Compulsory Purchase: Life after Aylesbury

Lucy Thomas

Introduction

Done well, the redevelopment of housing estates is capable of making a significant contribution to increasing housing supply.

One of the most divisive questions is whether to demolish or refurbish the existing homes. The trade-offs associated with demolishing council homes to build a greater quantity of more expensive houses are seen by some as realism, and others as social cleansing.

Opponents of estate demolition and rebuild proposals argue that homes are unnecessarily demolished and such schemes lead to a large loss in social housing, sometimes moving tenants to other parts of London or the UK and replacing their homes with large quantities of private market housing that is unaffordable for the majority. Those affected may perceive their redistribution to other areas as part of a deliberate policy, feeling that they're seen as a drag on their local authorities' ambitions for the area.

On the other hand, the homes are often in a bad state of repair, and refurbishment would either be too expensive or impractical. All too recently we have become aware of how refurbishment doesn't always fix the underlying deficiencies of some of these older housing blocks. Advocates argue that demolition and rebuild is not only a more viable option, but allows a better use of available land area, creates a significant increase in overall numbers of homes and improves the living conditions of remaining tenants.

Compulsory purchase has a major role to play in facilitating redevelopment, a point recognised by both the Conservative and Labour parties whose 2017 election manifestos made reference to the need to improve the compulsory purchase regime to deliver more houses. However, recent decisions have shown that compulsorily acquiring someone's home or business premises, even where this is to create more houses or commercial space, is fraught with difficulties.

This paper considers some recent examples of where the compulsory purchase process has delayed (and in some cases derailed) the estate regeneration process. It seeks to identify where the compulsory purchase process is particularly vulnerable to challenge and what promoters of compulsory purchase orders underpinning estate regeneration schemes can do better to improve their rates of success.

What are the issues?

Proposals for change inevitably result in those that lose and those that gain.

The acquisition and redevelopment of large estates represent major investments for local authorities, housing providers, developers and funders; they do not take such decisions lightly. However, for the communities living in an estate earmarked for regeneration, the decision to demolish affects the very fabric of their lives. For some, maybe the change isn't so great. For others who depend on close ties with those in their communities, the thought of leaving the area (with the resultant change to their children's schools, their doctors, their church and their commute to work) can be devastating. The significance to those affected is evident in the often heated and emotional debates that we see in our newspapers, television and on social media. It is therefore vitally important that decisions are made carefully and for the right reasons.

Those existing residents with a secure tenancy will suffer the same uncertainties and upheaval, but are more likely to benefit from authority or scheme specific policies guaranteeing a right to return to a property in the new development, together with promises to minimise the number of moves and disruption where possible. Although they may suffer a downsize in the number of bedrooms where this is based on current

need, there is often greater clarity on what disturbance costs will be paid, and statutory consultation[1] takes place before any decisions are finally made.

The package is rarely the same for resident leaseholders. Since the 1980s, many people have taken advantage of the Government's Right to Buy scheme which offers discounts to tenants, subject to various qualifying criteria, to help them purchase their home. This has led to a rise in home ownership on estates and has undoubtedly added to the complexity of the regeneration process. Such leaseholders not only face the threat of home loss, but are suddenly forced into a world of legal advice, surveyors and compensation. Not all have the finances available to cash flow or fund the fees for professional advice.

Such impacts must all be properly taken into account by acquiring authorities, whose job it is to make the initial decision as to whether the benefits of the scheme, with its shiny new homes, retail, community and leisure facilities, outweigh the burden imposed on those whose existing homes and businesses will be lost.

Government guidance on the use of powers of compulsory purchase[2] ("the CPO Guidance") seeks to assist with this delicate balance of benefits against impacts. The CPO Guidance provides that:

> "A compulsory purchase order should only be made where there is a compelling case in the public interest …
>
> The minister confirming the order has to be able to take a balanced view between the intentions of the acquiring authority and the concerns of those with an interest in the land that it is proposing to acquire compulsorily and the wider public interest. The more comprehensive the justification which the acquiring authority can present, the stronger its case is likely to be."

For those assessing the need for estate regeneration, the difficulty is determining exactly where the public benefits of estate regeneration lie. It is often noted that a process of "gentrification" may, over time, accompany regeneration. The new homes are often priced far in excess of the financial capability of those that have been moved from the original estate. Major regeneration schemes in London have been rumoured to attract overseas investors that simply mothball the sites and wait out a rise in capital values. Those new homes that are owner occupied are lived in by households far more affluent than previous residents, thus altering the make-up of the local community. Critics query the reality of the perceived benefits of regeneration schemes in terms of new homes, jobs and facilities for local people.

Such debates have recently been played out across a number of estate regeneration schemes. The next section takes a closer look at these examples and the avenues of challenge being cited by their objectors. Key recurring issues are:

- the inadequacies of the compensation system to enable those displaced by a scheme to remain in the area;
- what acquiring authorities must do to properly discharge their Public Sector Equality Duty pursuant the Equalities Act 2010 s.149;
- the need for acquiring authorities to secure effective mitigation measures against the adverse impacts of a compulsory purchase; and
- how acquiring authorities can best engage with those affected to better understand (and so be better placed to remedy) any adverse impacts.

[1] Housing Act 1985 s.105.

[2] "Guidance on Compulsory purchase process and The Crichel Down Rules for the disposal of surplus land acquired by, or under the threat of, compulsion", October 2015.

The inadequacies of the compensation system

In its publication "Knock it Down or Do it Up? The challenge of estate regeneration",[3] the London Assembly made a number of recommendations. These included:

> "Ensure that leaseholders are treated fairly and provide for them to nominate an independent valuer so they receive fair recompense for their properties. The starting point should be that leaseholders are offered a like-for-like replacement of their property, or a similar offer, wherever possible."

