

Compulsory Purchase in Scotland

Guidance for Acquiring Authorities



Scottish Government
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| To | Acquiring Authorities |
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| Page | 1 of 11 |

The Scottish Government considers powers to purchase land compulsorily to be an important tool for local authorities and other public bodies (collectively referred to as Acquiring Authorities) to use to acquire land needed to enable projects that are in the public interest to proceed, where this would otherwise not be possible.

In particular Ministers consider compulsory purchase powers to be important for helping to deliver housing, development and regeneration that create high quality places where people want to live, work and invest. Such projects will deliver social, economic and environmental improvement for the public benefit and, used properly, these powers can aid effective and efficient regeneration, the revitalisation of communities, and the promotion of inclusive economic growth.

Authorities are therefore encouraged to consider using their powers pro-actively when necessary and appropriate to ensure real gains are brought to communities without delay.

The Scottish Government vision for compulsory purchase is for:

“A clear, accessible, consistent, effective and efficient system of legislation and policy which allows for the compulsory acquisition and purchase of legal interests in land and property for the public benefit. The provisions relating to any compensation should be fair and transparent and allow for timeous settlement.”

This series of guidance notes are primarily aimed at Acquiring Authorities and are intended to provide information for those with no, or limited, experience of compulsory purchase. They comprise **both** good practice advice and guidance on the legal and procedural requirements that must be met at each stage of the Compulsory Purchase Order (CPO) process.

These notes draw from and are intended to complement Planning Circular 6/2011 (<https://beta.gov.scot/publications/scottish-planning-series-planning-circular-6-2011-compulsory-purchase-orders/>) which provides more detailed, technical advice on some aspects of the CPO process and which authorities may wish to continue to refer to.

These notes are intended to be read sequentially as follows:

- CPOGNAA/001 Can I use Compulsory Purchase?
- CPOGNAA/002 What should I do before developing a Compulsory Purchase Order?
- CPOGNAA/003 How do I prepare and submit a Compulsory Purchase Order?
- CPOGNAA/004 How do Scottish Ministers consider a Compulsory Purchase Order?
- CPOGNAA/005 Confirmed Orders – Next Steps.

This second note in the series aims to help Acquiring Authorities who are actively exploring the potential use of compulsory purchase understand the actions they will need to undertake before a CPO can be drafted and submitted to Ministers for determination.

Whilst the general advice, guidance and principles contained in these notes are applicable to all bodies with compulsory purchase powers it should be noted that Compulsory Purchase Orders promoted by Scottish Ministers or their Agencies are processed under distinct procedures which, while broadly similar, may differ in some regards. Furthermore, certain bodies can be empowered to purchase land compulsorily through special Acts of Parliament, or via other processes (e.g. through Transport and Works Act Orders).

Where necessary this guidance identifies instances where aspects of the process vary, but it does not seek to be comprehensive. Separate guidance is available for these specialist processes – for example for compulsory purchase related to Trunk Road projects promoted by Transport Scotland (www.transport.gov.scot/publication/road-projects-guidance-on-compulsory-purchase-process-and-compensation/)

This guidance is not intended to be either prescriptive or definitive. It is also not intended to replace specialist legal advice.

Content

| | | |
|----|---------------------------------|----|
| 1. | Pre-Actions and their Purpose | 4 |
| 2. | Alternative Resolution | 4 |
| 3. | Land Referencing | 5 |
| 4. | Engagement | 8 |
| 5. | Pre-actions Required by Statute | 9 |
| 6. | Finance | 10 |
| 7. | Formal Resolution | 10 |

1. 'Pre-actions' and their Purpose

- 1.1. This guidance uses the term 'pre-actions' to describe the set of actions and considerations that an Acquiring Authority should undertake prior to resolving to use, and then preparing, a Compulsory Purchase Order (CPO).
- 1.2. Carrying out these actions before undertaking compulsory purchase can greatly assist an Acquiring Authority mitigate or fully address the concerns of land owners and communities and help discharge any concerns under the European Convention of Human Rights. As such, pre-actions should also improve transparency and accountability in a decision making process which may be subject to later legal challenge.
- 1.3. The suggested 'pre-actions' contained in sections 2-7 of this guidance note are activities that Scottish Ministers **strongly encourage** an Acquiring Authority to carry out to help them develop and prepare a proper and robust justification for the use of compulsory purchase or, conversely, to rule out the use of compulsory purchase where there is insufficient justification to support this. They can also speed up the process by pre-empting and addressing objections that may arise and resolving them by negotiation, thereby avoiding the need for, or simplifying any Hearing or Inquiry.
- 1.4. The evidence gathered, and the results and findings of the 'pre-actions' should be used to assist the Acquiring Authority justify its proposal for using a CPO and to prepare the 'statement of reasons' which accompanies a CPO submitted to the Scottish Government for determination.

