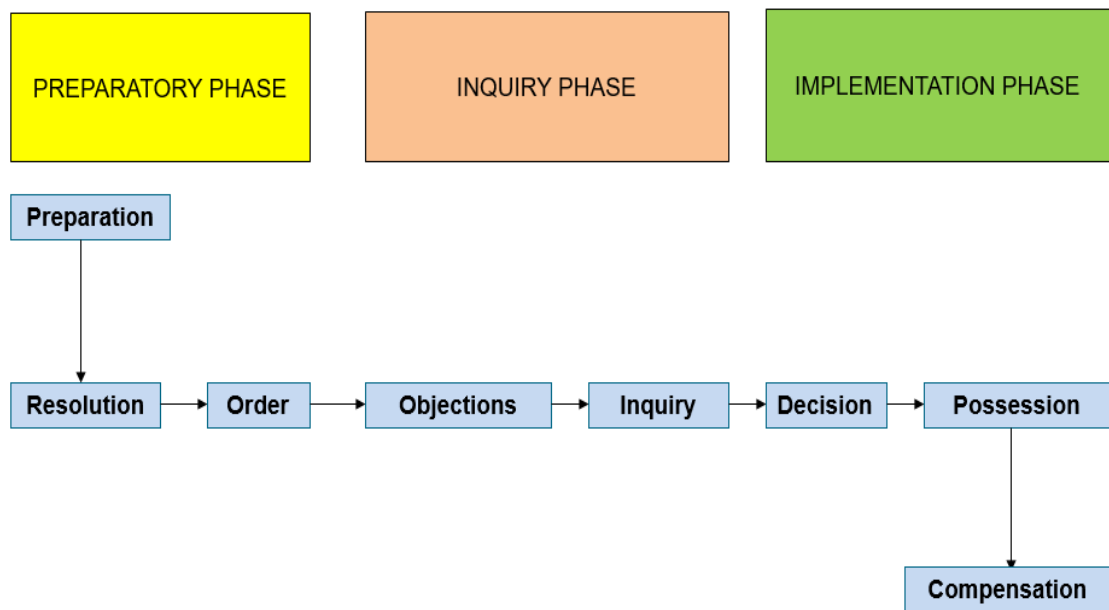


1 Introduction

1.1 The note provides a broad overview of the process and law on the use of compulsory purchase powers by Northampton Borough Council (**NBC**) in the context of supporting the regeneration of the estates of St Mary's Court and Berkeley House (known as the **Roof Gardens**).

2 Outline of Compulsory Purchase Order (CPO) procedures

2.1 The process is summarised by the following diagram.



2.2 The preparatory stage to a CPO involves reviewing relevant planning policies, considering the available legal powers for the proposal, working up a scheme and determining how it will be delivered, and negotiating with land owners for the voluntary acquisition of third party interests.

2.3 After the preparatory stage is concluded and a final decision is made by the Cabinet to make a CPO, the order can be made. A CPO is a formal document which lists all the plots of land proposed to be acquired and the names of all persons having interests in those plots (so far as can be ascertained) together with a map (or maps) which shows all the plots of land. Interests to be acquired and contained in the schedule of interests include land interests as well as third party rights over land such as rights of light and rights of way. The CPO would be “made” by the sealing of the CPO following a resolution the Cabinet authorising the making of the CPO.

2.4 Notice of the making of the CPO would then have to be served on all those having interests in the land and published in newspapers. The notice would make clear that anyone wishing to object may do so within a specified time limit (minimum 21 days).