While we may query what is meant by a "like-for-like" offer in these circumstances, it is clear that independent advice that residents can trust can be very beneficial. On the Aylesbury Estate in Southwark LBC, the valuations undertaken by the council-appointed surveyor were claimed to be one of the main causes of mistrust amongst Aylesbury leaseholders of the whole valuation process.

On the nature and level of offers that should be made by acquiring authorities in seeking to first acquire land by agreement in advance of making a compulsory purchase order, the CPO Guidance states:

> "When offering financial compensation for land in advance of a compulsory purchase order, public sector organisations should, as is the norm, consider value for money in terms of the Exchequer as a whole in order to avoid any repercussive cost impacts or pressures on both the scheme in question and other publicly-funded schemes.
>
> Acquiring authorities can consider all of the costs involved in the compulsory purchase process when assessing the appropriate payments for purchase of land in advance of compulsory purchase. For instance, the early acquisition may avoid some of the following costs being incurred:
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> - legal fees (both for the order making process as a whole and for dealing with individual objectors within a wider order, including compensation claims);
> - wider compulsory purchase order process costs (for example, staff resources);
> - the overall cost of project delay (for example caused by delay in gaining entry to the land); and
> - any other reasonable linked costs (for example potential for objectors to create further costs through satellite litigation on planning permissions and other orders).
>
> In order to reach early settlements, public sector organisations should make reasonable initial offers, and be prepared to engage constructively with claimants about relocation issues and mitigation and accommodation works where relevant."

However, the level of offer made is often the key reason for affected parties maintaining their objection to a compulsory purchase order at the public inquiry. This was the case for the regeneration of the Aylesbury Estate, described as suffering from high levels of social and economic deprivation and widely acknowledged as being a high priority for regeneration.

Aylesbury Estate

Built between 1966 and 1977 on 28.5ha of land, the estate was originally home to 7,500 people. In January 2010, Southwark LBC took the first steps towards its aspiration to regenerate the area with the adoption of the Aylesbury Area Action Plan. This envisaged a phased approach to the redevelopment of the estate. By 2013, two CPOs for land falling within phase 1 had been confirmed and the first of the new homes were ready for occupation.
In June 2014, Southwark made the third of its phase 1 CPOs to bring forward two more parcels of land that would replace 556 homes with 830 new ones.

Tenants of the estate were offered a right of return to the new development. However, the suggestion of a "like-for-like" swap for resident leaseholders was rejected by the Council due to rising house prices. Resident leaseholders were offered the following opportunities:

[3] Published February 2015.

- repurchase a property in the scheme on the open market;
- purchase a replacement property through a shared ownership/equity scheme; or
- seek re-housing assistance from the Council and eventually become a full/shared owner or tenant of a Council property.

The leaseholders were originally to be means tested to assess their ability to afford the different types of re-housing options available.

Agreements were reached with a number of leaseholders but several refused to agree terms on the basis they felt that:

- the sum offered by way of compensation was too low to enable them to repurchase within the area (the average offer was £220,000 for a three-bedroom property while a similar sized flat on the nearby Camberwell Fields development was selling at £459,000); and
- to qualify for any of the repurchase schemes, leaseholders were placed under financial scrutiny and permitted to retain only £16,000 of capital. This requirement would have major implications for the leaseholders' future financial security and plans.

It is only fair to mention that Southwark had acted no differently than with previous estate regeneration schemes in the area, where the required compulsory purchase orders had been confirmed without difficulty. Offering market value for a property, together with statutory loss payments, is a standard approach and no different to the position taken by a large number of authorities across the country when promoting CPOs. Southwark's attempts to reach negotiated settlements with affected landowners had been by-and-large successful: by the time of the public inquiry, 55 dwellings had been acquired through private treaty with only 16 leaseholders remaining.

The CPO Guidance suggests that, in order to reach agreement, it is not unreasonable to take into account factors above and beyond market value. For example, it is not unusual for an authority to offer an additional payment to reflect the savings made by both parties in reaching early settlement and so avoiding the time and cost implications of a public inquiry. However, in calculating the viability of a scheme, neither the authority nor the developer will normally have allowed for the costs of "like-for-like" replacement homes for leaseholders and freeholders impacted by the redevelopment.

Objectors regularly raise concerns that offers based on market value simply don't work for regeneration schemes, where prices are inevitably depressed through lack of investment in the area pending regeneration. While it may be a genuine reflection of the financial worth of the property, the offers aren't enough to allow the owner to purchase a similar property in the area. When the concern is raised at the public inquiry, the answer given, and normally accepted by the Secretary of State, is that provided reasonable and genuine attempts to acquire by private treaty have taken place, the quantum of compensation is a matter to be heard by the Upper Tribunal if not agreed between the parties. The compensation amount itself is not a matter that the Secretary of State, or his appointed inspector, need have regard to when deciding whether or not to confirm a CPO.

However, in September 2016, almost 27 months after it was made, the Secretary of State (Sajid Javid), in line with his inspector's recommendation, concluded that a compelling case in the public interest had not been made and therefore the CPO should not be confirmed.

The Aylesbury decision

In reaching his decision to refuse to confirm the order, the Secretary of State considered the requisite statutory tests, along with the CPO Guidance. He found that the redevelopment scheme: was in accordance with the local plan; would be viable and deliverable; there were no other viable means by which Southwark could achieve its regeneration objectives; it would deliver significant economic benefits in terms of jobs; and there would be some social benefits in the form of a gym/learning centre. Nevertheless, the CPO should not be confirmed because:

- the scheme would have considerable economic, social and environmental disbenefits in terms of consequences for homeowners;
- as a result of the number of dwellings that would fail to meet Southwark's adopted policies for sunlight and daylight, and the extent of overshadowing of the proposed amenity areas, the scheme would fail to achieve the environmental wellbeing sought;
- Southwark had not taken reasonable steps to negotiate with the homeowners to acquire their interests by agreement;
- the purposes for which the CPO was made would not justify interfering with the human rights of those with an interest in the land affected; and
- in applying the Public Sector Equality Duty he was concerned that there would be significant negative impacts on protected groups if the CPO were confirmed.

