

Compulsory Purchase in Scotland

Guidance for Acquiring Authorities



Scottish Government
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To	Acquiring Authorities Planning Authorities Landowners & their advisors
Subject	Certificates of Appropriate Alternative Development (CAAD) associated with Compulsory Purchase Orders
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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 Technical Guidance note has been prepared in conjunction with the **Royal Institution of Chartered Surveyors (RICS) in Scotland**, and aims to help both Acquiring Authorities and affected Property Owners and their advisors understand the role of Certificates of Appropriate Alternative Development (CAADs) in the assessment of market value for CPO compensation claims and the procedures that require to be followed for determining these.

This Technical Note is part of the package of guidance notes available to Landowners and Acquiring Authorities associated with the compulsory purchase of land.

This Note comprises of **both** good practice advice and guidance on the legal and procedural requirements.

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

The law relating to CAADs is set out in the Land Compensation (Scotland) Act 1963¹ and the Land Compensation (Scotland) Development Order 1975². Before applying for or issuing a CAAD, authorities are encouraged to obtain their own advice from a suitably qualified professional.

¹ www.legislation.gov.uk/ukpga/1963/51/contents

² www.legislation.gov.uk/uksi/1975/1287/contents/made

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1. What is a Certificate of Appropriate Alternative Development (CAAD)?

- 1.1. A Certificate of Appropriate Alternative Development (CAAD) is a tool used by any party involved in a compulsory purchase scheme to help assess the market value of land or property acquired.
- 1.2. It should be emphasised that a CAAD is **not an actual planning permission, or a planning permission in principle**, but is instead a tool to help property valuers, acting on behalf of both Acquiring Authorities and claimants, arrive at an accurate opinion of the market value of land or property and, thus, the fair amount of compensation to be paid.
- 1.3. It should be noted that a CAAD **only** applies and relates to land or property acquired compulsorily. Where only part of a land holding is acquired, the CAAD has no role in determining the impact of the CPO scheme on the value of the retained land.
- 1.4. In assessing compensation claims the basic principle applied is one of **equivalence** – whereby the dispossessed owner has the right to be put, so far as money can do so, in the same position after the acquisition as if their land had not been taken from them. Compensation is therefore based on an assessment of the market value of the interest in the land at the time that it is compulsorily acquired – i.e. the best price that a person could expect to get if they willingly sold their interest on the open market, without the threat of the compulsory purchase; and disregarding any enhanced value in the land due to the scheme underlying the acquisition.
- 1.5. When determining market value account is taken of any pre-existing potential development value, including any existing planning permissions **as well as** any prospective permissions that it can be assumed would have been granted were it not for the compulsory acquisition of the land/property. Whilst this principle is broadly understood, it has been noted that there has been a significant increase in recent years in the number of disputes between Acquiring Authorities and landowners as to the development prospects for land acquired compulsorily. This has arisen for a number of reasons but primarily because of the significant difference in the value of land with and without development potential, which has a direct bearing on the amount of compensation required to be paid.
- 1.6. A CAAD therefore provides a mechanism to establish what development or class(es) of development (if any) for which the **prospect** of planning permission should be assumed when assessing compensation.
- 1.7. A CAAD can be either positive (i.e. concluding that specified types of development would have been permitted) or negative (i.e. concluding that no other types of development would have been permitted).
- 1.8. Applications for CAADs are considered by the relevant local authority planning department and are open to appeal to Scottish Ministers. It should be noted that in many cases the planning authority dealing with the CAAD application would also be the Acquiring Authority promoting the CPO.

2. When should a CAAD be considered and who can apply?

2.1. A CAAD may be useful in any CPO but particularly in cases:

- Where the development plan covering the land to be compulsory purchased is out of date;
- Where there is no specific development plan allocation for the land. For example, where the development plan shows “open space”; or
- Where the development plan allocates the land specifically for some public purpose, such as a new school.

2.2. An application for a CAAD can be made by either:

- a) A land owner who has been identified within the Compulsory Purchase Order and has an interest in the land concerned; or
- b) The Acquiring Authority promoting the Compulsory Purchase Order.

A person who has no interest in the land cannot apply for a CAAD.