- 2.5 If any objections are made and not withdrawn, a public inquiry would usually be held (even if there is only a single objection). The inquiry would be held by a planning inspector. The acquiring authority and objectors would present evidence to the inquiry in support of their respective positions and this would be subject to cross examination from the opposing side, and questions of clarification from the Inspector. Following the public inquiry, the inspector would write a report to the Secretary of State.
- 2.6 The decision whether or not to confirm the CPO would rest with the Secretary of State¹. Following the Secretary of State's decision there is a six week period within which the decision could be legally challenged. The Secretary of State has power to confirm the CPO with modifications. Where the Secretary of State is satisfied about the general need for the scheme but is persuaded by an objector that the scheme can be achieved without the need to acquire that objector's land, he has power to modify the CPO to exclude that land from the CPO. The Secretary of State does not have power to modify the CPO to include additional land not included in the CPO as made by NBC, so it is important to ensure, when the CPO is made, that it includes all the land and rights required.
- 2.7 An objector whose objection to the CPO is successful will normally be awarded his/her costs.
- 2.8 Once the CPO has been confirmed (and free from legal challenge), NBC would have power to acquire the land included in the CPO. In order to exercise that power, it would be able to choose between two possible procedures:
- 2.8.1 service of a "notice to treat" on each person having an interest in the land, together with a notice of entry, followed by taking actual possession. NBC would then be authorised to take possession of the land but title would not be transferred to NBC until after compensation has been agreed or determined;
- 2.8.2 making a "general vesting declaration" (in respect of all or some of the land included in the CPO) which would deem notice to treat to have been served and would vest in NBC all the interests included in the declaration.
- 2.9 The choice of procedure would depend upon the circumstances, but general vesting declarations are far more common for this type of scheme as they facilitate early possession allowing schemes to progress whilst compensation disputes are still settled.
- 2.10 A more detailed outline of the CPO process and well as indicative timeframes is included as an Annex to this note.

3 Overview of the law and criteria for confirmation

- 3.1 Since the NBC's power to acquire land compulsorily depends upon securing confirmation of the CPO by the Secretary of State, it is essential to have regard from the outset to the criteria and other considerations which the Secretary of State will take into account when deciding whether or not to confirm the CPO. Guidance about this is provided in a document published by the Ministry of Housing Communities and Local Government² (the **Guidance**). The main elements of the Guidance are set out under the following heads:

¹ Under the recently enacted Housing and Planning Act 2016, the Secretary of State will have power to allow an Inspector to confirm a CPO, but it is not known to what extent this power will be exercised.

² "Guidance on Compulsory Purchase and the Cribchel Downs Rules for the disposal of land acquired by, or under the threat of, compulsion" published in October 2015 (and updated July 2019) by the Ministry for Housing Communities and Local Government.

- 3.1.1 **Statutory powers:** NBC has power to acquire land for a variety of purposes including planning, housing and highways. Paragraphs 10-11 of the Guidance advise:

“The purpose for which an acquiring authority seeks to acquire land will determine the statutory power under which compulsory purchase is sought....Acquiring authorities should look to use the most specific power available for the purpose in mind, and only use a general power when a specific power is not available”.

- 3.1.2 A CPO in connection with St Mary's and Berkeley would be made under planning powers, that is, under section 226 of the Town and Country Planning Act 1990 (**TCPA**). Specific advice about the use of section 226 is set out in paragraphs 94-106 of the Guidance.

- 3.1.3 NBC is empowered under section 226(1)(a) TCPA, to acquire any land in its area if it is satisfied that the proposed acquisition will facilitate the carrying out of development, redevelopment or improvement on or in relation to the land. NBC may make a compulsory acquisition under section 226 TCPA (a) if it thinks the acquisition will facilitate the carrying out of development or redevelopment or improvement on or in relation to the land or (b) which is required for a purpose which it is necessary to achieve in the interests of the proper planning of an area in which the land is situated. In order to make an acquisition under (a), NBC must also consider that the development, redevelopment or improvement will contribute to the promotion or improvement of the economic social or environmental well-being of its area.

