are substantial practical issues that make this approach at best problematic and at worst unworkable. I identify three primary issues:

   (a) It is not at all clear that the power to stagger CPO would be available in respect of the GC;

   (b) The absence of clarity in the designation of the area for the GC means that landowners will not enjoy legal certainty in respect of potential CPO. This raises human rights issues.

   (c) The absence of clarity regarding delivery mechanisms means that the "scheme" is not clear for the purposes of the no scheme principle. This could result in substantially increased costs for later CPO.

   (d) The proposed "mix and match" approach is likely to increase the cost of any CPO.

ANALYSIS

The "No Scheme" Principle

3. The principle is set out in section 6A of the Land Compensation At 1961 (as amended) ("**the 1961 Act**"). This provides:

> "(1) The no-scheme principle is to be applied when assessing the value of land in order to work out how much compensation should be paid by the acquiring authority for the compulsory acquisition of the land (see rule 2A in section 5).
>
> (2) The no-scheme principle is the principle that—
>
> (a) any increase in the value of land caused by the scheme for which the authority acquires the land, or by the prospect of that scheme, is to be disregarded, and
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> (b) any decrease in the value of land caused by that scheme or the prospect of that scheme is to be disregarded.
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> (3) In applying the no-scheme principle the following rules in particular (the "no-scheme rules") are to be observed.
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> (4) Rule 1: it is to be assumed that the scheme was cancelled on the relevant valuation date.
>
> (5) Rule 2: it is to be assumed that no action has been taken (including acquisition of any land, and any development or works) by the acquiring authority wholly or mainly for the purposes of the scheme.
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> (6) Rule 3: it is to be assumed that there is no prospect of the same scheme, or any other project to meet the same or substantially the same need, being carried out in the exercise of a statutory function or by the exercise of compulsory purchase powers.
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> (7) Rule 4: it is to be assumed that no other projects would have been carried out in the exercise of a statutory function or by the exercise of compulsory purchase powers if the scheme had been cancelled on the relevant valuation date.
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> (8) Rule 5: if there was a reduction in the value of land as a result of—
>
> (a) the prospect of the scheme (including before the scheme or the compulsory acquisition in question was authorised), or

(b) the fact that the land was blighted land as a result of the scheme,

that reduction is to be disregarded.

(9) In this section—

- "blighted land" means land of a description listed in Schedule 13 to the Town and Country Planning Act 1990;
- "relevant valuation date" has the meaning given by section 5A.

(10) See also section 14 for assumptions to be made in respect of planning permission.

4. The effect of this provision is that, where a land is acquired for the purposes of a "scheme" (whether a prospective scheme or one that is already in motion), the impact of that scheme (whether positive or negative) on the value of the land in question is excluded from the calculation of the compensation due. For the purposes of the instant matter, it is necessary to identify what the "scheme" will be in respect of the GC.

5. This question is addressed in Section 6D of the 1961 Act, which provides:

> (1) For the purposes of sections 6A, 6B and 6C, the "scheme" in relation to a compulsory acquisition means the scheme of development underlying the acquisition (subject to subsections (2) to (5)).
>
> (2) Where the acquiring authority is authorised to acquire land in connection with the development of an area designated as—
>
> (a) an urban development area by an order under section 134 of the Local Government, Planning and Land Act 1980,
>
> (b) a new town by an order under section 1 of the New Towns Act 1981, or
>
> (c) a Mayoral development area by a designation under section 197 of the Localism Act 2011,

the scheme is the development of any land for the purposes for which the area is or was designated.

(3) Where land is acquired for regeneration or redevelopment which is facilitated or made possible by a relevant transport project, the scheme includes the relevant transport project (subject to section 6E).

(4) For the purposes of subsection (3) and section 6E—

> (a) a "relevant transport project" means a transport project carried out in the exercise of a statutory function or by the exercise of compulsory purchase powers (regardless of whether it is carried out before, after or at the same time as the regeneration or redevelopment), and
>
> (b) where different parts of the works comprised in such a transport project are first opened for use on different dates, each part is to be treated as a separate relevant transport project.

(5) If there is a dispute as to what is to be taken to be the scheme (the "underlying scheme") then, for the purposes of this section, the underlying scheme is to be identified by the Upper Tribunal as a question of fact, subject as follows—

> (a) the underlying scheme is to be taken to be the scheme provided for by the Act, or other instrument, which authorises the compulsory acquisition unless it is shown (by either party) that the underlying scheme is a scheme larger than, but incorporating, the scheme provided for by that instrument, and
>
> (b) except by agreement or in special circumstances, the Upper Tribunal may permit the acquiring authority to advance evidence of such a larger scheme only if that larger scheme is one identified in the following read together—
>
> > (i) the instrument which authorises the compulsory acquisition, and
> >
> > (ii) any documents made available with it.