2.3. When assessing any compensation due following a compulsory acquisition the Acquiring Authority must take a relevant CAAD into account, even if it was applied for by themselves or by the owners of a different interest in the same land.

2.4. A CAAD (including ‘nil certificates’- See 3.3) can be applied for at any point after an Acquiring Authority has committed to the compulsory purchase of land³. However, it should be noted that if a dispute over compensation has been referred to the Lands Tribunal for Scotland an application for a CAAD cannot be made unless both parties agree, or the Tribunal gives leave for one party to apply. The Scottish Government therefore advises interested parties to, where necessary, apply for a CAAD as early as possible in the process to enable this to be issued and then be used to inform negotiations about compensation.

3. Applying for and Obtaining a CAAD

Applications for a CAAD

3.1. There is no prescribed form for making an application for a CAAD but it must be made in writing to the relevant local authority planning department. Applications must also be accompanied by a map or plan that adequately identifies the land in question⁴.

3.2. The applicant must state in their application:

- The type(s) and scale of development or land use(s) which he or she considers would be appropriate for the land if it were not being acquired (for example, the number/density and type of housing or the size of commercial building that they consider would be appropriate);
- Whether he or she believes that they would be appropriate immediately or at a specified time in the future; and

³ This is normally once the Compulsory Purchase Order has been made and subsequently advertised

⁴ The Acquiring Authority promoting the Compulsory Purchase Order should be able to provide you with a copy of this if required

- The grounds on which he/she believes that the alternative development(s)/use(s) are appropriate.

The onus is on the applicant to substantiate the reasons why they consider that the specified alternative development(s) is appropriate. This will normally be done by reference to the relevant Development Plan(s) for the area and/or to any other relevant planning policies or proposals.

Nil certificates

- 3.3. A Planning Authority has the option to issue a 'nil' certificate indicating that no development would have been permitted. In such circumstances, the authority must set out the reasons why it believes that no alternative types of development would be suitable for the land in question in the foreseeable future. As noted previously, either a landowner or the relevant Acquiring Authority may apply for a CAAD – including seeking a nil certificate.

Nil Certificate Case Study: Inverness West Link

This case demonstrates how clear, detailed policies and a spatial strategy in the Local Development Plan can help determine CAAD applications – in particular providing robust justification for the issuing of “nil certificates”.

The Inverness West Link scheme comprises a new road linking the western and southern parts of the City via new river and canal crossings, which is, in part, intended to open up allocated development land for residential development. The CPO was made by the Highland Council and notice served on affected landowners in November 2013. The CPO was confirmed in August 2015 and title to the land taken via GVD in January 2016. The relevant date for CAAD applications was therefore November 2013. The land required was allocated in the approved development plan as part of a mixed-use City expansion area. However, this was subject to a long-standing development strategy for the area that all Inverness' peripheral expansion areas could only be developed in parallel with significant infrastructure improvements, including in this case, the Inverness West Link road or a suitable alternative.

In June 2016, three CAAD applications from the principal, private landowners affected by the scheme at Ness-side were submitted to the Highland Council seeking a positive certificate for class 9 (residential) use. Highland Council issued nil certificates for all three applications in August 2016 citing the policies and agreed spatial strategy for Ness-side in the Highland-wide Local Development Plan. This stated clearly that the land in question was constrained by a lack of strategic improvements to road infrastructure, required master planning to avoid piecemeal development, and could not be developed before the access issues were addressed. Appeals against all three CAADs were submitted to DPEA but were subsequently withdrawn.

Whilst the compensation sums to be paid for this project have yet to be finalised the reasoned issuing of negative CAAD certificates and the withdrawal of the appeals are very likely to be material to any future ruling by the Lands Tribunal, should the valuations be contested. Furthermore, the Inverness West Link project has been designed in such a way (e.g. in terms of alignment and junctions) that the development potential of the land adjoining the scheme will be maximised. The resultant uplift in value of the land retained by the affected owners, which is attributable to the scheme, is also expected to be reflected in the final valuation. Highland Council hopes that this will help to demonstrate the benefits of public and private sectors working together to coordinate infrastructure provision to unlock development potential.