- 3.1.4 In the context of that overarching consideration paragraph 106 of the Guidance states that there are four specific factors of particular relevance to CPOs under section 226 of the TCPA which will be taken into account by the Secretary of State when deciding if a CPO should be confirmed. These are summarised as follows:

- (a) whether the purpose for which the land is being acquired fits with the adopted planning framework for the area;
- (b) the extent to which the Scheme would contribute to the achievement of the promotion and/or improvement of the economic, and/or social, and/or environmental well-being of NBC's area;
- (c) whether the purposes for which the proposed land is to be acquired could reasonably be achieved by any other means. This may include considering the appropriateness of any alternative proposals put forward by the owners of the land, or any other persons, for its reuse. It may also involve examining the suitability of any alternative locations for the purpose for which the land is being acquired;

- 3.1.5 Section 226(4) TCPA confirms that the works of development do not need to be undertaken by NBC and can be procured through a third party developer, as is envisaged at St Mary's and Berkeley by NPH.

- 3.1.6 **Justification:** NBC must be able to demonstrate a “*compelling case in the public interest*”: paragraph 12 of the Guidance. The Secretary of State will balance the justification for the CPO against the effect upon those whose interests in the land are proposed to be acquired. Putting it another way, NBC would have to be able to show that the need for the land to be put to a purpose in the public interest outweighs the impact on those affected. It is often convenient to consider the question of “need” at two different levels. First, it will be necessary to demonstrate the need for the scheme in principle and in general. Second, it will be necessary demonstrate the need to acquire each and every parcel of land included in the CPO in order to achieve that need.
- 3.1.7 Part of the justification for obtaining confirmation of a CPO would involve demonstrating that compulsory powers are necessary because the land required cannot be acquired voluntarily. Compulsory purchase is seen as a last resort and an authority must be able to show that it has made genuine attempts to acquire the land by negotiation.
- 3.1.8 A CPO will affect third party rights, so NBC will need to take care that it does not contravene the rights of individuals under the European Convention on Human Rights (the **ECHR**) or breach the public sector equality duty under section 149 of the Equality Act 2010. Section 6 of the Human Rights Act 1998 makes it unlawful for NBC to act in any way which is incompatible with a right under the ECHR. Pursuant to Article 1 of the First Protocol to the ECHR, every person is entitled to the peaceful enjoyment of his or her possessions and no one shall be deprived of those possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The public sector equality duty requires NBC to have due regard to: (i) the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010; and (ii) the need to advance equality of opportunity between persons who share a protected characteristic and persons who do not share it.
- 3.1.9 **Resource implications and financial viability of the Scheme:** NBC would have to demonstrate that it has, or at least will obtain, the resources necessary not only to pay compensation for the land but also to implement the scheme: paragraph 14 of the Guidance. The reason for this requirement is to avoid a situation in which private land has been acquired compulsorily for a purpose which, in the event, cannot be achieved for lack of funds.
- 3.1.10 A general indication of funding intentions, and of any commitment from third parties, will usually suffice to reassure the Secretary of State that there is a reasonable prospect that the scheme will proceed. The greater the uncertainty about the financial viability of the scheme, however, the more compelling the other grounds for undertaking the compulsory purchase will need to be. The timing of any available funding may also be important. For example, a strict time limit on the availability of the necessary funding may be an argument put forward by the acquiring authority to justify proceeding with the order before finalising the details of the replacement scheme and/or the statutory planning position.

3.1.11 **Impediments:** NBC would also need to be able to demonstrate that the scheme for which the CPO has been made will not be prevented from proceeding due to some legal or other impediment, for example, the need for planning permission or some other consent. The reason for this requirement is, again, to avoid a situation in which private land has been acquired compulsorily for a purpose which, in the event, cannot be achieved because of some impediment such as planning permission being refused. While it is preferable if all necessary permissions and consents have been obtained by the time when the CPO is made, this is not essential so long as they have been obtained before the Secretary of State has to consider whether to confirm the CPO. However, if they are not in place by the time of the inquiry, this is likely to widen the debate at the inquiry and possibly cast doubt upon whether they will be granted to enable the purpose of the CPO to be achieved.

3.2 When an acquiring authority serves notice of making a CPO, it is required to serve a "Statement of Reasons" for making the CPO. In practice, such a statement is normally drafted before the CPO is made.

