# COMPULSORY PURCHASE – COMPENSATION REFORMS: DEPARTMENT FOR LEVELLING UP HOUSING AND COMMUNITIES

Consultation response by ASocialDemocraticFuture

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**General Commentary Applicable to All Questions**

Background

ASocial DemocraticFuture welcomes this consultation. It fully concurs that a faster and more efficient compulsory purchase system marked by fairer and more certain regime governing the payment of compensation is necessary to secure the "*right outcomes to bring forward much needed development including for housing, regeneration and infrastructure*".

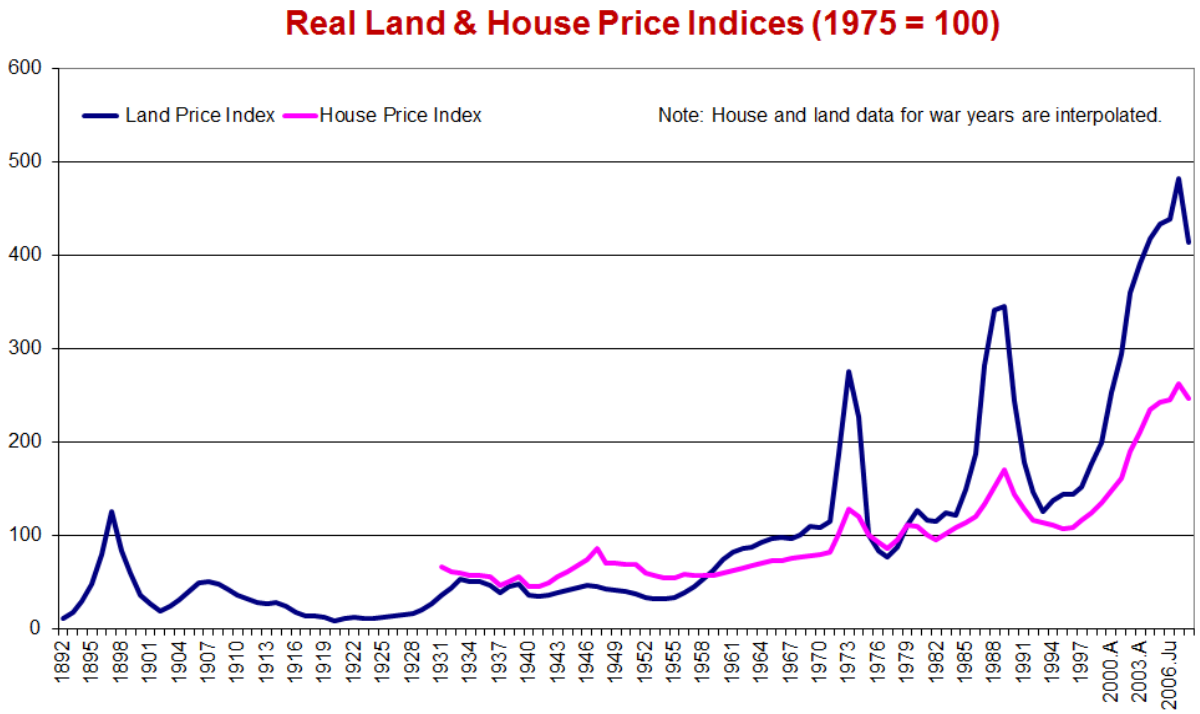
The achievement of these outcomes is vital not only to the government's Levelling-Up agenda and wish to secure more widespread access to affordable cross-tenure housing through planning certainty and the effective stretching use of public resources, but also to the related and overriding imperative to raise national growth rate to a level could allow the fiscal deficit to be lowered in combination with future needed additional investments in public services and economically optimal targeted tax cuts.

Actual and prospective planning permissions that offer a more lucrative use of plots can provide substantial potential windfall gains to landowners, unrelated to their own efforts (apart from lobbying activity). The gap between the cost of keeping land in its existing use and such windfall gains represent in economic parlance unearned economic (land) rent.