Where a CAAD already exists

- 3.4. The planning authority, if requested to do so by the owner of an interest in the land, should state whether an application for a CAAD has been made, and if so by whom, and supply a copy of any certificate that has been issued.

4. Determining a CAAD Application

4.1. Where the local planning authority considering a CAAD is also the Acquiring Authority promoting the scheme the application should be considered by officials who were not involved in the preparation of the CPO.

4.2. In considering the request for a CAAD, the planning authority will disregard the intended purpose for which the Acquiring Authority is seeking to compulsorily purchase the land and the underlying public purpose of the scheme.

4.3. The planning authority will therefore assume that the scheme for which the land is to be acquired, together with any references to the underlying proposal that appear in any planning documents, were cancelled at a “relevant date”.

4.4. The “relevant date” will be when the Acquiring Authority:

- Published and served a notice of the making of the compulsory purchase order;
- Is deemed to have served a notice to treat in respect of the interest; or
- Has made an offer in writing to negotiate for the purchase of the interest.

It should be noted that, whilst a CAAD is determined as at the “relevant date”, compensation is valued/assessed at the date that the land is acquired. There may be circumstances (e.g. where a CPO receives objections and a PLI needs to be scheduled, or where a confirmed CPO is challenged) where there may be a significant gap between these two dates, during which market conditions may have changed and, hence, the amount of compensation due has also changed.

CAAD Date of Assessment Case Study: Field 52, Aberdeen Western Peripheral Route

This case demonstrates how a difference between the date of assessment of the CAAD and the date of valuation can affect the consideration of a CAAD, and the impact it has on the final compensation paid. This 4.7-hectare site on the outskirts of Stonehaven was required for road realignment and the formation of a junction as part of the AWPR project, promoted by Transport Scotland on behalf of Scottish Ministers.

Following the publication of the draft Road Orders for the AWPR in September 2007, the owners applied for planning permission for a supermarket and filling station in October 2007. However, the application was not determined by Aberdeenshire Council due to the AWPR proposals for the site. In January 2009 the owners therefore submitted a CAAD application for the same uses – with the date of assessment being set at September 2007 (i.e. the date the draft Orders were published). The CAAD was determined positively by the Council in July 2009 on the basis that the need for a supermarket in Stonehaven had been identified and Field 52 was one of the candidate sites – all be it with some access difficulties to be addressed.

Scottish Ministers appealed the CAAD decision and, following consideration, the Reporter determined that the disadvantages of the site were such that planning permission would not have been granted for a supermarket and filling station at the date of assessment and, hence, issued a negative CAAD.

However, given the long delay in implementation of the AWPR project, due to a legal challenge, vesting of the title for the site was not undertaken for some time and the relevant date of valuation was therefore not until January 2013. The owner maintained that, due to the passage of time since the CAAD assessment, circumstances had changed at the date of valuation and that a buyer on the open market would have paid significant hope value for the site, above the existing agricultural use value.

The matter was referred to the Lands Tribunal for Scotland who determined that the case should be considered giving appropriate weight to the terms of the negative CAAD, but that their decision should not be tied to it given the passage of time. They concluded that the compensation payable should be significantly above existing use value (but not full development value) to reflect the hope value that that market would have assumed at the valuation date.

Whilst the significant delay between the assessment date and the valuation date was outwith the control of the Acquiring Authority in this case it illustrates the importance of considering the relevant dates, and the potential complexities of CAAD that can result if authorities do not take ownership of land and property soon after an Order is confirmed.

