This short briefing outlines the compulsory purchase powers available to local authorities under planning legislation, considers human rights issues associated with the exercise of such powers and briefly describes the operation of the compulsory purchase system as it applies to planning issues.
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INTRODUCTION

There has been considerable interest in local authority compulsory purchase powers following the announcement that the development of the Menie Estate by Trump International Golf Links (Scotland) may involve the exercise of such powers. This briefing looks at what compulsory purchase powers are granted to local authorities by the Town and Country Planning (Scotland) Act 1997 (“the 1997 Act”). It also briefly looks at how human rights legislation influences the exercise of these powers and very briefly summarises the operation of the compulsory purchase system as it applies to planning issues.

It is worth noting that the 1997 Act is only one of many Acts which grant compulsory purchase powers to a number of statutory bodies. For example the Roads (Scotland) Act 1984 [c54] grants roads authorities the power to compulsorily acquire land for the construction of roads and certain associated facilities. The compulsory purchase system described below relates to the 1997 Act only.

It is important to note that this briefing is not a definitive statement of the law. Rather it is intended as a brief introduction to this subject area.

PLANNING LEGISLATION AND COMPULSORY PURCHASE

Section 188 of the 1997 Act gives local authorities the power to acquire land needed for a legitimate planning purpose by agreement. However, where land cannot be purchased by agreement, Section 189 of the 1997 Allows for land to be compulsorily purchased as described below:

(1) A local authority shall, on being authorised to do so by Scottish Ministers, have power to acquire compulsorily any land in their area which—

(a) is suitable for and is required in order to secure the carrying out of development, redevelopment or improvement;
(b) 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.

Purpose (a) above allows a local authority to exercise compulsory purchase powers to assemble a site required for development which is currently owned by many different people or organisations. These powers were used to acquire slum properties from numerous owners in the 1950’s and 1960’s as part of the comprehensive redevelopment of urban centres across Scotland. Purpose (b) allows the local authority to also acquire land that is not directly required for a major development but is required for a planning purpose.

In deciding whether land is suitable and required for development, and therefore compulsory purchase, a local authority and Scottish Ministers must consider the following, as set out in Part 2 of Section 189 of the 1997 Act:

(2) A local authority and the Scottish Ministers in considering for the purposes of subsection (1)(a) whether land is suitable for development, redevelopment or improvement shall have regard to—

(a) the provisions of the development plan, so far as material,
(b) whether planning permission for any development on the land is in force, and
(c) any other considerations which would be material for the purpose of determining an application for planning permission for development on the land.
Local authorities’ compulsory purchase powers also extend to acquiring land adjacent to a development site which is to be compulsorily purchased as set out in Part 3 of Section 189 of the 1997 Act.

(3) Where a local authority exercise their powers under subsection (1) in relation to any land, they shall, on being authorised to do so by Scottish Ministers, have power to acquire compulsorily—
   (a) any land adjoining that land which is required for the purposes of executing works for facilitating its development or use, or
   (b) where the land forms part of a common or open space, any land which is required for the purpose of being given in exchange for the land which is being acquired.

The power to acquire adjacent land is only exercisable where the land is required for the purpose of executing works for facilitating the development or use of the main area, e.g. the provision of access roads.

The land being compulsorily purchased does not have to be developed by the local authority. Part 4 of Section 189 of the 1997 Act states:

(4) It is immaterial by whom the local authority propose any activity or purpose mentioned in subsection (1) or (3)(a) is to be undertaken or achieved and in particular the local authority need not propose to undertake that activity or achieve that purpose themselves.

Section 191 of the 1997 Act allows a local authority to dispose of land acquired for a planning purpose to:

such person, in such manner and subject to such conditions as may appear to them to be expedient for the purposes mentioned in subsection (2).

(2) Those purposes are to secure—
   (a) the best use of that or other land and any buildings or works which have been, or are to be, erected, constructed or carried out on it, whether by themselves or by any other person, or
   (b) the erection, construction or carrying out on it of any buildings or works appearing to them to be needed for the proper planning of their area.

(3) Subject to the provisions of subsection (7), any land disposed of under this section shall not be disposed of otherwise than at the best price or on the best terms that can reasonably be obtained

In practice, where land is being compulsorily purchased to facilitate development by a body other than the local authority, the local authority will compulsorily purchase that land and then sell it to the developer. The price and other conditions for such a sale will be decided by negotiation and set out in a formal agreement, sometimes known as a back-to-back agreement, prior to the exercise of compulsory purchase powers by the local authority.