The Office of National Statistics (ONS) in its latest estimates of the value of land derived from the 2021 Census puts the value of UK land at £6.3 trillion in 2020 with land underlying dwellings valued at £5.4m, 86% of the total value of non-produced non-financial assets.

*Figure 1* paints in that light a clear and instructive story: an upward step-change in land prices commenced in mid-fifties before accelerating to produce an exponential rising secular trend across housing market 'boom-bust' cycles.

Land prices increased far faster than house prices, resulting an inexorable rise in the proportion of residential values (house prices) taken by the cost of the land plot(s) on which dwellings sit.




According to the *Savills Land Residential Land Development Index* land prices exploded even faster in the long boom period between 1995 and 2007 before imploding in the Great Financial Recession of

2008-2009 before subsequently recovering at a more muted pace to again approach 2007 levels by 2020.

A hectare of land in England in agricultural use has maintained an average constant value of c£22,000 for many years. Such a plot with planning permission for residential development will be worth on average more than £2m outside London.

Such an eye-watering hundredfold increase, which can be substantially more across the south-east and some high value areas, where values can exceed £4m a hectare, however, needs to be put in context.

The valuation excludes the cost of obtaining planning permission, the future cost of Section 106 planning and affordable housing obligations and infrastructural levies, as well as infrastructural servicing costs.

That said, landowners can and do realise substantial windfall gains that if reduced would further the aims of this Consultation.

The secular rising land price trend has materially contributed to the housing affordability crisis that in recent years has prevented 'Generation Rent' from buying their own home. It has spiked up the average real provision cost of affordable housing, especially in high-cost areas.

The slippery slope towards this outcome began with the progressive divorce of the twin-principles that the 1947 Town and Planning Act enshrined that both development control and value vested with state.

It attached a 100% development charge or tax on the added value attributable to planning permission faced by private developers. Although this charge was lifted in 1953, until 1959 local authorities were still able to buy land for residential development at existing use value, helping them to deliver record levels of affordable housing.

The enactment of the 1959 Town and Country Act then, however, forced them to pay future residential use value.

The 1961 Land Compensation Act (1961LCA) was a key landmark along the road to the destination of exploding land values.

It consolidated and codified case law dating back to Victorian times and remains the principal statute governing the assessment of compensation, notwithstanding recent changes and substitutions made by subsequent legislation, most notably, *section 232* of the *Localism Act* and the *Neighbourhood Planning Act 2017 (NPA2017).*

*Section 14* of the 1*961LCA* gave statutory status to the '*no scheme'* principle whereby for the purpose of compensation any impact on plot value attributable to the scheme subject to the CPO was to be disregarded as if no such scheme existed or was 'cancelled' on the valuation date.

It also provided for the payment of compensation at market value to reflect permissible planning use (not existing use): giving statutory footing to the principle that landowners could benefit from a windfall gain attributable to that permission.

In addition, it opened the door to future 'hope value' claims based on the market value of plots predicated on the prospect of the grant of a future planning permission "*in (the) circumstances known to the market at the relevant valuation date*" and in respect to appropriate alternative development (AAD), which Paragraph 13 of the Consultation points out may be assumed for valuation purposes "*if AAD is established*".

*Section 17* allows either of the parties directly concerned to apply to the local planning authority for a certificate of appropriate alternative development (CADD) confirming or otherwise the local planning authority's opinion whether there is development that, for the purposes of section 14, is appropriate alternative development in relation to the CPO acquisition, or that is there no such AAD.

The former DCLG and HM Treasury in 2016 undertook a joint consultation process on reform of the compulsory purchase rules. Its central premise was that the application of the 'no scheme' application in practice over time as interpreted by case law had become complex and uncertain.

It advanced a new principle that where land is acquired for a wider regeneration or redevelopment scheme that is directly linked (facilitated or made possible) to a 'relevant' transport infrastructure scheme, the definition of 'the scheme' should so include that 'relevant' linked transport scheme.

Any compensation payable by an acquiring authority would exclude and disregard increased values attributable to both the wider regeneration and the supporting 'relevant' transport scheme.