4 **Application of CPO to St Mary's and Berkeley**

4.1 In making a decision to use CPO powers NBC will need to consider the legislation and Guidance discussed above. Broadly speaking estate regeneration programmes have the potential to provide significant public benefits: regeneration; additional housing/affordable housing; employment creation; public spaces; use of brownfield land etc. Specifically St Mary's and Berkeley is clearly a project that can make significant improvements given the current position of poor quality housing stock and deprivation within the area. Therefore, in principle, a regeneration scheme for the Roof Gardens can meet the legal requirements of the TCPA and could demonstrate the general need to justify use of CPO powers.

4.2 In applying that to a CPO for the remaining interests necessary to implement the Roof Gardens the following will be relevant:

4.2.1 **Establish the Powers** – this will likely be section 226(1)(a) of the TCPA.

4.2.2 **Clearly Define the Scheme** – the 'Scheme' for which CPO powers are being sought should be clearly defined and identifiable in Council policy. The Roof Gardens scheme is defined by the planning permission already obtained.

4.2.3 **Consistency with NBC Planning Policy** – we have reviewed the existing planning policy framework (Central Area Action Plan (January 2013), the Spring Borough's Neighbourhood Plan (April 2016) and the West Northamptonshire Joint Core Strategy Local Plan (Part 1) (December 2014) and the with the strategic aims of the National Planning Policy Framework) and consider it provides a solid basis for supporting regeneration of St Mary and Berkeley i.e the Roof Gardens. This is confirmed by the grant of planning permission for the Roof Gardens by NBC.

4.2.4 **Planning Permission** – whilst it is not a legal requirement, it is best practice to secure planning permission before making the CPO. Planning permission was granted for the roof Gardens on 6 August 2019 (ref: N/2019/0456).

4.2.5 **Establish the CPO Case** – NBC will need to be able to demonstrate that there is a scheme which is in the public interest with a reasonable prospect of delivery. This entails defining the Scheme, establishing that it accords with the local and national planning policy framework, that it is fundable and deliverable. NBC should also be able to show that it promotes economic, social or environmental well-being of the areas and that there are no alternatives that could deliver the objectives of the scheme. NBC also need to show that it will be delivered in a way that is fair and proportionate and minimises the impact on the parties who are subject to the CPO. These matters are addressed with the Cabinet report but of relevance are: the benefits of additional housing and affordable housing; the regeneration of a major town centre location which suffers from deprivation; that the alternative of refurbishment would not address the issues with the existing housing stock; a clear development programme and financial appraisal is in place; and a comprehensive programme of resident engagement and communication has been undertaken.

4.2.6 **Acquisition Strategy and Private Treaty Negotiations** – there is a requirement to negotiate with all parties whose interests are to be acquired to try to agree terms for an acquisition prior to embarking on the CPO process. Negotiations should have commenced before the CPO has been made and should continue in parallel throughout the formal process, up to and beyond the CPO inquiry. For estate regeneration a robust consultation and community engagement programme should be in place. NPH have made a Resident offer to tenants and leaseholder in line with that set out in NBC's Housing Regeneration Policy. In addition NPH have engaged in regular open dialogue with residents and the success of this is demonstrated by the fact that the majority of tenants have moved out and 75% of the leaseholders have either sold their properties back to NBC, or have sales pending.

4.2.7 **Equalities and Human Rights** In order to avoid contravening individual human rights by making a CPO, it must be demonstrated that the CPO is in the public interest and that it is necessary and proportionate to make the CPO. Provided the requirements of section 226 (1) and (1A) of the TCPA have been fulfilled (i.e. the development, redevelopment or improvement will contribute to the promotion or improvement of the economic social or environmental well-being of the local authority's area), this will provide a very substantial basis upon which to make the case that the scheme is policy based and is consistent with statutory objectives. However any specific concerns should be given specific consideration. A Community Impact Assessment has been undertaken and NBC should have due regard to this in making a decision to proceed with a CPO to comply with the public sector equality duty.

4.3 Subject to NBC's consideration of the Roof Gardens scheme in light of the above, we consider there are appropriate grounds to consider use of CPO powers.

Trowers & Hamlins LLP

September 2019