HUMAN RIGHTS

Section 6 of the Human Rights Act 1998 makes it unlawful for any public authority to act, or fail to act, in a way that is incompatible with the rights established by the European Convention of Human Rights. With regards the exercise of compulsory purchase powers the main rights that could be affected are set out in Article 6 (Right to a fair trial or hearing), Article 8 (Right to
respect for private and family life) and the First Protocol Article1 (Right to peaceful enjoyment of one’s possessions). These are considered in more details below:

**Article 6:** Article 6 provides for a fair hearing before an independent and impartial tribunal. The exercise of compulsory purchase powers by local authorities must be authorised by Scottish Ministers. If Scottish Ministers have called-in a planning application for their decision or are involved in the development in some other way then it could be argued that they are neither impartial nor independent. However, the Court of Session (County Properties Ltd vs. Scottish Ministers 2001 SLT1125) has ruled that the availability of an appeal against Ministers’ decision is sufficient to comply with Article 6.

**Article 8:** Article 8 grants everyone the right to respect for their private and family life, home and correspondence. Any compulsory purchase which would interfere with these rights would have to be justified within the terms of Article 8 (2) which states:

> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

No Scottish court, or the European Court, has so far found the exercise of compulsory purchase powers under the 1997 Act to be in breach of Article 8 of the ECHR.

**First Protocol, Article 1:** Article 1 of the First Protocol to the ECHR expands on the rights relating to private possessions granted by Article 6, stating:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Any compulsory purchase which interferes with these rights would have to be justified by the acquiring authority as meeting the requirements of that Article.

Section 2 of the Human Rights Act 1998 requires courts which are determining questions involving Convention rights issues to take account of Strasbourg jurisprudence, i.e. consider the matter in a similar way to that normally exercised by the European Court of Human Rights. This would normally involve considering three key issues:

- **The action has a basis in law:** The infringement of a Convention right by a public authority must have a clearly defined legal basis.

- **The action must be in pursuance of a legitimate aim:** A public authority wishing to interfere with a Convention right must be pursuing a legitimate aim. These aims are set out in each of the relevant Articles, e.g. the legitimate aims applicable to Article 8 are set out above.

- **Proportionality:** Finally, a public authority wishing to interfere in a Convention right must be able to prove that the action is necessary in a democratic society. The approach of the
European Court is to assess whether the interference is proportionate to the legitimate aim pursued.

COMPULSORY PURCHASE SYSTEM

COMPULSORY PURCHASE ORDER PROCEDURE

The procedure for the exercise of compulsory purchase powers by local authorities under the provisions of the 1997 Act are set out in the Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947. The key stages in the compulsory purchase procedures set out in this Act are briefly outlined below:

• Acquiring authority resolves to exercise compulsory purchase powers

• Acquiring authority prepares schedule of land owners, lessees and occupiers of the land to be acquired

• Acquiring authority drafts a Compulsory Purchase Order (CPO) in the manner prescribed by the Compulsory Purchase of Land (Scotland) Regulations 2003 along with a statement of reasons for the making of a CPO.

• Acquiring authority advertises its intention to make a CPO for two successive weeks in a newspaper circulating in the area of the relevant land, giving notice of the 21 day period for objections to be submitted. Objections are submitted directly to the Scottish Government.

• Acquiring authority serves notices on the owners, lessees and occupiers of the land to be purchased, indicating the period of objection which must be no less than 21 days from the date the notice is served.

• CPO is submitted to Scottish Ministers.

• If the CPO is unopposed, or any objections are withdrawn, then the CPO may be confirmed with no further action.

• If the CPO is opposed (other than on grounds of the level of compensation), and not all objections from statutory objectors (i.e. land owners, lessees or occupiers) are withdrawn, then a public local inquiry will be held before a person appointed by Scottish Ministers (the inquiry Reporter).

• A public local inquiry is held, following procedures set out in the Compulsory Purchase by Public Authorities (Inquiries Procedure) (Scotland) Rules 1998.

• The inquiry Reporter prepares a report for Scottish Ministers which includes their findings of fact and recommendations as to whether the CPO should be confirmed, with or without modifications, or rejected.

• The Scottish Ministers make the decision as to whether the CPO is confirmed, with or without modifications, or rejected. Scottish Ministers must notify their decision to the acquiring authority, statutory objectors and anyone else who appeared at the public local inquiry.
Where Scottish Ministers confirm a CPO, the acquiring authority must publish a notice in a newspaper circulating in the area of the land advertising this decision and serve a notice and copy of the confirmed CPO on anyone who initially received a notice of the making of the CPO.

CPO becomes operative on the date when the notice of confirmation is first published

APPEAL AGAINST A COMPULSORY PURCHASE ORDER

The validity of a CPO may be challenged in the Court of Session, although this option is only available within six weeks of the date the CPO came into operation. A judicial review cannot be used to challenge a CPO after the expiry of the statutory six week appeal period.

A CPO can only be challenged on two particular legal grounds:

1. it is ultra vires, i.e. beyond the powers of the acting authority
2. that a relevant requirement has not been complied with

Once a CPO has been confirmed the acquiring authority has the right to purchase the land at any point in the following three years, although they are not obliged to do so. This period can be extended by agreement between the acquiring authority and land owner. The acquiring authority can use one of two different methods to purchase the land:

**General vesting declaration:** A general vesting declaration is a mechanism which allows the ownership of all the land identified in the CPO to pass to the acquiring authority when the declaration takes effect. If all occupiers consent, it allows the acquiring authority to fully acquire the land 28 days after confirmation of the CPO. Without that consent, the authority must provide a minimum notice of two months of their intention to use this procedure. On expiry of the two month period, the authority may serve notice on affected parties of their intention to fully acquire the land after a minimum period of 28 days. The intention of an acquiring authority to use a general vesting declaration will normally have been given in the notice of confirmation of the CPO.