This was a bold decision, not least because of its potential to derail (if only temporarily) a significant regeneration project which would deliver an additional 1,225 new homes (3,983 in total) over a 20-year period; a project which was reliant upon a rolling programme to re-house displaced residents. It flew in the face of two decisions for previous CPOs for the same scheme (the second of which took just 10 months to progress from making to confirmation) despite Southwark's inquiry plea that the inspector's reasoning and conclusions in relation to the second CPO were equally applicable here.

However, the Secretary of State found that given that the use of CPO powers is a remedy of last resort, it was incumbent upon Southwark to demonstrate that it had taken reasonable steps to acquire the affected properties by negotiation. The inquiry heard that whilst the majority of homes had been acquired by agreement, the main reason that the remainder could not be secured was due to the compensation and re-housing options made available to the leaseholders.

Southwark contended that market value had been offered. However, both the inspector and the Secretary of State concluded that, although quantum of compensation was not a matter on which they were entitled to form a view, the approach to only offer what would be payable under the compensation code would result in a clear shortfall between the compensation paid and the cost of finding a replacement home in the locality, thus creating social and economic implications for the wellbeing of affected homeowners. Critics of the decision have questioned how the CPO could be refused on grounds of inadequate compensation if this is not a matter for the Secretary of State to take into account. Southwark's offers were, after all, in line with the compensation code. However, the Secretary of State is entitled to take into account the impacts of the compulsory purchase on those affected. If the result of the order, even where compensation is to be paid in full in accordance with case law and statute, is that residents are still going to be forced to move from their communities, this impact is something that the Secretary of State must be able to take into account when deciding whether or not the order should be confirmed.

Paragraph 12 of the CPO Guidance states:

> "An acquiring authority should be sure that the purposes for which the compulsory purchase order is made justify interfering with the human rights of those with an interest in the land affected. Particular consideration should be given to the provisions of Article 1 of the First Protocol to the European Convention on Human Rights and, in the case of a dwelling, Article 8 of the Convention."

Sajid Javid and his inspector both considered the European Convention on Human Rights ("ECHR") art.8 (the right to respect for private and family life, home and correspondence) and the ECHR First Protocol art.1 (every natural and legal person is entitled to the peaceful enjoyment of his possessions).

They took the view that whilst compensation would be available to the homeowners affected by the CPO and that they had been offered a range of housing opportunities to allow them to stay in the area, in order to exercise this option, they would need to invest considerable personal resources in addition to any compensation received. Therefore, the CPO would not only deprive them of their home, but also their financial security. If they didn't pursue this option, those affected would inevitably have to leave the area, with resultant implications for their family life and those dependent upon them. As such, interference with

the residents' human rights would not be proportionate having regard to the level of interference and the public benefits that the scheme would bring.

For a decision to fall down on this ground is highly unusual and as such has taken local authorities and developers by surprise.

The duty to consider the human rights implications of a CPO is not a new one, however this obligation is ordinarily dispensed with in fairly short order.

Historically, those promoting a CPO would, in their statement of reasons, make a perfunctory comment that compensation would address any human rights implications and those confirming the order would note that a fair balance between the public interest and the interests of those affected had been struck. For example, in respect of the second Aylesbury CPO, the inspector did not mention human rights at all and the Secretary of State's decision letter covered the issue in just four lines.

However, there have been indications that the Planning Inspectorate (at least) has been willing to take an alternative view. In the case of the Shepherds Bush Market CPO, the inspector took the view that "the personal losses and widespread interference with private interests arising from confirmation of the Order cannot be justified". Although Eric Pickles disagreed and concluded that "a fair balance would be struck between the wider public interests and private interests", this approach unravelled in the Court of Appeal. There he was criticised for failing to give adequate reasons for his disagreement with the inspector and his decision was quashed, resulting in the subsequent scrapping of plans for the market's redevelopment.

Those involved in compulsory purchase have long battled with the question of adequate compensation for residents. While the code requires the impacts of the pending CPO to be ignored when determining the market value of land (known as the "no-scheme world"), this won't normally require valuers to imagine a world in which an area or building would, but for the CPO, have received investment, care and maintenance such that values would have kept in line with neighbouring up and coming areas.

The compensation system is intended to ensure that those whose land is taken are left in no better or worse position than before the CPO, but only in financial terms. There is no allowance within the code for the impacts on a person's social or emotional wellbeing that may have accrued from being part of a community or having a sense of belonging. The alternative would be a valuation based on the cost of a replacement home. For some, maybe those that have lived and worked in the area all their lives and who never expected to have to move, this may be a just and proper outcome. For others, new to the area with no particular affinity with the community, this may be seen as unjust enrichment. It seems unlikely for now that tinkering with the compensation system will provide the answer. The solution is likely to depend on the facts of each particular scheme and will require a degree of flexibility on the part of both developers and acquiring authorities to find an outcome that works for all.

The Public Sector Equality Duty

The Public Sector Equality Duty is set out in the Equalities Act 2010 s.149. It requires local authorities to have due regard to the need to: (a) eliminate unlawful discrimination, harassment and victimisation; (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; and (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

Protected characteristics are age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

Implementing the Public Sector Equality Duty

The following principles explain what is essential in order for the Equality Duty to be fulfilled. Public bodies should ensure:

- **Knowledge:**

  Those who exercise the public body's functions need to be aware of the requirements of the Equality Duty. Compliance with the Equality Duty involves a conscious approach and state of mind.

