



Stan Edwards now looks beyond the requirements for a decision to promote a CPO and how these factors are taken forward in the Approval in Principle to eventually authorise Making and Sealing the CPO . . . but there are still concerns

Wolves has started the hares running 'pour encourager les autres'

The two previous articles emanated from the Wolverhampton CPO, revolving around whether a CPO enlarged site (Raglan Street) for a superstore led, mixed use development could be promoted to cross-subsidise an unconnected (except financially) unviable (Royal Hospital) site some distance away. However, Raglan Street was an orphan site with no connection to other Wolverhampton schemes. Strangely, in 2006, the Wolverhampton Retail Core Expansion CPO¹ was being promoted, which could perhaps have provided the Royal Hospital site with greater connectivity, but that arrangement was not pursued. Such is the strange world of CPOs when commercial pressures in partnering arrangements drum out the straightforward delivery of a plan led system. The question as to whom Wolverhampton partnered was not an issue as far as the validity of the CPO was concerned.² It will be recalled that in this case Sainsbury's, with 86% of the Raglan Street site, was the challenger, eventually winning the decision in the Supreme Court on a point of law relating to **the strict interpretation of statute** and clear direction on status of the CPO project and parameters of the relationship that could exist with proximity and connectivity elements with other sites.

The circumstances relating to developers competing for CPO support of acquiring authorities are by no means isolated occurrences, with *Arrowcroft/Croydon Borough Council* being just one case in point, but this justifies an article in its own right.

The Wolves case dealt with the statutory power on which the case was brought, but there were uncomfortable elements of the case that never evolved into a challenge. In my December *Valuer* article it was seen that the compelling case on the public interest should be a logical progression from the public interest in the case itself, and there should be some recognised way of demonstrating an assessment. Although their Lordships' decision was 4:3, hopefully the argument provided will go some way to establish principles to be incorporated in further guidance. This would be incorporated in a revised version of Circular 06/04, but would the new version be attributed the authority that the work on the contents deserve?

Circular 06/04

The Wolves decision was based on the interpretation of a specific point of law but on just a cursory view of the case it seems obvious

that there was a disregard for a number of the terms of Circular 06/04. The Circular is the only rules of CPO guidance we have, and has been thoughtfully compiled with the aim to help acquiring authorities to use their compulsory purchase powers to best effect, and by advising on the application of the correct procedures and statutory or administrative requirements. This is to ensure that orders progress quickly and are **without defects**. It states this, and that it is not intended to be comprehensive. This creates necessary latitude but also an opportunity for abuse. A partner in a leading law firm took great delight in quoting the Circular that it has no statutory status, and is for guidance only. Such cynical dismissal is unhelpful to say the least.

The Circular is due for update but, on the whole, the current version is very useful. In order that promoting authorities are able to put their own schemes together, the Circular must be held in high regard to provide confidence in the process. Only those with a vested interest of pursuing their own interpretations would consider otherwise. Much of what was contained in the previous articles was an attempt to amplify the elements in Circular 06/04 to make it even easier for the authorities to deliver their own schemes in-house.

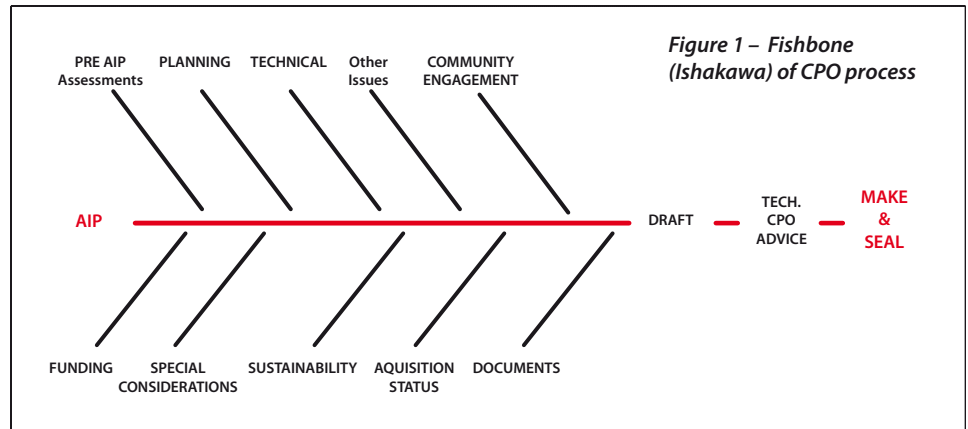
The approval process

The Wolves CPO was generated in accord with the terms of an agreement between Wolverhampton CC and Tesco. This culminated in an Approval in Principle (AIP) in January 2008, followed by a resolution to Make and Seal a CPO on the 19th February 2008. The intervening time between the AIP and the authorisation is in no way considered as an appropriate standard. Undue haste can become a problem in human rights terms, particularly if no engagement with the community in respect of the CPO has been demonstrated. Actually, community engagement is little understood in the CPO process. **Certainly at the policy stage there can be a high degree of flexible participation.** At the CPO delivery stage there is little room to manoeuvre, because the project by then has by necessity taken on a high degree of inflexibility to provide certainty. The following diagram taken from Arnstein's ladder³ helps to describe the situation. For the system to work there needs to be documented community participation through the process. Raglan Street, being an orphan site could not demonstrate that audit trail.