The 2016 consultation also proposed that Mayoral Development Corporations (GLA, and the new combined authorities led by a mayor, including, Birmingham, Manchester, and Liverpool) should be put on the same statutory footing as New Town and Urban Development Corporations, in that all prior development undertaken preparatory to a scheme should be disregarded for the purposes of assessing compensation. These changes were enacted in the Neighbourhood Planning Act 2017 (NPA2017).

A new power for the Secretary of State to create a New Town Development Corporation for which a local authority, or more than one local authority, rather than central government, is responsible for, was also provided in NPA2017.

The Levelling-up and Regeneration Bill already contains provision to amends sections 6D and 6E LCA 1961 to ensure that where greenfield land is acquired for development made possible by a relevant transport project, then that 'scheme' will include the relevant transport project.

But more specific mechanisms and policy changes to embed certain affordable housing obligations into transport schemes are needed and the current amendments do not address hope value.

Issues relating to the Consultation

The crux of the consultation is to reform the compensation treatment of the 'hope value' of plots attributable to the value accorded to a future prospective planning permission payable under Sections 14 and 17 of the 1961LCA.

*Paragraph 15* of the Consultation specifically highlights the scope for perverse outcomes to occur where AAD is currently established under section 14(3) of the 1961LCA.

Because planning permission for that AAD is then assumed on the relevant valuation or later date, 100% certainty is assumed for compensation purposes, even when the planning likelihood may be only 51% at the time of determination.

The Consultation points out this would then "*artificially inflate(s) compensation because a transaction in normal market conditions would reflect the actual risk associated with likelihood of planning permission being granted*".

This is an inequity that on pure public value-for-money and horizontal equity grounds requires remedy "*to ensure that the balance of compensation and costs in relation to hope value is right*" sought by the Consultation is achieved.

*Para 16*, in response, proposes that in such circumstances to reflect *"normal market conditions*" the Levelling Up and Regeneration Bill should amend sections 14 and 17 of the 1961LCA.

The compensation payable should then be calibrated to the likelihood of planning permission for the AAD, if a CAAD is obtained in relation to that AAD.

A potential problem with that proposed approach is that the assessment of the market likelihood of such a planning permission could prove problematic where it was based on a contestable judgment.

ASocialDemocraticFuture (The Respondent) believes that a better approach would be to end the requirement for 'hope value' to be compensated with reference to an artificial 'market value' altogether.

Compensation payable under sections 14 and 17 of the 1961LPA should be calibrated instead to a more certain and uniform framework based on a premium on existing value, such as Existing Use Plus 30% (EUV+). The application of such a framework would itself serve to reduce land prices and expectations of future prices.

*Para 24* of the Consultation proposes such a treatment in the limited case where the planning authority could '*request a direction*' (a Direction) from the Secretary of State to cap payments of hope value "*at, or just above, existing use value … where it can be shown that the public interest in doing so would be justified*".

Such Directions would set out the levels of 'hope value' payable for a relevant scheme(s), providing certainty on land plot cost and on wider viability, thus avoiding "*lengthy disputes*" over the amount of hope value payable and the associated uncertainty.

The other proposals that *para 16* made to establish a "*single route*" for determining hope value based on the likelihood of appropriate alternative development; to remove the requirement for authorities to cover the cost of obtaining a CAAD; to require a planning authority to only issue a CAAD in relation to the AAD's sought; and to address the issue raised in *Lockwood v Highways England,* should not be contentious and are unproblematic with regards to the earlier stated aim of *Section 3* of the Consultation.

They would be rendered largely superfluous, however, if hope value was always compensated with reference to existing use or a value close to it, or even to a higher prescribed maximum cap.

In that light*, para 28* advised that the government had "*considered whether changes to the value attributable to prospective planning permission could be made generally or in relation to specific types of CPO or schemes*".