(6) In the application of no-scheme rule 3 in relation to the acquisition of land for or in connection with the construction of a highway (the "scheme highway") the reference in that rule to "any other project" includes a reference to any other highway that would meet the same or substantially the same need as the scheme highway would have been constructed to meet.

6. Under section 6D(2)(b), where land is designated as a "new town" under section 1 of the New Towns Act 1981, then the entirety of the designated land is considered part of the same "scheme". This means that, if the GC's are designated using s. 1, then each GC will be one "scheme" even if the land on which it is built is obtained using multiple CPO.

7. This protection does not exist, however, if the GCs are not designated as new towns under s. 1. If no such designation exists, then the relevant "scheme" must be determined as a matter of fact. It will be at least arguable that, in such a case, the "scheme" is that described in the relevant planning permission (which is may cover less than the full GC area). In that case, where sequential CPO relate to different planning permissions, there is no reason that the impact of earlier development cannot be included in the calculation of the compensation due in relation to later CPO.

The Section 13C Power

8. NEGC indicates that the power on which it relies in taking a sequential approach to COP is found in section 13C of the Acquisition of Land Act 1981 ("**the 1981 Act**") [**EXD/073, §13**]:

> (1) The confirming authority may confirm an order (with or without modifications) so far as it relates to part of the land comprised in the order (the "relevant part") if each of the conditions in subsection (2) is met.
>
> (2) The conditions are—
>
> > (a) the confirming authority is satisfied that the order ought to be confirmed so far as it relates to the relevant part but has not for the time being determined whether the order ought to be confirmed so far as it relates to the remaining part;
> >
> > (b) the confirming authority is satisfied that the notice requirements have been complied with.

(3) If there is a remaining objection in respect of the order, the confirming authority may only act under subsection (1) after complying with section 13A(2) or (3) (as the case may be).

(4) But it may act under subsection (1) without complying with those provisions if it is satisfied that all remaining objections relate solely to the remaining part of the land.

(5) If the confirming authority acts under subsection (1)—

(a) it must give a direction postponing consideration of the order, so far as it relates to the remaining part, until such time as may be specified by or under the direction;

(b) the order so far as it relates to each part of the land must be treated as a separate order.

(6) The notices to be published, affixed and served under section 15 must include a statement as to the effect of the direction given under subsection (5)(a).

(7) Notice requirements must be construed in accordance with section 13.

(8) Remaining objection must be construed in accordance with section 13A.

9. S. 13C envisages a single order that is confirmed in multiple stages. After the first stage of the order is confirmed, the latter stages are treated as separate orders. This power is only available, however, where two conditions are satisfied. The first condition (and that which is relevant for the instant matter) is that the confirming authority (in this case, the minister) is satisfied that:

(1) The order should be confirmed in relation to the relevant land (i.e. the portion of land under consideration);

(2) But has not yet determined whether it should be determined in relation to the rest of the land encompassed in the original application.

10. It follows from this that the power to confirm in stages is only available where an application for a CPO has been made and the confirming authority is able to confirm the order in relation to one part of the land but is not able to confirm the order in relation to some other part of the land. The circumstances in which a CPO can be confirmed are set out in s. 13 of the 1981 Act. These are:

> (1) The confirming authority may confirm a compulsory purchase order with or without modifications if it is satisfied—
>
> (a) that the notice requirements have been complied with, and
>
> (b) that one of the conditions in subsection (2) is satisfied.
>
> (2) The conditions are—
>
> (a) no relevant objection is made;
>
> (b) every relevant objection made is either withdrawn or disregarded.

11. When these conditions are met, there is no reason for the confirming authority to refrain from making the order. Indeed, a failure to make an order in the event that the conditions in s. 13 are met would invite challenge by judicial review. Where a public authority has a power, it has a duty to consider using that power (if the conditions for doing so are met) [***Stovin v Wise*** **[1996] AC 923**].