2. Alternative Resolution

- 2.1. An Acquiring Authority should always assess whether there is a suitable alternative way for it to realise the aims of the scheme. As part of this work the Acquiring Authority should consider whether:
 - Any alternative proposals put forward by other parties would be appropriate. The Acquiring Authority may find it helpful to carry out consultation to aid with this exercise;
 - It is able to serve statutory notices or use some other legal powers to avoid the need to use compulsory purchase powers. This may be particularly beneficial where there is a poor standard and quality of housing;
 - It may be possible to use a management agreement or some other legally binding contract that would avoid the need to use compulsory purchase; and
 - It actually requires ownership, e.g. if all that it needs is a right of access over the land it may be sufficient (if legislation allows) to obtain a servitude right by CPO or obtain these rights by obtaining a Wayleave or alternative access rights instead.
- 2.2. Where there is more than one site on which the scheme could be located, the Acquiring Authority should be satisfied that it has properly assessed the suitability of any alternative sites and is clear on its rationale and justification for why it has chosen the site in question.

Purchasing land without compulsion

- 2.3. It is always preferable for land to be purchased by agreement. However, authorities should take a realistic view, depending on the circumstances, on whether it is practicable to do so. For example, it may be clear very early on in discussions with the land owners that they are not willing to sell their land voluntarily or agree to sell at an acceptable price. In assessing this, the Acquiring Authority should be mindful of the overall costs of compulsory purchase, including legal fees and the costs of holding a Public Local Inquiry or Hearing, if required, against the costs of inaction by the Acquiring Authority.
- 2.4. The date by which entry to the land is required to deliver the underlying project or purpose can be particularly important in determining the approach that is taken.
- 2.5. CPO cases and the associated assessment of financial compensation due can be complex matters and will usually take time to process. Therefore, it may be prudent for an Acquiring Authority to initiate the formal CPO procedures in parallel with ongoing negotiations with land owners. This will often provide a clear signal of the Acquiring Authority's intentions and its commitment to the acquisition of the land. This in turn may encourage those whose land is affected to enter more readily into meaningful negotiations.
- 2.6. Acquiring Authorities will normally be expected to attempt to purchase the land by agreement and, ideally, a resolution with the land owner would be found **without** the need for compulsory purchase. However, a lack of any attempt to purchase by agreement will not necessarily prevent Scottish Ministers from confirming a compulsory purchase order, as long as the Acquiring Authority can justify why it has adopted the approach used.
- 2.7. **An Acquiring Authority should keep a detailed record of all alternative options considered and the conclusions reached. Furthermore, the Acquiring Authority should keep a record of all engagement and negotiation with affected landowners, including the results of attempts to purchase the land by agreement. The conclusions from both these actions will form an important element of the 'statement of reasons' (see CPOAAGN/003 and CPOAAGN/004).**

3. Land Referencing

- 3.1. The Acquiring Authority should carry out thorough land referencing to make sure that, as far as possible, it has identified all rights and interests in the land that it seeks to acquire and extinguish. This should include searching the Land Register of Scotland and/or the Register of Sasines, as appropriate. The Books of Council and Session may also be consulted as a source of information. However, it should also visit the site and enquire locally. This is because some interests may not appear in the property registers.
- 3.2. The Acquiring Authority may also find it helpful to consult with Community Councils and any local history or amenity groups.
- 3.3. In addition, an Acquiring Authority may also find it helpful to issue questionnaires to postal addresses within the land referencing zone. The questionnaires can be used to seek information about who is actually in occupation of each property and any other relevant circumstances, and they are an efficient way of gathering information that may not be available from the official registers. Acquiring Authorities should be encouraged to make these questionnaires as user friendly as possible, with a single point of contact at the Acquiring Authority to whom any queries can be directed.