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STAGE LEVEL OF COMMUNITY INPUT

| STAGE | LEVEL OF COMMUNITY INPUT |
|-----------|--------------------------|
| | High Level |
| POLICY | Empowerment |
| PROGRAMME | Collaboration |
| PROJECT | Engagement |
| DELIVERY | Involvement |
| CPO | Consultation |
| | Inform |
| | Low level |

- Build in community engagement
 - Obtain Authorisation to Make and Seal the CPO (conditions fulfilled)
- B – Then**
- Notices and submission
 - Objections
 - Public inquiry
 - Inspector’s report
 - Confirmation (or not) by the appropriate Minister
 - Challenge period
 - Possession (general vesting declaration / Notice to treat).

There are statutory timings for B (relating to the T&CP Act) but not for A. In an attempt to demonstrate these elements, an adaptation of a ‘fishbone’ diagram (Figure 1) may assist.

Commencement

The last issue focused on:

- Justifying the project
- Justifying the CPO
- Assessing the specific power and its requirements.

These form the *raison d’être* of a necessary initial report to the Cabinet or Committee of the acquiring authority for formal AIP to promote a CPO. Actually **the AIP is the most important ‘event threshold’ in the whole process**. It brings together all the factors and facts already considered, and the pre-conditions required to obtain authority to make and seal the CPO. In process terms, other elements will have taken place, such as negotiations with vendors (potential claimants) and documented community/stakeholder engagement, plus required funding and relationships with partners.

There are a number of documents to be included with the Order⁴. Obviously the Order itself and the plans and interest schedule, but critically, the Statement of Reasons which will form the basis of a Statement of Case in an Inquiry. It does not require an expert in logic to realise that the AIP should encompass and demonstrate all the components that would be required to eventually Make and Seal the Order. As Lord Nicholls stated, “normally the scope of the intended works and their purpose will appear from the formal resolutions or documents of the acquiring authority”⁵. The best advice for any authority is to work backwards

The rest of the article therefore takes the form of a check list to be read in conjunction with the previous one, that provided much of the approach necessary to provide a robust argument for a CPO.

Seeking a safe standard

In order to provide a useable sequence for a CPO (focusing on T&CP Act powers as an example) we have to move away from the special and perhaps questionable circumstances of the Wolverhampton case, to ask what is a safer standard process, and how it accommodates the CPO context and content? As stated above, the government provides this guidance in Circular 06/04.

A standard sequence can be considered as:

A – Commencement – Pre CPO case and justifications

- Justifying the project (case) – in the public interest
- Stakeholder consultations
- Making a ‘compelling case in the public interest’ – justifying a CPO
- Authority decides to promote a CPO and obtains a resolution for Approval in Principle (AIP)
- Set and fulfil requirements (set out in the AIP) as preconditions to Make and Seal a CPO

to ensure that all the heads from the Statement of Reasons (SoR) are identified in the AIP. **The core guidance for a Statement of Reasons is found in paragraphs 35 and 36** of the Circular 06/04 plus Appendix R which includes a basic list of requirements (Roman numerals (I) to (XIII)), adapted and supplemented as necessary according to the circumstances of the particular Order. It will be recalled that Appendix A provides the guidance for the use of the T&CP Act power.

The Approval in Principle

For the purposes of deriving good practice, we can look at the justification and assessment components described in the previous article as applied to the core SoR list, so:

Pre AIP context and content

1. Justifying the project
 - a) A brief **description** (App. R (I)) of the Order land and its location
 - b) An outline of the **authority's purpose** (App. R (III)) in seeking to acquire the land
 - c) A description of the **proposals for the use** (App. R (V)) or development of the land
 - d) A statement about the **planning position** (App. R (VI)) of the Order site
 - e) **Information** required in the **light of Government policy statements** (App. R (VII)) where orders are made in certain circumstances (e.g. Housing Acts)
 - f) Any **special considerations** (App. R (VIII)) e.g. Ancient Monument, Listed Building, Conservation Area, Special Category Land, Consecrated Land Renewal Area, etc
 - g) Actions already undertaken under Statutory Powers
2. Justifying the CPO
 - a) A statement of the authority's **case for compulsory purchase**⁶ (App. R (IV))
 - (i) The core analysis of a compelling case in the public interest
 - (ii) The assessment of the justification of the use of compulsory powers
 - b) Details of how the acquiring authority seeks to **overcome any obstacle** (App. R (IX)) or prior consent before the order scheme can be implemented
 - c) Details of any **views** expressed by a **government**

- d) Any other **information** which would be of **interest to persons affected** (App. R (XI)) by the order
 - e) Details of contact with the potential claimants
3. Assessing the specific power and its requirements
 - a) A **justification** (App. R (II)) of the use of the enabling power
 - b) **Related applications, appeals, Orders**, etc. (App. R (XII)).