It appears that the limited proposal made *in para 24* for a cap on hope value to apply only for a specific scheme where an application for a Direction is made to the Secretary of State, related to concerns that the public interest justification for the CPO can vary considerably between schemes, as well as by a wish to avoid schemes not involving hope value being brought within the ambit of the proposed changes.

Directions would likely require evidence to demonstrate how land value captured would subsequently be applied for the public benefit to make the process lawful with reference to the human rights position of landowners.

Certainly, it is a matter of utmost importance that the CPO process is used sparingly as a last resort and in a proportionate, fair certain manner, and is justified on a scheme-by scheme basis with reference to demonstrable public benefit.

Those imperatives should not, however, be carelessly conflated with the loss of compensation covering the escalated market value of land accorded with planning permission or, even more so, to the hope or prospect of it.

The founders of modern economics and liberal democracy, including Adam Smith, David Ricardo, and John Stuart Mill, all identified that land as a fixed factor of production in inelastic supply whose value depended on its use and location rather than its intrinsic characteristics provided scope for its owners to capture massive unearned gains at the expense of the wider community as its value rose for reasons unconnected with their own actions but with the wider development of society.

*Figure 1* demonstrated the impact that tendency has had in post war Britain. Rising land values generated by community actions including investment in infrastructure and connectivity and changes in permissible planning use or zoning and the future prospect of such changes represents a windfall unearned gain, not a product of an efficient competitive market where the owner has invested in a service or good purchasable in that market.

Given that context, the interests of landowners need to be balanced with the wider interests of the community in terms of reducing the cost of needed infrastructure and affordable housing.

Taking a concrete example, the post war New Town Programme benefited from the facility to acquire development land at or close to existing agricultural value that then was lost with the enactment of the 1961 LCA due to its allowance of landowners claiming hope value.

Today, tightening public fiscal constraints and increased residential demand and need makes it even more pressing that increases in land values generated by public actions are predominantly reaped for public benefit rather than unearned private gain.

The compulsory purchase compensation framework is one aspect part of a wider broken housing system that the *2017 Housing White Paper* identified as in need of urgent reform for overarching economic and social policy reasons.

Land price expectations need to be dampened generally to make housing more affordable within a wider Levelling-Up and Growth policy environment.

The changes in compulsory purchase compensation proposed in this Consultation need to contribute to wider, supporting, and concerted changes to the national housing and planning policy framework.

Using Existing Use Value Plus (EUV+) approach (current use value of a site plus an appropriate site premium), to determine the benchmark land value would help to embed known and increased affordable housing requirements, crucially, into future land and house price expectations.

Compensation for hope value should likewise be calibrated to EUV+ not a spurious inflated hypothetical ‘market value’, which in economic terms is speculative unearned rent.

Such elimination of hope value might be perceived as creating a new horizonal inequity in the treatment of compensation available to owners of plots with planning permission and those with prospective planning permission.

In line with the above commentary, that potential issue would be mitigated by the impact of the wider application of EUV+ on land prices, scheme viability, and hence house price expectations.

**Question 3***: Do you agree that there are schemes where capping or removing the payment of hope value will increase the viability of certain schemes and/or increase*

*the public benefits delivered through the schemes? Please provide details and where possible examples of schemes.*

The ‘no scheme’ value, defined as the open market value that a willing buyer and seller would agree in the absence of the scheme subject to the CPP, will still be potentially dependent on a host of actual or assumed planning factors ‘conceivably known to the market’ that could be deemed relevant to that scheme.

This allows owners to claim for compensation of loss of potential future betterment that can be linked to an existing planning permission, or to one associated with a possible prospective future planning permission for an alternative appropriate development (AAD) use, which could be available, according to ‘circumstances known to the market’ at the relevant valuation date for the CPO.

In terms of specifics, the prospect of a future planning permission for, say, a future housing alternative use offering the speculative hope of a significantly higher future development value than its existing use - can be referenced to factors including future expected population increase and the related future need for more land to be zoned for housing within a particular LPA area.

A farmer owning agricultural land in an area subject to possible acquisition by a New Town or Local Development Corporation established by a LPA or group of LPA’s that sometime in the future could designate that land for housing use, could still hope value.