**Notice to treat:** Unless the acquiring authority uses the general vesting declaration procedure, it must serve a notice to treat on the owner of the land to be compulsorily purchased before it can take ownership of the land. The notice must describe the land to be acquired and demand details of the current owners’ interest in that land and his claim in respect of that interest. The authority can take entry 14 days after service of the notice of entry, although title can only be taken after determination of compensation.

COMPENSATION

The amount of compensation to be paid by the acquiring authority to the owner of land purchased following a CPO is dependent on the particular circumstances of the land to be acquired. As a general principle the claimant should not be put in a worse or better position than if the land had not been compulsorily purchased. If the amount of compensation payable for the compulsory purchase of a property cannot be agreed by negotiation, then it can be referred to the Lands Tribunal for Scotland for determination. The rules governing the amount of compensation that will be awarded for a compulsory purchase are set out in the Land Compensation (Scotland) Act 1963, although payments for injurious affection and disturbance are made under the provisions of the Land Compensation (Scotland) Act 1973. The 1963 Act sets out six statutory rules for deciding upon the level of compensation for land purchase as follows:
1. No allowance shall be made on account of the acquisition being compulsory: A landowner will not receive any additional payment, with certain statutory exceptions, to reflect the fact that their land is being purchased compulsorily.

2. The value of the land should be the same as that which would be achieved by a willing seller marketing the land on the open market: The fact that the land owner does not wish to part with the ownership of any land being compulsorily purchased is not to be considered as a factor in deciding on the value of the land. Where the land to be purchased is subject to a lease, the amount paid may also be affected by the landowner’s ability to obtain vacant possession of the land prior to purchase.

3. The special suitability or adaptability of the land for the purpose of the acquiring authority should be disregarded in deciding upon the value of the land: The value of the land is based solely on what could be achieved on the open market. The value of the land cannot be inflated to reflect its value to the acquiring authority for the purposes of the scheme it is pursuing.

4. Any increase in the value of land due to an unlawful use that could be restrained by a court is to be disregarded: The value of land cannot be increased to reflect an ongoing use if that use is unlawful, e.g. a business which is operating without planning permission.

5. Equivalent reinstatement of compulsorily purchased property: This provision only applies to subjects such as churches, schools or hospitals for which there is no general market demand. Any decision on reinstatement is made by the Lands Tribunal, which must be satisfied of the following:

- the purpose of the property would continue but for the CPO
- the purpose of the property is one for which there is no general market
- there is a genuine intention to reinstate the property elsewhere

If these conditions are met then the amount of compensation warded should cover the cost of purchasing an equivalent site, the construction of a replacement building, professional fees and other costs.

6. Compensation for disturbance: While rule 2 limits the amount payable for land subject to a CPO to the market value of their land, this rule allows for other payments to be made to the owners of that land, such as disturbance payments, which are payable in terms of the Lands Clauses (Consolidation) Acts. These payments are based on the subjective "loss to the claimant", which is personal to him and not on the objective "market loss" related to the value of the land.

In addition to receiving the market value of the land purchased, the land owner may also be eligible to receive payments covering one or more of the following:

Severance and other injurious affection: Severance is where only part of a property is compulsorily purchased. Where this happens compensation may be payable for the adverse physical effects the severance has the remainder of the property. In circumstances where the owner considers the effect of severance to be particularly severe, then they may be entitled to serve a notice of objection to severance. If successful the Scottish Ministers would be required to purchase the whole of the property.

In addition to severance, the owner of land of which only a part is purchased may also be able to claim for “injurious affection”. This is the term used to describe the adverse effects (such as
noise and vibration) that construction and operation of the development supported by the CPO can have on the remainder of the property.

**Disturbance:** The compulsory purchase of business and residential property may lead to the owner incurring additional expenses, e.g. removals, as well as possible loss of goodwill, loss of profits, payment of professional fees etc. Compensation covering these items is generally referred to as disturbance.

**Home loss payment:** A home loss payment is an additional sum to reflect and recognise the distress and discomfort a home owner/tenant would experience at being compelled to move out of their home.

**Farm loss payment:** A farm loss payment is an additional sum that may be payable to the owner of an agricultural unit that is displaced from that unit. The farm loss payment recognises that as a result of a move to unfamiliar land, the owner may be faced with temporary losses of yield.

**Planning permission after acquisition:** If during the period of ten years after the compulsory purchase of a property, planning permission is granted for the additional development of that property, the owner may be entitled to additional compensation to reflect any increase in the value of the property.

**SOURCES**


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