Approval in Principle – additional documents to accompany the Order (not exhaustive)

Eventually all relevant documentation will need to be identified:

1. The draft plan to include all the land edged red, which will outline all the necessary interests as wide as possible at this stage, but limiting the acquisition to the minimum amount necessary to deliver the scheme. This will form the basis of the final Order plan
2. Details of alternatives to the scheme
3. Draft agreements with stakeholders
4. Draft funding arrangements
5. Draft or final agreements with partners
6. Planning position
7. A travelling Statement of Community Engagement
8. Local/national government policy statements.

Conditions related to the request for Approval in Principle (not exhaustive)

The AIP report provides a set of conditions precedent before the Order can be 'reported' prior to making and sealing:

1. Completion of any agreements with stakeholders
2. Rehearsal of the purpose and terms in the AIP
3. Acquisition status
 - a. Contacts with owners
 - b. Other Interests
 - c. Crown.
4. Community engagement – exhibition with feedback provisions prior to finalising SoR and that an audit trail of early and effective community involvement can be demonstrated
5. Planning
 - a. Statement of Sustainability/well being factors
 - b. That a planning application has been made for the

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scheme (if not previously done so) providing the mechanism for a joint Inquiry.

6. Technical update since AIP if this is a fundamental element of the scheme
7. Legal – such as all notices will be placed on subject lands in accordance with statutory guidance
8. Final confirmation compelling case in the public interest. If assessment of the justification and compelling case in the public interest for the promotion of the CPO had not been adequately assessed before the request for an AIP, they should be a condition to be fulfilled and submitted as part of the request for authorisation to make and seal
9. Confirmation that the requirements of all other ancillary Orders will be applied for
10. Confirmation that additional rights including those of the Crown have been accommodated
11. Confirmation that funding is forthcoming conditional upon the Confirmation of the Order in line with the terms of a partnership agreement, and that the authority is able to demonstrate that there is a reasonable prospect that the scheme will proceed in that funding, resources and organisational facilities will be available
12. A referencing exercise has been undertaken to accurately ascertain wherever possible all affected parties including those with interests outside the CPO boundary that may be affected by the Order which will then form part of the documentation
13. **Preparation of the documentation** – Order, Statement of Reasons, CPO Plan, Schedule of Interests in line with the conditions contained in the AIP (App. R (XIII))
14. Technical approval of the Draft CPO by Government Department GOL/DSC
15. A Report to the acquiring authority for approval to make and seal a CPO on being satisfied that the conditions precedent have been fulfilled.

to take a balanced view between the intentions of the acquiring authority, and the concerns of those whose interest in land it is proposed to acquire compulsorily. The more comprehensive the justification which the acquiring authority can present, **the stronger its case is likely to be.**

This article is intended to provide a useful standard CPO spine of activities to produce a robust attempt at a regeneration CPO, deliberately setting out to comply with as many of the rules and regulations as possible. It would be a useful exercise to study the Wolverhampton case to see why they could move so quickly from the AIP to the resolution to make and seal the CPO, and what was missing. In fact whenever I am promoting or challenging a CPO, it is many times more important to look for what is missing than what is stated. Additionally, what was the level of assessment for the CPO based on the principles outlined above? What was the Wolves spine? The reader may find it useful to review the principles outlined in this trilogy of articles, and judge accordingly – more importantly, apply any principle of good practice to the reader's own projects.

Last, take a thought for Circular 06/04, for without it where would we have our processing ability? When the replacement Circular is being considered, we must take heed that it is not there just to promote CPOs, but to provide guidance for those affected by it. ■

Footnotes:

- 1 The Wolverhampton City Council (Retail Core Expansion) Compulsory Purchase Order 2006.
- 2 Standard Commercial Property Securities Ltd v Glasgow City Council (No 2) [2006] UKHL 50.
- 3 Based upon Arnstein, Sherry R. "A Ladder of Citizen Participation," JAIP, Vol. 35, No. 4, July 1969, pp. 216-224.
- 4 ODPM Circular 06/04 Appendix Q.
- 5 Waters v Welsh Development Agency, [2004] 2 EGLR 103, Lord Nichols 63 (5).
- 6 ODPM Circular 06/04 Para 17,18,19.

Report for approval to make and seal a CPO

It is a similar practice to teaching. Tell them what you are going to do, do it, and then tell them what you have done. **The final report to Cabinet draws all the argument and detail together**, providing in the made and sealed CPO a robust case for the use of powers. As the Circular clearly states, the confirming Minister has to be able

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