- **Timeliness:**

  The Equality Duty must be complied with before and at the time that a particular policy is under consideration or decision is taken. That is, both in the development of policy options and in making a final decision. A public body cannot satisfy the Equality Duty by justifying a decision after it has been taken.

- **Real consideration:**

  Consideration of the three underlying aims of the Equality Duty must form an integral part of the decision-making process. The Equality Duty is not a matter of box-ticking; it must be exercised in substance, with rigour and with an open mind in such a way that it influences the final decision.

- **Sufficient information:**

  The decision maker must consider what information he or she has and what further information may be needed in order to give proper consideration to the Equality Duty.

- **No delegation:**

  Public bodies are responsible for ensuring that any third parties which exercise functions on their behalf are capable of complying with the Equality Duty, are required to comply with it, and that they do so in practice. It is a duty that cannot be delegated.

- **Review:**

  Public bodies must have regard to the aims of the Equality Duty not only when a policy is developed and decided upon, but also when it is implemented and reviewed. The Equality Duty is a continuing duty.[4]

The courts[5] have made clear that the requirement to pay due regard to equality impact is just that:

> "It does not require a precise mathematical exercise to be carried out in relation to particular affected groups."

In the case of *R. (on the application of Bracking) v Secretary of State for Work and Pensions*, McCombe LJ stated:

> "The concept of 'due regard' requires the court to ensure that there has been a proper and conscientious focus on the statutory criteria, but if that is done, the court cannot interfere with the decision simply because it would have given greater weight to the equality implications of the decision than did the decision maker. In short, the decision maker must be clear precisely what the equality implications are when he puts them in the balance, and he must recognise the desirability of achieving them, but ultimately it is for him to decide what weight they should be given in the light of all relevant factors."[6]

The CPO Guidance provides acquiring authorities with advice on how it should approach complying with its Equality Duty when considering whether or not to make a compulsory purchase order. It states:

[4] "Equality Act 2010: Public Sector Equality Duty, What Do I Need to Know? A quick guide for Public Sector Organisations", Government Equalities Office, June 2011.

[5] See *R. (on the application of West Berkshire DC) v Secretary of State for Communities and Local Government* [2016] EWCA Civ 441; [2016] J.P.L. 1034 in which the Court of Appeal discussed the nature and level of obligations on public bodies when considering how to comply with their Equality Duty, in the context of the issue of a written ministerial statement to reduce the affordable housing requirements on housing developments of less than 10 dwellings.

[6] *R. (on the application of Bracking) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345 per McCombe LJ at [78].

> "All public sector acquiring authorities are bound by the Public Sector Equality Duty as set out in section 149 of the Equality Act 2010. In exercising their compulsory purchase and related powers (e.g. powers of entry) these acquiring authorities must have regard to the effect of any differential impacts on groups with protected characteristics.
>
> For example, an important use of compulsory purchase powers is to help regenerate run down areas. Although low income is not a protected characteristic it is not uncommon for people from ethnic minorities, the elderly or people with a disability to be over-represented in low income groups. As part of the Public Sector Equality Duty, acquiring authorities must have due regard to the need to promote equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it. This might mean that the acquiring authority devises a process which promotes equality of opportunity by addressing particular problems that people with certain protected characteristics might have (e.g. making sure that documents are accessible for people with sight problems or learning difficulties and that people have access to advocates or advice)."

The inspector in Aylesbury didn't find that Southwark had failed to comply with its Equality Duty. However, Mr Javid disagreed with both Southwark's and the inspector's conclusions on this matter. He considered that there would be significant negative impacts on protected groups if the CPO were confirmed.

In particular, he noted that there would be an impact on elderly homeowners on the grounds that they would be unlikely to secure a mortgage to make up any shortfall in house prices and their future earning potential would be limited. He also noted that if they were forced to use their savings it would severely limit their ability to choose how to spend their retirement.

Mr Javid further stated that if forced to move away from the area as a result of lack of resources, this would impact upon those with protected characteristics, including in relation to the care of elderly relatives and children's education.

As the ultimate decision maker on whether or not to confirm the CPO, Mr Javid was entitled to take these matters into consideration. However, to refuse to confirm a CPO on Equality Duty grounds is unusual. In respect of the Shepherds Bush Market CPO, Eric Pickles noted that although the decision had the potential to affect traders of particular ethnic groups, the effects would be mitigated and as such, the impact of the decision was justified and proportionate.

Although not a new ground of challenge within the planning industry,[7] the position taken by the Secretary of State in Aylesbury may well boost the confidence of those seeking to object to redevelopment proposals on the grounds of failure by an authority to properly comply with its Equality Duty. For example, the potential for compliance by an acquiring authority with its Equality Duty has been recently raised in objections to proposals by Haringey LBC to promote estate regeneration through the transfer of a number of Council-owned estates into a 50/50 joint vehicle company with a private developer.

Haringey Development Vehicle

In November 2015, Haringey LBC commenced a procurement process seeking private development partners to enter into a 50/50 joint venture company to promote the development of Council-owned land within the borough. This would include the decant, demolition and rebuild of a number of the Council's existing housing estates.

The business plans for the Haringey Development Vehicle suggest that the arrangement would result in an estimated 6,400 new homes (at least 40% of which would be affordable) and 20,000 new jobs. The Council, as 50% owner of the company, would take an equal share of both the risk and rewards of any development.

An Equalities Impact Assessment was undertaken by the Council in September 2015 based on census data. This concluded that any impacts on affected parties would be positive since it would lead to the possible creation of more homes and jobs.