The use of land value capture, therefore, will continue to be constrained by the existing institutional and legal framework relating to the compulsory purchase of land and buildings by public authorities, and the continuing ability of landowners/developers to exploit hope value connected to public policy action and investments.

Comprehensive reform of the LCA 1961 going beyond what was introduced in the 2017 Neighbourhood Planning Act (NPA2017) and currently included in the Levelling-up and Regeneration Bill is thus required and are partly reflected in the proposals made in this Consultation.

These changes would potentially make it easier for sponsoring public bodies to capture and recycle a higher proportion of the land value uplift (captured from the subsequent sale or leasing of acquired land and properties) that should follow strategic and major investments in transport infrastructure.

Their initial infrastructure investments could then also be potentially financed by bonds on the back of the collateral offered by the prospect of increased land values generated by that public infrastructural investment.

This should help mooted major infrastructural projects, such as the Oxford-Cambridge transport corridor, to be self-funding, improving the prospects of their approval and completion by governments possessed with limited fiscal flexibility.

Land value uplift resulting from major transport schemes could then be recycled as cross-subsidy in support of additional affordable housing provision

The history of the post war new town programme that provided homes for 2.5m people within 32 new towns located across the UK, offers a more direct pointer as to how land value uplift could be used more directly to provide additional substantive additional housing supply at an affordable public cost.

The dedicated New Town Development Corporations established under the New Towns Act 1946 were provided with express powers to compulsorily purchase land at current use value, grant or refuse planning permission, provide and manage housing, to borrow money, and to undertake all ancillary functions necessary to develop the settlement, such as infrastructure and utilities provision, but successor arrangements to manage and maintain the assets provided in a way that would sustain a balanced community was neglected or not foreseen for decades afterwards.

The New Towns Act 1981 consolidated the provisions of the NTA1946 and succeeding legislation.

Most of the powers available in the NTA1946 remain, save that the LPA1961 and case law chipped away their power to purchase at existing use value, in contrast to its 'no scheme' value: the open market value disregarding both any increase or decrease in the value of the land solely attributable to the particular purpose for which it is acquired, and the acquiring authority's need for the land for that purpose.

That might differ from current or existing use value, insofar that 'hope value' linked to the possible future alternative use of the land for housing or other more lucrative uses before its vesting or valuation for compulsory purchase, can still possibly be considered when compensation is assessed, depending on the circumstances of each case.

In that light the inclusion within the NPA2017 of Mayoral and Urban Development Corporations does not necessarily extinquish any requirement to compensate hope values with attendant impacts on future scheme viability and public cost and benefit.

Capping hope value in a certain and prescribed manner with reference to a benchmark such as existing value plus a premium (EUV+) should capture land value and generate public benefits including lowering the future public cost provision of affordable housing.

That, in turn, should provide increased scope to increase the quality of both public and private provision with reference to general design, beautification, and climate change outcomes) by reducing windfall gains that currently can be reaped by landowners (sometimes shared with developers) linked to planning use and public investment.

Greater valuation certainty would also provide greater planning and viability certainty that would over time reduce the costs associated with securing planning permission for developments, especially large-scale schemes.

The capping of hope value should also dampen future land price expectations, which would generate continuing dynamic cumulative public benefit gain.

**Question 4:** *Please provide any comments you may have as to the proportionality of capping or removing the payment of hope value balanced against the delivery of public benefits. Please provide any examples you have where you believe the public benefits would be such that it would be proportionate to impose such a cap or removal of hope value to a scheme and what those public benefits may be.*

The challenge is to mainstream and embed land value capture for public benefit within the wider residential development process.

The potential direct benefit of land value capture needs to be backed by complementary compulsory purchase powers.

These should remain as a last resort, however, and take regard of some substantive efficiency and equity concerns.

A general legal duty to demonstrate a compelling case in the public interest already exists that must be met in all CPO cases.