3.4. The Acquiring Authority should seek to identify **all** of the following:

- Owners;
- Lessees;
- Occupiers;
- The owner of any land which is a benefited property where the rights of the benefited property may be affected by compulsory acquisition of the subject land. The owner of benefited property may have title to enforce a real burden over the subject land or enjoy a servitude right of access or other servitude (e.g. to run cables or pipes through the subject land);
- The holder of any personal real burden that affects the land (if the real burden may be extinguished or varied on registration of a conveyance implementing the order);
- The owners' association of the development in question (if a development management scheme applies in respect of any of the land, and would no longer apply if the CPO is implemented).

3.5. Acquiring Authorities should also note that, in some circumstances, the details recorded in the title may not be fully up to date. Accordingly, the Acquiring Authority may wish to seek up to date information from the Registers of Scotland. Registers of Scotland will be able to check titles against the Land Register and the Register of Sasines for land ownership. If an Acquiring Authority subsequently identifies additional interests and/or the correct current address for an interest it is considered advisable to re-issue any relevant notices and provide an opportunity for the landowner to respond or make objections.

Airspace

3.6. Compulsory purchase of 'airspace' may be necessary where the Acquiring Authority requires rights to a space above a landowners land and/or any structures on it, and/or where a previous landowner retains title. Examples of where airspace issues may apply include:

- Where delivery of a development requires the use of a crane for building works, which would impact any space above a landowners property;
- Where the Acquiring Authority wishes to acquire only one property in a block of high rise flats, where the property in question is not attached to the ground; or
- Where the Acquiring Authority proposes purchasing a piece of land upon which a building previously existed but which has been demolished and where rights to properties in the building were not extinguished (e.g. in a block of flats demolished for safety reasons).

In such circumstances Acquiring Authorities should take particular care to ensure that they have taken steps to identify the landowner(s) affected.

Unknown owners, lessees or occupiers

3.7. In some cases the Acquiring Authority may not be able to ascertain the name and/or address of an owner, lessee or occupier. In this situation compulsory purchase is still possible, but special procedures apply for completing the order and serving notice of the order as set out in the Section 19(4) of the Acquisition of Land (Authorisation Procedures) (Scotland) Act 1947.

3.8. Before using Section 19(4) procedures the Acquiring Authority must make **reasonable** enquiries to ascertain ownership. To this end, Acquiring Authorities should take a progressive approach to any enquires, relying initially on localised information, then progressing to the next tier of enquiry only when needed.

3.9. Indicative tiers of enquiry are as follows:

1st Tier Enquiries (administrative enquiries)

- Checking Council Tax records;
- Checking the records of the local authority housing department;
- An examination of the electoral roll;
- Examining the title deeds of adjoining ground;
- In the case of a company, examining the Register of Companies.

2nd Tier Enquiries (consultative enquiries)

- Consulting the Valuation Office Agency Scotland/Local District Valuer;
- Contacting the solicitor who presented the last recorded title to the land for registration in the Register of Sasines or Land Register;
- Consulting Royal Mail;
- Where a business has recently closed down, checking with Utility providers;
- In the case of a foreign national, checking with the nationalities branch of the appropriate Police force.

3rd Tier Enquiries (advertisement and public notices)

- Fixing a notice to the relevant land to seek information about the last known owner;
- Enquiring locally (including asking adjoining owners, solicitors and estate agents);
- In the case of a deceased person, enquiring at the Local Sheriff Court Commissary Department, failing which, advertising in the Scots Law Times and other journals;
- Where the Acquiring Authority believes trustees have an interest in the land, advertising in the Scots Law Times and other journals;
- Advertising in a local newspaper to seek information about the last known owner.

3.10. Acquiring Authorities need not undertake all of the steps set out for each tier. However, before determining whether or not to confirm a CPO, Scottish Ministers will expect that the Acquiring Authority can demonstrate that notices have been properly served and that the Acquiring Authority has first taken reasonable steps to establish the identity and address of the owner, lessee or occupier of the land (as the case may be).

Queen and Lord Treasurer's Remembrancer

3.11. The Queen's and Lord Treasurer's Remembrancer is the Crown's representative in Scotland who deals with ownerless property.