Planning Authority considerations

- 4.5. The current Development Plan(s) for the area **at the relevant date** will be the primary reference point for a planning authority considering a CAAD application. The designations and policies contained in the Local Development Plan (LDP) and, where relevant, the Strategic Development Plan (SDP) will, in most cases, enable the planning authority to determine what alternative development may be appropriate.
- 4.6. However, a planning authority cannot refuse to issue a CAAD for a particular class of development **solely** on the grounds that it would be contrary to the relevant development plan **where** the development plan(s) earmark the land in question for a particular public purpose related to the CPO scheme (such as a road or a school). Given that the consideration of market value ignores the fact that the land is being acquired compulsorily and disregards the impact of the scheme underlying the CPO on the value of the land; it follows that the planning authority should ignore any development plan policies that have no function beyond the acquisition scheme.
- 4.7. However, the planning authority may take account of broader policies such as green belts and countryside protection policies (if these imply that the classes of alternative development suggested by the applicant would not have been acceptable if the scheme associated with the compulsory purchase were not pursued).
- 4.8. The planning authority should exercise its judgement, taking into account those factors that would normally apply to its consideration of planning applications. These factors might include:
- The character of the development in the surrounding area;
 - Any general policy of the development plan and national planning policy (ignoring any development policies that have no function beyond the scheme underlying the compulsory purchase) ;
 - Any relevant foreseeable development plan policies (such as Master Plans, or Development plans etc. currently being advanced); and
 - Any other relevant considerations.
- 4.9. The planning authority should exclude only those forms of development that are considered inappropriate. The planning authority may also issue a CAAD other than for the class or classes of development that the applicant has applied for, or contrary to representations made by the party(s) directly concerned. In this case the planning authority should state its reasons and advise the applicant that they have a right to appeal the decision to the Directorate for Planning and Environmental Appeals, on behalf of Scottish Ministers.

Alternative Development Case Study: Haymarket Yards, Edinburgh Trams

This case demonstrates the importance of considering all types of alternative development against the policies and proposals in the relevant Development Plan(s) for the area at the relevant date, not only those included in the CAAD application. It also illustrates how interpretation of the 'no-scheme world' can affect the outcome of CAAD applications and subsequent rulings by the Land Tribunal.

Plot 518 was a narrow strip of land near Haymarket station, which had previously been part of the adjoining office development site. In July 2005, the owner was notified that the site may be acquired for the Edinburgh tram project, promoted by the City of Edinburgh Council. At the time the land was vacant but was used informally for car parking and storage. It was part of a larger site that had planning permission for office development with associated parking as part of a wider Major Development Opportunity.

The owner applied for a CAAD in November 2009 for a 32 space car park. A negative CAAD was issued by Edinburgh Council in November 2010 stating that planning permission would only have been granted to facilitate the construction of the tram project and for no other purpose. This was appealed in December 2010 and considered by the DPEA in October and November 2011.

The Council determined the original CAAD application negatively on the grounds that car parking would have been contrary to policies restricting parking at sites with excellent public transport links. High quality office development with associated parking was identified as suitable for the site, with an access road and pedestrian and cycle route through the wider site required as part of a masterplan.

The Reporter agreed with the Council that stand-alone parking with spaces for sale or lease would have been contrary to the Development Plan. However, the Reporter also considered that in the 'no-scheme world' (i.e. if the land was not required for the tram project) the extant permission for the wider office development site would have been granted and that this could have been amended to realign the road and pedestrian/cycle route and still accommodate car parking of the scale sought without compromising the quality of the permitted scheme. Scottish Ministers therefore cancelled the CAAD issued by the City of Edinburgh Council and issued a new certificate including office development with associated car parking.

The outcome of the CAAD appeal was highly relevant when the owners applied to the Lands Tribunal in 2015 for a ruling on the value of compensation to be paid, by which time the adjacent office site had been developed. The owners argued that, in the no-scheme world, a larger office development could have been built on the site because plot 518 could have been utilised for car parking without compromising the relevant ratios of office floor space to the number of parking spaces. The Tribunal agreed and ruled that compensation should be paid on the basis that plot 518 would have enabled an additional 17,500 square feet of office space and an additional 3-4 car parking spaces to be built.

CAAD where Planning Permission has previously been refused or granted subject to restrictions

- 4.10. In some cases the planning authority might previously have refused planning permission for the land in question, or granted it subject to restrictive conditions. However, a decision to refuse or attach restrictive conditions to a previous application does not prevent the planning authority from determining a CAAD positively, particularly where the planning assumptions would be materially different, were it not for the scheme underlying the compulsory purchase.

Out-of-date Development plans

4.11. Where the development plan is out-of-date, the planning authority should consider any emerging but, as yet, unapproved plan, any decisions given on other planning applications relating to neighbouring land (including land unaffected by the proposed acquisition), and the existing character of the surrounding area and development.