In short, the right of a landowner to enjoy the fruits of that ownership should only be overridden, where it can be demonstrated that a wider public interest case of greater force prevails.

To be successful any reform - certainly within a timescale of interest to the existing generation that needs additional affordable housing - would need to encourage and underpin mutually beneficial voluntary exchanges between owners and LPAs at values closer to existing than alternative residential value, rather than to regulate antagonistic relationships that would risk distracting scarce planning resources running counter to long established principles of constitutional and administrative law, and incorporated EU human rights legislation.

LPA's do not currently possess the right to simply designate land for housing use and then to acquire it for such use at a value less than its future housing development value, and thus, by doing so, capture that potentially higher value for the community (land value capture).

Rather they depend upon on private developers to bring forward proposals for residential development after they have acquired and/or assembled land interests across such sites; in which case, the price for the land will invariably reflect its future housing development use value, not the existing value.

They can then attempt to clawback some of any resulting windfall gains accruing to the landowner and/or the developer by means of the Community Infrastructure Levy (CIL) and through affordable housing planning obligations.

This provides the possibility that land at risk of being compulsorily acquired at or close to its existing use value will see its values depressed (as above, a desired component of public value capture and its wider benefits), in contrast to land whose development potential is unimpeded: a potential inequity that affected owners could possibly claim to have human rights implications.

That needs to be balanced and measures against the wider benefits of capping hope value that positively impact on the human rights and interests of those households that have been priced out of affordable housing by escalating land values unrelated to owner efforts (other than seeking planning permission and demonstrating hope value)

It also reinforces other related arguments made in the general commentary of this response that changes to compulsory purchase compensation need to be supported by complementary planning and housing policy changes.

In that light, the 2017 HWP, highlighted (Para A.48) that in many countries, local authorities regularly directly work with local landowners to proactively assemble land for housing, noting, that in Germany, local authorities often use processes, known as land 'pooling' or 'adjustment' to acquire and, assembly close to its existing use values, and then service it, ready for residential development.

A range of commentators, official reports, parliamentary committees in recent years have endorsed land value capture as a pivotable and required instrument to channel value generated by development towards infrastructure and housing without incurring more public debt – a consideration underscored by the current and future post-Covid fiscal situation.

Practice in some other European Union (EU) countries is different, most notably Germany, where land values are frozen when land is vested for housing use by a local authority.

Countries deploying such forms of public land capture effectively, tend to benefit from much more steady house price trends, where not only land accounts for smaller proportion of total residential development value compared to the UK, but where build rates are much higher, both outcomes supportive of the wider macro-economic ends of steady, balanced non-inflationary growth.

In England and Wales, making the affordable housing regime more certain and integrated to affordable housing requirements would tend to deflate residential land values generally and thus reduce the relative opportunity loss of landowners facing capped hope values.

**Question 6:** *Do you think there are more likely to be measurable public benefits in capping or removing hope value in particular types of scheme? Do you think any solution to this issue should be limited to individual schemes, particular types of scheme or apply across all types of compulsory purchase situations? Please provide details in support of your answers.*

This Respondent has made the case in its general commentary and Question 3 and 4 responses for hope value to be capped across all compulsory purchase situations and for hope value along with wider land price expectations to be deflated by supporting housing and planning policy changes.

Safeguards protecting against arbitrary acquisition demonstrating proportionality and compelling public interest, would, however need to be clearly set out, therefore, not only to secure acceptance and sustainability, but to prevent and/or render unnecessary protracted legal challenges.

The worst-case example of a farmer forfeiting the lands that have been in their family's ownership for generation, thereby losing their livelihood and financial security to a local authority that then hoards the land, letting it fall into disuse, would need thereby to be clearly avoided.

That said, the inequity and inefficiency of the current situation, whereby - generally already affluent landowners have enjoyed rises in land values that sometimes reflect the capitalisation of subsidies and tax breaks linked to agricultural use, are able to capture potentially massive windfall gains from the granting of residential planning permission needs to change to safeguard and further the interests and prospects of a larger group of less advantaged potential first time buyers priced out of the current housing market.