- 3.12. Where a person dies intestate (i.e. does not leave a will) and either has no spouse, civil partner or blood relative, or none who can be easily traced, the estate both moveable and heritable (i.e. cash, shares, pension and land or buildings), is claimed for the Crown by the QLTR as ultimus haeres (last heir). In these circumstances, the Acquiring Authority should contact the Queen and Lord Treasurer's Remembrancer (QLTR) to identify the land in question at the earliest opportunity, due to the QLTR's timescales for processing enquiries.
- 3.13. QLTR will not normally commence administration for 12 weeks after an estate is reported to them to give a further opportunity for an entitled person to claim the estate before their administration commences.
- 3.14. It is only on completion of administration of an estate that the QLTR is able to add the net value of the estate and move the estate onto their unclaimed estates list. The estates of these people are advertised on the website as "having fallen to the Crown".
- 3.15. QLTR can be contacted at: NationalUltimusHaeresUnit@copfs.gsi.gov.uk or by telephoning 0300 0204196.

Identifying and Notifying Benefited proprietors for servitude rights

- 3.16. Rights of access to land may not always appear in the property registers and Acquiring Authorities should therefore visit the site and enquire locally to identify the owners of any benefited properties with servitude rights over the land, such as a right of access.
- 3.17. In some cases it may be difficult for the Acquiring Authority to identify all benefited proprietors with servitude rights with any certainty. In such cases it can serve notice of the making of the Order on benefited proprietors by advertising and other means, rather than sending a letter. If an Acquiring Authority decides to serve notice in this way special procedures and requirements apply, as set out in section 19 of the Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947 (see Guidance Note CPOGNA/004 for further details).

4. Engagement

- 4.1. Acquiring Authorities should seek to involve people in the decisions that affect them and ensure that they are consulted on proposals at relevant stages of the process. Including:
- **Before a decision to use compulsory purchase is taken**, such as when exploring land acquisition options. This can help Authorities explore alternative solutions and allay any concerns about the compulsory purchase process, potentially saving time and money;
 - **During the preparation of a CPO** and while it is being considered by Scottish Ministers, as this can help those impacted by a potential compulsory purchase understand how a CPO may affect them; and
 - **After an Order is confirmed** keeping land owners informed and, while appropriate compensation and the transfer of ownership is agreed, supporting affected landowners and members of the community through this time.
- 4.2. As well as the people directly affected, the Acquiring Authority should engage with appropriate key agencies, community councils and community planning partners, as well as anyone with a wider interest in the development, such as utility providers, and neighbouring landowners where wider rights may be affected.

- 4.3. Early engagement will afford the Acquiring Authority an opportunity to establish whether developments are likely to give rise to protracted negotiations, and assist them in establishing whether there would be benefits in making a CPO in parallel with negotiations to purchase by agreement. This may be particularly relevant in larger schemes with multiple interests needing to be acquired.
- 4.4. In all cases Acquiring Authorities should provide clarity to affected landowners as early as possible in the process about what their rights are and what expenses (for example, reasonable professional fees for negotiating compensation) can be claimed and when. Where relevant, Authorities should provide clarity on the rates that will be applied and any limits they will seek to apply to expenses incurred.
- 4.5. **The Acquiring Authority should keep a record of all engagement undertaken and all issues raised how it responded to these, and subsequent conclusions. This record should include records of telephone calls and face to face meetings, as well as formal written or email correspondence. This record can be later used as evidence to support any justification for compulsory purchase (see CPOGNA/003).**
- 4.6. **Acquiring Authorities seeking to compulsory purchase land also have a legal duty to provide affected parties with information on their intentions and their rights, as well as how information gathered about them will be used.**

5. Pre-actions Required by Statute

- 5.1. The exercise of certain compulsory purchase powers requires specific pre-actions or steps to have been completed before a CPO can be pursued. Acquiring Authorities should therefore always ensure that they have checked the enabling Act to identify where the legislation specifies pre-requisites that must be completed in addition to the normal procedural requirements for a CPO.
- 5.2. For example, local authorities may use powers under the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 to acquire a listed building compulsorily if they consider that reasonable steps are not being taken for properly preserving it.
- 5.3. In addition to the usual CPO considerations the Acquiring Authority must meet certain procedural requirements, including:
 - a. Demonstrating that it was expedient to make provision for the preservation of the building;
 - b. Serving a Listed Building Repairs Notice on the owner;
 - c. Providing evidence through the planning history of the site that demonstrates no reasonable steps are being taken by the owner for the proper preservation of the listed building and the building fabric continues to deteriorate, despite the Authorities efforts to resolve the situation; and
 - d. Adequately considering the public interest and providing a proportionate response in relation to the owners' rights.