[7] See *LDRA Ltd v Secretary of State for Communities and Local Government* [2016] EWHC 950 (Admin) in which the court held that the inspector did not have due regard to the Equality Duty, having failed to consider whether the loss of the car park would not be merely "less convenient" for disabled people, but may mean they could not access the riverside at all. If the inspector was not fully appraised of the relevant information, he was under an obligation to seek it out.

The procurement process followed a competitive dialogue process and the preferred bidder was selected in February 2017.

In February 2017, the Older Persons Reference Group of Haringey instructed solicitors to issue a pre-action protocol letter setting out potential grounds of challenge to any decision by the Council to proceed with the HDV.

The key grounds of challenge included the alleged failure by the Council to comply with its Public Sector Equality Duty when deciding to proceed with the HDV. In particular, by relying on census data rather than consultation with affected residents, the Council could not have known and so could not have reached an informed conclusion on the impacts on those affected by its decision to form the HDV (although the objector did not identify that there were in fact any different impacts on those with protected characteristics than those without).

The compulsory purchase order for Aylesbury is currently back on the drawing board due to a technicality: the Secretary of State's decision not to confirm the CPO was quashed as a result of his failure to adequately explain why a change to Southwark's much maligned £16,000 policy (between the close of the CPO public inquiry and the publication of the Secretary of State's decision, Southwark scrapped the requirement for affected residents to commit all but £16,000 of their savings towards the purchase of their new homes) didn't alter his decision not to confirm the CPO.

However, the Secretary of State's position on the application of the Equality Duty and of human rights under the ECHR in the context of negotiations with resident leaseholders in a CPO situation remains a game-changer. Many authorities in the early stages of preparing CPOs are making greater demands of developers in terms of their proposed relocation and re-housing strategies to avoid similar criticisms of their own schemes.

The question for those currently planning regeneration schemes is how far do the obligations under the Duty go? Government guidance[8] on the Duty states that:

> "Having due regard to the need to advance equality of opportunity involves considering the need to:
> - remove or minimise disadvantages suffered by people due to their protected characteristics;
> - meet the needs of people with protected characteristics; and
> - encourage people with protected characteristics to participate in public life or in other activities where their participation is low."

The first hurdle is therefore to obtain accurate information about those residents within an estate. As the challenge at Haringey demonstrates (although the point is yet to be considered by the courts), a lack of express consultation can (if nothing else) lead to questions as to the level of information held by the authority and so the validity of its efforts to comply with the Duty. Early assessments of those residents at or working within the land will allow developers and authorities to better plan their developments around the needs of those that may need to be rehoused back into the new scheme.

Of course, not all schemes will be able to afford a policy that provides resident leaseholders with the opportunity to return to the development on a like-for-like basis. For those schemes that can, the authority and the developer have further matters to consider:

- will the policy be limited only to those with known protected characteristics or should it be applied consistently across all resident leaseholders?
- Will an inequality in treatment of leaseholders from different groups or backgrounds lead to its own difficulties in terms of reaching negotiated settlements?
- Will a more favourable compensation package or re-housing offer to resident leaseholders encourage non-resident leaseholders to terminate tenancies so that they can move back into their flat to take advantage of the better terms?

[8] "Equality Act 2010: Public Sector Equality Duty, What do I need to know? A quick start guide for public sector organisations", June 2011

The guidance confirms that complying with the Equality Duty may involve treating some people better than others, as far as this is allowed by anti-discrimination laws.

Greater difficulties are faced by those schemes that can't afford a like-for-like policy with some commentators hailing the Secretary of State's decision in Aylesbury as the end of the road for any estate regeneration schemes that house a high number of resident leaseholders. For those with such schemes it should be emphasised that there is not, and never has been, a "one size fits all" solution. Successful regeneration will always be reliant on early and meaningful communication with those affected to see what other measures may be offered to mitigate against any impacts and so ensure that the balance of public benefits against individual harm continues to weigh in favour of the scheme going ahead.

Going forward, local authorities would be advised to consider what information about those living and working within the land they need before they can properly assess how the scheme may impact on those with protected characteristics. Timing of the assessment is also key. Retrospectively considering the impacts once the local authority has already contractually committed to a developer to use reasonable endeavours to make a CPO (for example through a development or indemnity agreement) will make it hard to show that the authority gave any true consideration to the issue. It may also result in missed opportunities to hard wire mitigation measures into both the scheme and the development programme.

Need for the acquiring authority to effectively secure mitigation measures against the adverse impacts of a compulsory purchase

As already set out above, when determining whether or not to make a compulsory purchase order an acquiring authority must assess whether the public benefits of a development outweigh the impacts on private interests.

In doing so, it is reasonable for it to take into account any measures proposed by the developer that are designed to mitigate against known impacts on affected parties. It must also take into account the promised benefits of the scheme, for example, meeting a shortfall in housing supply, public open space, leisure facilities and transport links.

While quick to set these all out in its documentation supporting the making of a CPO, the authority must take care to ensure that these are properly secured (by way of e.g. the development agreement, planning condition or s.106 agreement) if it is to have certainty that the Secretary of State will take them into account when considering whether or not to confirm a CPO.

This was the difficulty faced by Hammersmith and Fulham LBC with the regeneration of Shepherd's Bush Market.

The market consisted of 137 separate retail pitches occupied by small independent traders providing a diverse mix of products in food, fashion and household, mainly to the local population. The market offered the opportunity for independent businesses to trade in an affordable environment not found elsewhere in the area.

Planning policy adopted by Hammersmith and Fulham Council encouraged the redevelopment of the market "to create a vibrant mixed-use town centre development of small shops, market stalls, leisure uses, residential and possibly office". However, the importance of the market's character was reflected in the Council's Core Strategy policy which stated that any such redevelopment "should encourage small independent retailers and accommodate existing market traders".