To provide a secure statutory footing to redistribute windfall gains from landowners to the developing public authority beyond that provided for in the NPA2017, requires the LCA 1961 to be further amended in such a way to remove any requirement to compensate owners of land not currently zoned for housing, for any future prospective land uplift or 'hope' value, beyond a prescribed EUV+ cap.

That should serve to deflate future land price expectations and encourage voluntary land assembly for local affordable housing and regeneration purposes.

**Question 7:** *Do you agree with the proposal to address this through the issue of directions for specific schemes as set out in this consultation?*

Covered in previous responses.

Some development professionals have cautioned that some acquiring authorities may be reluctant to apply for Directions due to the risk of having to publicly disclose viability information, which could open objections to the CPO on viability grounds, while the process of seeking Directions within a discretionary regime could prove cumbersome in resource and time requirements prone to possible legal challenge, although this could be mitigated by a streamlined and fast track process.

This Respondent believes that restricting the capping of hope value to specific schemes that obtain a Direction from the Secretary of State could detract from the stated aims of the Consultation and that it would be better to limit and cap hope value more generally in combination with a more certain affordable housing obligations regime.

**Question 8:** *Do you agree with the proposal that the directions could cap the payment of compensation at existing use value or at a percentage above existing use value (excluding the payment of compensation under other heads of claim)?*

A more general dampening of land price expectations encouraged by wider changes in the planning system that effectively encourage landowners to release land for housing development for a reduced premium above existing value would support this change.

It is consistent with developer business models shifting towards securing a steady return from construction, rather than from volatile returns from speculative landholding, amid a wider deflation of windfall gains secured through transactions conducted outside the CPP envelope.

**Question 9:** *Please provide any comments you may have as to: (1) whether it will be possible to identify certain, deliverable public benefits in applying for directions; (2) how it will be possible to link those public benefits to value captured.*

Covered by previous responses.

**Question 10:** *Do you think that an acquiring authority should have to consult with affected landowners before seeking a direction from the Secretary of State?*

As per response to Question 6, the policy environment should encourage voluntary agreement based on a reformed and more certain policy environment rather than recourse to Directions or CPP process, which should act as a last resort backstop to acquiring authorities to use.

Compensation payable under CPP should be less than that potentially available for voluntary agreement.

**Question 12:** *It might be possible for landowners to seek a planning permission so that development value applies under section 14(2)(a) LCA 1961 circumventing any cap applied under a direction. Do you think it should be possible for the directions to cap development value for any planning permission which falls under section 14(2)(a) where that planning permission is made after the "launch date" of the scheme or after the date the directions are issued if later? The launch date is defined by section 14(6) LCA 1961.*

Yes, this might be necessary to avoid such recourse to subvert the intention of the reform but such recourse would be discouraged by the proposals made in the other Question responses including that to Question 13 below.

**Question 13:** *Do you have any further comments as to how the process of seeking and issuing directions might work?*

This Respondent has made a case for hope value to be divorced from market value compensation as a general principle and should be capped close to existing use value for CPP purposes when used as a last resort and that such a more general reform should be supplemented and complemented by measures to dampen future land and development values, including a more certain affordable housing obligation regime based on EVU+.

We appreciate that the government may wish to proceed along a more incremental path despite the ensuring problems that it might consequently encounter, and would suggest that, if so, that some demonstration projects are expedited to move things along in the short term.

In that light, if the government decided to limit the principle to the use of Directions for specific schemes, it could prioritise applications from:

- New Town and Urban Development Corporations;

- Infrastructure Development Corporations;
- LPA's with an already NPPF plan in place;
- LPA's wishing to approve and vest land for urban extensions or villages;
- Where local neighbourhood commitment to their exercise was demonstrated;

and, most relevant in the London context to:

- The regeneration of derelict and under-used industrial land.

The Directions could relate to lands that they wish to zone for housing, transport, or other regeneration purpose.

The cap would relate to both actual and prospective development value eliminating the distinction the two.