A helpful tool kit for Local Authorities provides further information on preserving Scotland's historic buildings at risk and can be found at <https://www.buildingsatrisk.org.uk/toolkit>

6. Finance

Where an Acquiring Authority is clear about Funding

6.1. The Acquiring Authority needs to be satisfied that it has a reasonable prospect of securing enough funding to (a) purchase the land from the date of acquisition and (b) complete the proposed development of the land within a reasonable timescale. In many, if not all schemes it will be necessary to carry out a full Land Cost Estimate, which details the cost of the land acquisition, reasonable professional fees for those affected, compensation payments for disturbance and any other matter, and compensation for any blight, severance or injurious affection to remaining land.

6.2. This means that the Acquiring Authority should satisfy itself that:

- It has properly estimated the likely levels of compensation that it will need to pay;
- It has (where seeking to purchase only part of someone's land) considered and could meet the financial implications of the landowner(s) serving a Notice of Objection to Severance or advancing a claim for material detriment;
- It could make enough funding available immediately to cope with any acquisition resulting from a successful blight notice; and
- It has estimated the costs of the proposed public works and all associated works (such as the provision of Accommodation Works).

Where an Acquiring Authority is not clear about Funding

6.3. In circumstances where funding streams for the public works/projects are unpredictable or funding sources may change, or if the Acquiring Authority is unable to finalise details until it has assembled the necessary land, the Acquiring Authority must be satisfied that there is a reasonable prospect that it can meet the potential financial commitments.

6.4. Where long term funding is not guaranteed the Acquiring Authority should consider the degree to which others have agreed to contribute or underwrite the scheme and on what basis other bodies will contribute or underwrite.

7. Formal Resolution

7.1. Whilst not required explicitly by statute, it is considered to be good practice for a meeting of the full Authority, or a meeting of a committee or Board of Directors with delegated powers for the Acquiring Authority, to pass a resolution authorising the making of a Compulsory Purchase Order.

7.2. Furthermore, Acquiring Authorities may, in some circumstances, find it helpful to adopt a two stage approval process (approval in principle, then approval to make the Order).

7.3. A two stage process will allow the Acquiring Authority to agree in principle to pursue compulsory purchase, based on the outcome of the pre-actions it has undertaken. It would then subsequently develop its detailed arguments and documentation to support an Order.

- 7.4. A two-step process can keep land owners informed and avoid any unnecessary administrative costs if compulsory purchase is not something which the Acquiring Authority would seek to pursue under normal circumstances. It allows the Acquiring Authority to separate the 'in principle decision' to use compulsory purchase from the detailed evidence and justification ahead of resolving the final Order. The process can also provide certainty for all concerned about the Acquiring Authority's intention to pursue the proposal and, thereby, support negotiations with landowners about purchase by agreement.
- 7.5. Irrespective of the approach taken, the report to the council or committee seeking authorisation to use compulsory purchase should explain in sufficient detail the purpose of the acquisition, the public benefits to be delivered by the scheme and why these are considered to be sufficient to over-ride the rights of the people affected (see further detail at paragraph 3.2 of guidance note CPOGNA/003).
- 7.6. In addition, the Acquiring Authority should clearly show on a map accompanying the papers the extent of all land they intend to purchase compulsorily, with full justification of why the land is needed for the delivery of the purpose/project.**
- 7.7. The council or committee will then either agree to the making of the Order, seek further information, or refuse to resolve to use CPO powers.
- 7.8. Care should be taken to ensure that the wording of the resolution precisely matches what is or will be set out in their draft order, otherwise this may give rise to legal challenge.
- 7.9. An Acquiring Authority cannot use an Order to acquire more land than has been authorised in the resolution, or to acquire land for a different purpose than what has been authorised in the resolution. It is therefore important that the Acquiring Authority ensures that all the land they might need and clear reasoning for this is included in the justification and resolution.
- 7.10. As soon as the Acquiring Authority resolves to make the Compulsory Purchase Order, it should contact the relevant Scottish Government Lead Officer¹ to advise them of this decision as this will help to ensure that consideration of the order is included in future work plans (for example, of the Directorate for Planning and Environmental Appeals).

¹ An up to date list of the appropriate Lead Officers can be found at <https://beta.gov.scot/publications/compulsory-purchase-orders-contact-information/>

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