The Council accordingly granted outline planning permission for the phased redevelopment of the market as part of a mixed-use scheme to developer, Orion Shepherds Bush Ltd.

The Council made a CPO to facilitate land assembly for the regeneration scheme. There were over 200 objections and a 10-day public inquiry. The overall question for the inspector (and for the Secretary of State as decision maker) was whether a compelling case had been made out. The inspector concluded that it hadn't.

In her report, the inspector found that the provisions of the s.106 agreement that were purported to safeguard the businesses of existing market traders did not provide sufficient certainty to ensure their retention. She considered the effectiveness of the operation of the s.106 obligations to be "a vital element of the consented scheme".

Horada v Secretary of State for Communities and Local Government[9]

The case concerned the proposed regeneration of Shepherd's Bush Market. Outline planning permission for the refurbishment and enhancement of the Market, and the construction of new buildings to provide up to 212 residential units together with retail floor space, restaurants, cafes and public space was granted in March 2012 to developer Orion Shepherds Bush Ltd.
The s.106 agreement with the Council required Orion to consult traders, have regard to their views and for there to be a rent freeze during the works. Rent and service charge levels were to be affordable for small local, entry-level businesses.

The inspector recommended that the CPO be refused on the ground that the s.106 obligations weren't sufficiently effective to safeguard the businesses of existing market traders and did not provide sufficient certainty to ensure their retention.

The Secretary of State disagreed and confirmed the CPO. He concluded that there were sufficient safeguards to protect existing traders in the form of both planning conditions and the s.106 agreement.

James Horada, chairman of the Shepherd's Bush Market Tenants Assoc, challenged the Secretary of State's decision.
The Administrative Court[10] found that the Secretary of State had fully understood the contents of the s.106 agreement and the importance of the need for details of the physical requirements to create a regenerated environment for the market.
However, the Court of Appeal[11] overturned the decision on the basis that the Secretary of State had failed to give adequate reasons for disagreeing with his inspector.
There are no current proposals for the redevelopment of the Shepherd's Bush Market.

The uncertainty as to the nature and affordability of the replacement scheme and whether certain works to repair and improve the market's physical fabric would be carried out was enough for the inspector to conclude that delivery of the public benefits was not sufficiently certain to outweigh the impacts on the private interests of the market traders:

> "Without knowledge of the replacement provision intended, the traders cannot fully comprehend their future, nor plan for it. That level of uncertainty is unacceptable and provides a poor basis for assessing the extent to which existing traders could or would relocate to the refurbished market. The s106 provides no guarantees in that regard."

The Secretary of State (then Eric Pickles) disagreed and confirmed the CPO. He concluded that there were sufficient safeguards to protect existing traders in the form of both planning conditions and the s.106 agreement. He confirmed that he was:

> "satisfied that sufficient safeguards are in place to protect traders and shopkeepers through a series of planning conditions requiring the review and approval of the council and through the section 106 agreement which can be enforced by the council to ensure that a development in line with the relevant planning framework can be delivered."

Horada (who had objected to the CPO on behalf of the Shepherd's Bush Market Tenants' Assoc at the public inquiry) challenged the Secretary of State's confirmation of the order. Although the challenge was rejected by the Administrative Court, the Court of Appeal found fit to overturn the decision. The question before the Court of Appeal was whether the Secretary of State's decision was flawed for failure to give adequate reasons for disagreeing with his inspector. The Court was unanimous that it was. Of course, if a decision is overturned due to a failure to give adequate reasons, it teaches us little about the lawfulness of the decision itself. Had the Secretary of State given full reasoning for why he found there to be adequate

[9] *Horada v Secretary of State for Communities and Local Government* [2016] EWCA Civ 169.
[10] *Horada v Secretary of State for Communities and Local Government* [2015] EWHC 2512 (Admin).
[11] *Horada v Secretary of State for Communities and Local Government* [2016] EWCA Civ 169.

safeguards then the decision to confirm the Shepherds Bush Market CPO may well have stood despite the reservations expressed by the inspector.

The acquiring authority may not have to prove every detail of the proposed scheme, nor show that protection for those affected is absolute. Often with large regeneration projects it will be difficult for authorities to provide certainty on the make-up of the final proposal. However, *Horada* shows us that the extent of such safeguards will, if nothing else, be at least relevant to the confirmation of the CPO. Developers will naturally look to build flexibility into planning obligations. For most schemes this causes little difficulty (and may provide its own benefits) for the authority. However, where a planning permission is to be relied upon to support a CPO they would be wise to forgo this in place of certainty that the proposed benefits of a scheme, together with any measures to protect existing occupiers, are sufficiently well drafted to withstand the scrutiny of a public inquiry.

Need for acquiring authorities to engage with affected parties to first understand and then seek to remedy adverse impacts

Notably absent from the CPO Guidance is any obligation on acquiring authorities to consult with those affected before making the CPO. The only suggestion of engagement is at para.3 (What should acquiring authorities consider when offering financial compensation in advance of a compulsory purchase order?) which provides:

> "In order to reach early settlements, public sector organisations should make reasonable initial offers, and be prepared to engage constructively with claimants about relocation issues and mitigation and accommodation works where relevant."

There is some sense in this approach. If consulted in advance, few affected parties would be likely to indicate that they were in favour of their property being included within a compulsory purchase order.

However, time and again objectors to estate regeneration schemes complain of lack of information and engagement from the acquiring authority. The proposed development of New Bermondsey in Lewisham LBC was heavily criticised by affected parties for failure to engage with residents.

New Bermondsey, Millwall

Developer Renewal Group Ltd began acquiring interests in land surrounding Millwall Football Club's stadium back in 2004. It promoted the site Lewisham's development plan process leading to it being included as a strategic redevelopment site in the Council's Core Strategy.