5. Issuing a CAAD

5.1. On request, the planning authority should issue a CAAD that states what planning permissions it would have granted if the land were not being acquired compulsorily.

5.2. In the CAAD, the planning authority should state that either:

- It would have given planning permission for development of one or more specified classes in addition to the development for which the land is to be acquired (a 'positive certificate'); or
- It would not have given planning permission for any development other than the development for which the land is to be acquired, (a 'nil' or 'negative' certificate).

5.3. The planning authority may consider that it would have granted permission only subject to certain conditions and/or at a future time. In this case, the planning authority should specify the conditions that would apply and/or the future date at which it considers that permission would potentially have been granted.

5.4. To be fully effective, and to be of meaningful assistance in the negotiation and agreement of the compensation claim, a CAAD should be as detailed and unambiguous as possible. Where appropriate a CAAD should specify (in as much detail as is possible given the circumstances of the application) any material conditions that would be attached to a planning permission and the type(s) and scale of development (e.g. the number and type of housing or the size of commercial building) that would be considered appropriate.

6. Timescales

6.1. The planning authority must issue the CAAD **within two months** from the date it receives the application **and** all the required associated information (or such extended period as may be agreed with the applicant in writing).

6.2. Where the planning authority fails to issue a decision within the specified time limit it is open to the applicant to appeal to the Directorate for Planning and Environmental Appeals (DPEA) for a determination of the CAAD (see next section). Planning authorities are therefore encouraged to notify applicants when they consider that they have received all the information necessary to determine an application and, therefore, the date by which they expect to issue a decision. Where any information is lacking the planning authority should contact the applicant as soon as possible identifying the additional information required and making it clear that the determination of the application cannot proceed until this is received.

7. CAAD Appeals

- 7.1. Both the Acquiring Authority and the landowner can appeal **within 1 month of the certificate being issued** directly to the DPEA against the planning authority's decision (even if they are not the applicant) or a failure by the planning authority to issue a decision within the specified time limits.
- 7.2. Before determining an appeal both parties must be given an opportunity to be heard. DPEA will therefore (unless agreed by all parties) arrange for the case to be assigned to a Reporter who will consider all relevant facts of the case, determine whether a Public Local Inquiry or Hearing is required, and the form of submissions and representations. After all the evidence and arguments have been heard the Reporter will then provide Scottish Ministers with a report and recommendations on whether the appeal should be allowed in whole or in part. It is for Scottish Ministers to ultimately decide upon the appeal, but the Reporter's report and recommendations will carry considerable weight. DPEA aim to submit their report to Ministers for consideration within 26 weeks for cases where a Hearing is held or 32 weeks where a Public Local Inquiry is held.
- 7.3. Scottish Ministers will consider any CAAD appeal and then decide whether to:
- Confirm the CAAD;
 - Vary the CAAD;
 - Cancel the CAAD; or
 - Cancel the CAAD and issue a different CAAD in its place.
- The Scottish Government aims to determine 80% of CAAD appeals within 2 months and 100% within 3 months of the receipt of the report from DPEA.
- 7.4. Any person aggrieved by the Scottish Ministers' decision on the appeal may challenge its validity in the Court of Session **within a period of six weeks** from the date of the decision.
- 7.5. It is worth noting that any such challenge on the validity of the decision of the Scottish Ministers can only be made on the grounds of the lawfulness, rather than the merits, of the decision itself.

8. CAAD Fees

- 8.1. Circular 1/2004⁵ on Planning Fees states that no fee is chargeable for an application for a CAAD and a public authority cannot charge a fee for carrying out its statutory functions unless it has express authority to do so. If a planning authority intends to charge a fee for the processing of an application for a CAAD it must therefore be able to satisfy itself that it has authority to do so and must set out clearly which powers it intends to use, and specify the amounts due in full to the applicant prior to receipt of the application.
- 8.2. Notwithstanding this, as the costs incurred by affected owners associated with determining the value of land to be purchased compulsorily are normally reimbursable as part of a claim for compensation, **authorities are strongly encouraged to waive any fees or charges for a CAAD application and assessment.**
- 8.3. No fees are payable for a CAAD appeal.

⁵ <http://www.gov.scot/Resource/Doc/47251/0026306.pdf>

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