12. It seems that, in the instant case, a sequential approach to CPO is envisaged for financial reasons: it may be difficult to raise capital to obtain the land outright and a sequential approach will allow the capital to be raised in stages. The problem with this approach is that a public authority's inability to afford the required compensation is not a relevant consideration the confirming authority under s. 13. If the confirming authority was to confirm a CPO for only part of the total area which must ultimately be obtained by CPO, it can only do so on the basis of relevant considerations [***Associated Provincial Picture Houses Ltd v Wednesbury Corporation*** **[1948] 1 KB 223**] and for proper purposes [***Earl***

Fitzwilliam's Wentworth Estates Co Ltd v Minister for Town and Country Planning **[1951] 2 KB 284**].

13. If, therefore, the s. 13C power was to be used for the purpose of easing financial problems it would be susceptible to challenge by judicial review. Such a challenge would likely be successful. The proposed approach to CPO, in which s. 13C is used to facilitate a sequential or staged approach, does not, therefore, appear to be viable.

Human Rights Issues

14. I am instructed that the boundaries of the proposed GCs have changed a number of times. Ambiguity as to the boundaries of the "scheme" is problematic for the making of CPO.

15. CPO is, prima facia, an interference with the right to peaceful enjoyment of possessions set out in Article 1 of Protocol 1 of the European Convention on Human Rights ("**A1P1**"). As correctly identified in EXD/073, such an interference can be justified if it is proportionate and "strikes a fair balance between the public justification for the expropriation and the private rights of the landowner". In many cases, where proper compensation is paid according to the law, CPO is a justifiable and lawful interference with the A1P1 right.

16. Any interference with A1P1 can only be lawful, however, where it is "subject to the conditions provided for by law and the general principles of international law". This language incorporates the principle of legal certainty into the A1P1 right [***Sunday Times v United Kingdom*** **(1979) 2 EHRR 245 at 271].** The right to legal certainty is also a fundamental constitutional principle in English law. As

Lord Diplock put it in ***Black Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG*** **[1975] AC 591 at 638:**

> "The acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it."

17. Ambiguity as to the borders of the GC denies landowners legal certainty because they are not able to make decisions about their property inf full knowledge of the legal consequences of those decisions. Put simply, it is not clear which landowners will find their land subject to a CPO and to what extent.

18. This puts the scheme in unlawful breach of A1P1. While a justified CPO can be lawful, it will not be so if it is not obtained in a manner that ensures sufficient legal certainty for landowners.

Ambiguity of Delivery Mechanisms

19. A similar problem arises in respect of the delivery of the GC schemes. Given that the proposed plan claims to be "delivery mechanism blind", it is not possible to properly risk assess the delivery of the schemes. This ambiguity is problematic considering the proposed sequential approach to CPO. If problems with the delivery mechanism force alteration to the scheme after the initial CPO have been granted, then the new version of the scheme could be considered a different "scheme" from that set out in the original s. 1 order. In that case, the impact of the development thus far completed could be taken into account in calculating the required level of compensation. This could increase the costs of development exponentially.

Drawbacks of a "mix and match" approach

20. During the hearing on 15 January, NEGC Ltd indicated that they would likely only adopt considering a "mix and match" approach to land acquisition, in which some land would be acquired by private treaty and some by CPO. This will likely result in increased compensation costs under any CPO.

21. The starting point for the calculation of the value of compensation is "the amount which the land if sold in the open market by a willing seller might be expected to realise" [**s. 5(2), 1961 Act**]. It is clear from land value benchmarks submitted by private developers (who are working closely with landowners including having options on land) that land purchased by private treaty would be at a higher price than the CPO values outlined in any analysis by NEGC Ltd.

22. Such an increase in price could not be discounted under the "No Scheme" Principle. That principle bites where the increase in the price of land results from the relevant scheme. Under the piecemeal approach to acquisition the market value of land would increase as a result of the choices made about the approach to land acquisition, not the scheme itself. A "mix and match" approach to land acquisition will therefore lead to CPO prices for similar land to that being purchased by private treaty increasing to match the aforementioned private treaty prices paid.

Public Interest Justification for CPO

23. The MHCLG guidance on compulsory purchase provides "A compulsory purchase order should only be made where there is a compelling case in the

public interest."[1] [**p. 12**]. Where a private developer is prepared and has the requisite capabilities to build on the relevant land in accordance with the relevant planning policies, it will be difficult to make a convincing public interest case. In this situation, it is unlikely that a CPO could lawfully be confirmed.

24. If, therefore, there are private sector developers who are willing and able to develop the relevant sites in accordance with the relevant policies, it will not be possible to acquire the land by CPO.

SAM FOWLES
Cornerstone Barristers
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[1] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/817392/CPO_guidance_-_with_2019_update.pdf [last accessed 29 January 2020]