In 2012, Renewal obtained planning permission for the creation of New Bermondsey. The scheme proposed 240,000m^2 of mixed use development including retail and café uses, a hotel, up to 2,400 residential units and a new state of the art leisure centre which would include four arenas including an indoor football pitch and swimming pool.

It subsequently sought the assistance of Lewisham BC to use its compulsory purchase powers to facilitate assembly of the remaining interests in the site.

Objections were made by Willow Winston, a 72-year-old local artist and resident of one of the 22 owner occupied flats due to be demolished as part of the scheme. Mrs Winston was offered £58,000 for her leasehold interest in her flat, significantly less (she claimed) than the cost of acquiring a similar property in the new scheme. Ms Winston, together with fellow opponents to the scheme, claimed that not only had the Council failed to provide them with adequate information on the proposals, but that it had failed to carry out the necessary exercise of balancing the public benefits of the scheme with the impacts upon those with private interests in the land.

Accusations of inaccurate funding claims and conflicts of interests within the Council later lead to the Leader of the Council withdrawing his support for the scheme.

Plans for the development of New Bermondsey are being reconsidered.

A particularly vocal objector, Ms Winston, a resident at the Excelsior Works in Rollins Street, wrote to the authority on the day of its decision to make the CPO complaining that she had received no contact from the authority or the developer before finding out that her property was to be included within the compulsory purchase order. She claimed that the supporting documentation indicated that the developer hadn't even been aware that there was anyone living at her address.

Such a story will always make for good copy. The 72-year-old's complaints were soon picked up by a reporter working for *The Guardian* newspaper. The cause of the CPO's downfall was unrelated to Mrs Winston's original complaints; the newspaper's further investigations revealed a misreporting of funding claims and conflicts of interests that ought properly to have come to light in any event. However, the story demonstrates both the importance of good and clear communications with affected parties and the crucial role that the press can play in the public's attitude towards a scheme. The very genuine concerns of affected parties caused by lack of timely and accurate information can quickly escalate into strong public distrust of and opposition to a scheme. Importantly, a story in which Mrs Winston had been promptly and properly informed of the proposals for her property would be unlikely to have caught the reporter's eye.

Similar complaints have been made in relation to the proposed Haringey Development Vehicle, with objectors suggesting a lack of compliance with both statutory and common law duties to consult affected parties of the proposal.[12]

Secure tenants have a statutory right to consultation before any decision is made as to the management or disposal or their property pursuant to the Housing Act 1985, but no such obligation applies to affected parties that fall outside of the scope of the Act.

However, despite the lack of obligation upon acquiring authorities to consult non-secure tenants as to the impacts on them of a compulsory purchase order affecting their property, there is a growing understanding among those promoting estate regeneration schemes that early and proper engagement can have a significant impact on the future outcome of any required planning application and compulsory purchase order. The Reigate and Banstead case below provides one such example.

In deciding whether to support estate regeneration residents will rightly consider how it may benefit them and balance this against their current circumstances. Agreement on decant and re-housing strategies is easier to reach if residents have been meaningfully engaged with on what they want from the regeneration. Each scheme is different and will require a bespoke approach to engagement, but a major step will be ensuring that those most affected have an understanding of why the regeneration is proposed, why the building cannot instead by renovated and what the wider benefits of the scheme will be. This information should be coupled with genuine attempts on behalf of the authority and developer to understand where impacts and disruption will be felt the most and what can and can't be done to mitigate the challenges and difficulties that will be faced by individuals throughout the process.

Reigate and Banstead BC: Regeneration of the Merstham Estate
Land subject to the CPO comprised a four-storey block incorporating a parade of 24 retail units at ground floor level with 42 residential flats above being a mixture of housing association flats and privately owned long leaseholds.
The developer sought to acquire all interests by agreement but a number of interests remained outstanding and the Council proceeded to make the CPO.
The developer maintained regular contact with all affected parties, visiting each individually and explaining the scheme and the process and suggesting relocation options.
The CPO received no objections and the Council received the permission of the Secretary of State to confirm the order itself pursuant to the Acquisition of Land Act 1981 s.14A.

[12] *The Guardian* ran a live twitter feed from the Council Chamber during the Cabinet meeting to approve the formation of the HDV.

Best practice examples

Recent experience of working with developers post the decisions in *Horada* and *Aylesbury* indicates a palpable nervousness within local authorities. Following the well-trodden path of their previous approach to making CPOs no longer feels like a safe option. All are concerned that any resident engagement is already too little too late, and any re-housing offer short of a like-for -like replacement risks criticism that they've arrogantly failed to consider the effects of their decisions on the most vulnerable within their community.

However, there are some excellent estate regeneration schemes both ongoing and in the pipeline that are striving to demonstrate best practice in the area.

Some of London's first housing estates were built by philanthropists and charities in the late 19th century before being taken over by the local authority. Through the stock transfer process in the latter half of the 20th century, housing associations took over the ownership and management of significant numbers of local council-owned estates. Housing associations have therefore become key players in estate regeneration and are making a significant contribution to improving existing estates, while also building more new homes.

An example is Circle Housing's Merton Priory's regeneration project in Merton LBC.

Circle Housing, Merton

Circle Housing and Merton LBC developed a pledge, published in September 2014, of 10 commitments to residents on three of their estates where regeneration is being considered:
To consult with residents, consider their interests at all times and address concerns fairly.

Current homeowners will be entitled to at least the market value of their home should they wish to take the option to sell their home to Circle Housing Merton Priory.
Current tenants will be entitled to be rehoused in a new home of appropriate size considering the number of people in the household.
Existing tenants will keep all their rights and have the same tenancy agreement, including rent levels, in the new neighbourhood as they do now.
All new properties will be more energy efficient and easier to heat than existing properties, helping to keep down residents' fuel bills.

To keep disruption to a minimum, and to do all it can to ensure residents only move once if it is necessary to house them temporarily while their new home is being built.
To offer extra help and support for older people and/or disabled residents throughout the regeneration works.
To continue to maintain the homes of residents across the three neighbourhoods throughout the planning process until regeneration starts, including ensuring a high quality responsive repairs service.

Any growth in the number of homes will be in accordance with the Council's Development Plan so that it is considered, responsible and suitable for the area.
As a not for profit organisation, Circle Housing Merton Priory will not profit from any regeneration and will use any surplus to provide more housing or improve existing neighbourhoods.

Circle Housing listened closely to the community when producing its offer to residents. Consequently, the offer prioritised giving all residents the opportunity to stay in their neighbourhood, helping to keep the community together. Offers have been tailored depending on whether the affected individual was a social tenant, a resident homeowner or an investment owner. Offers to pay disturbance payments, legal costs and removal fees were all clearly communicated.

For resident homeowners (both leaseholders and freeholders) the offer included a new replacement home at no additional cost if they chose to stay or open market value for their home plus 10% if they preferred to leave. A shared equity option was also available. The package included a free and independent valuation of their home together with legal fees, Stamp Duty Land Tax and help to achieve a temporary move if needed as a result of the decant process.

This example closely follows the recommendation set out by the Department for Communities and Local Government in its recently published "Estate Regeneration National Strategy". The Strategy aims to:

> "support local partners to improve and accelerate local estate regeneration to deliver more and better quality housing, drive local growth and improve opportunities for residents."

The Strategy includes a "Good Practice Guide" which encourages a number of key considerations for the early stages of a scheme and sets out a model process for successful regeneration. Importantly, this includes a guide to ensuring residential engagement and landowner commitment, assessing the housing needs of those affected and how best to accommodate these within the new development. It also has suggestions for offering community benefits during the construction period to further encourage local support for the scheme.

It is not yet clear whether the Strategy will be cited at future CPO inquiries or court hearings as a best practice guide that all authorities ought to follow. Certainly, as an authority or developer, being able to demonstrate consideration of and compliance (where relevant) with the advice in the Strategy can only be positive.

The future for compulsory purchase and estate regeneration?

The latest decision at *Aylesbury* marks a clear focus of the Secretary of State to ensure that regeneration projects are of benefit to existing as well as future residents. Much of the rationale for the decision was based on the financial offer made to existing residents and their ability to remain on the estate, or at least in the local area. This further underlines the importance of ensuring that residents are engaged in the regeneration process from an early stage to prevent suggestions that it has been imposed upon them as a fait accompli.

The quashing of the *Aylesbury* decision due to lack of reasons means that, for now at least, we do not know if the Court endorses Mr Javid's approach to the application of human rights and the Equality Duty, nor whether his consideration of the compensation package available to resident leaseholders was an approach that he could lawfully take as part of his decision on whether or not to confirm a CPO.

However, regardless of the final decision on that one particular case, acquiring authorities are already giving far more thought to how they ensure a proportionate interference with the human rights of those affected, the adequacy of their negotiations and compliance with their Equality Duty. It is already recognised that it is no longer sufficient to assume that schemes that can boast regeneration benefits will be automatically endorsed and their advantages assumed to outweigh the personal losses suffered. Pleas that the CPO is needed to secure the comprehensive regeneration of the area may no longer be sufficient.

This will be particularly pertinent for London schemes where house prices are an acute issue, but other major cities may also feel the sting. No authority wants to have the next *Horada* or *Aylesbury* on its hands through lack of forward thinking or a perceived disregard for proper process. Many are already reviewing their policies for negotiating and engaging with affected parties and seeking to demonstrate that there have been clear and genuine attempts to reach agreement with them. This can only be a positive thing for those whose homes and businesses fall within the boundary of a CPO, but it may well result in regeneration schemes that are dependent upon land assembly and CPO becoming more expensive and so less viable—especially within the context of the added risk of uncertainty of outcome and associated delay. This sits uncomfortably alongside the (forgotten?) manifesto promises of the Conservatives to make CPO easier and less expensive for councils to use.

Some suggestions

The following are suggestions for those currently engaged in an estate regeneration scheme that relies (or may rely) on compulsory purchase powers for its success:

Early engagement

Even where not required by statute or guidance, early engagement with affected residents and business owners should be considered. Clear explanations of proposals, coupled with honesty as to the limitations of what the regeneration can achieve (and why), will assist in developing a collaborative relationship with those most affected and, if done well, should minimise later resistance to the more challenging aspects of regeneration proposals.

Identify impacts

Work with affected parties to identify impacts and see what, if anything, can be done to minimise these. Early identification (ideally before the final details of the planning proposal have been fixed) will allow any mitigation to be built into the scheme and incorporated into the programme. If certain mitigation measures aren't possible, be prepared to discuss this with those affected and explain why.

Clarity on the re-homing offer

Include the option for residents to obtain a free valuation of their property. Ensure that recommendations for an appropriate valuer come from an independent source to generate trust.

A clear communications strategy

Consider how information is to be conveyed to affected parties and the press. Clear, easily accessible and consistent information can help to ease concerns and avoid the spread of incorrect information. Where numbers allow, look to visit those affected to discuss proposals on a one-to-one basis.

Good record management

Keep records of all engagement with affected parties. The results should be fully reported to members.

Robust decision making

Ensure that members have all relevant information in front of them before any final decision on whether or not to proceed with the CPO.

Ideally, where time permits, follow a two resolution process:

- a first "in principle" resolution to support those seeking to negotiate for the private acquisition of land interests; and
- a second, final, resolution once it is clear that negotiations to acquire by agreement have been exhausted and all impacts have been assessed and considered.