

Appendix A

Orders made under section 226 of the Town and Country Planning Act 1990 (as amended by section 99 of the Planning and Compulsory Purchase Act 2004)

APPROPRIATE ACQUIRING AUTHORITIES

1. Section 226 of the 1990 Act enables a local authority as defined in section 226(8) (i.e. county, district or London borough council), a joint planning board¹ or a national park authority² to acquire land compulsorily for 'planning purposes' as defined by section 246(1). These are the only bodies to which the powers in section 226 and, hence, the advice to acquiring authorities in this appendix, apply.

THE POWERS

2. The powers in section 226 as amended by section 99 of the Planning and Compulsory Purchase Act are intended to provide a positive tool to help acquiring authorities with planning powers to assemble land where this is necessary to implement the proposals in their community strategies and Local Development Documents. These powers are expressed in wide terms and can therefore be used by such authorities to assemble land for regeneration and other schemes where the range of activities or purposes proposed mean that no other single specific compulsory purchase power would be appropriate. However, these powers should not otherwise be used in place of other more appropriate enabling powers³, and the statement of reasons should make clear the justification for using the Planning Act powers. In particular, the First Secretary of State ('the Secretary of State' in this Appendix) may refuse to confirm an order if he considers that this general power is or is to be used in a way intended to frustrate or overturn the intention of Parliament by attempting to acquire land for a purpose which had been explicitly excluded from a specific power.
3. In preparing and submitting compulsory purchase orders under section 226, acquiring authorities with planning powers will need to have regard to the general advice in paragraphs 13 to 57 of this Part, including the guidance about planning requirements and the justification of the order in paragraphs 16 to 23. Authorities proposing to acquire land under section 226 should also have regard to the procedural changes introduced in the Planning and Compulsory Purchase Act 2004 and described in the Annex to this Part of the Memorandum. They should submit their orders for confirmation via the relevant regional Government Office.

¹ section 244(1) of the 1990 Act.

² section 244A of the 1990 Act.

³ eg. section 164 of the Public Health Act 1875, section 89 of the National Parks and Access to the Countryside Act 1949, section 19 of the Local Government (Miscellaneous Provisions) Act 1976, section 239 of the Highways Act 1980, or section 17 of the Housing Act 1985. See also paragraph 8 of Appendix E, which explains that when land for housing development is being assembled under planning powers, the Secretary of State will have regard to the policies set out in that Appendix.

4. The Secretary of State takes the view that an order made under subsection (1) of section 226 should be expressed in terms of *either* paragraph (a) or paragraph (b) of that subsection. As these are expressed as alternatives in the legislation, the order should clearly indicate which is being exercised, quoting the wording of paragraph (a) or (b) as appropriate as part of the description of what is proposed.

Section 226(1)(a)

5. The power provided in the amended section 226(1)(a) enables acquiring authorities with planning powers to exercise their compulsory acquisition powers if they think that acquiring the land in question will facilitate the carrying out of development⁴, redevelopment or improvement on, or in relation to, the land being acquired and it is not certain that they will be able to acquire it by agreement. The use of the words 'on, or in relation to' means that the scheme of development, redevelopment or improvement for which the land needs to be acquired does not necessarily have to be taking place on that land so long as its acquisition can be shown to be essential to the successful implementation of the scheme. This could be relevant, for example, in an area of low housing demand where property might be being removed to facilitate replacement housing elsewhere within the same neighbourhood.

The well-being power

6. The wide power in section 226(1)(a) is subject to subsection (1A) of section 226. This provides that the acquiring authority must not exercise the power unless they think that the proposed development, redevelopment or improvement is likely to contribute to achieving the promotion or improvement of the economic, social or environmental well-being of the area for which the acquiring authority has administrative responsibility. The amended power in section 226(1)(a) will assist those authorities to whom the provisions of section 2 of the Local Government Act 2000 apply to fulfil their duties under that section to promote the economic, social and environmental well-being of their area. Acquiring authorities who do not have powers under the Local Government Act 2000 can also make use of section 226(1)(a). They will also need to be able to show that the purpose for which the land is being acquired will contribute to the well-being of the area for which they are responsible. The benefit to be derived from exercising the power is also not restricted to the area subject to the compulsory purchase order, as the concept is applied to the well-being of the whole (or any part) of the acquiring authority's area.
7. In determining whether the purpose for which they propose to acquire land compulsorily under section 226(1)(a) can reasonably be expected to contribute to the achievement of the promotion or improvement of the economic, social or environmental well-being of their area, an acquiring authority may find it helpful to have regard to the statutory guidance issued by ODPM in 2001 concerning the interpretation of that power in the Local Government Act 2000⁵.

⁴ Under section 336(1) of the 1990 Act, 'development' has the meaning given in section 55 (including any special controls given by direction in relation to demolition and redevelopment (see DoE Circular 10/95: *Planning Controls over Demolition*)).

⁵ Entitled *Power to promote or improve economic, social or environmental well-being*, and accessible on the ODPM website at: http://www.odpm.gov.uk/stellent/groups/odpm_localgov/documents/page/odpm_locgov_605709.hcsp

8. As that guidance explains, the Government's purpose in introducing the well-being power has been to relax the traditionally cautious approach adopted by many local authorities by encouraging innovation and closer joint working between local authorities and their partners to improve the quality of life of those living, working or otherwise involved in the community life of their area. As the guidance goes on to suggest, each authority will want to consider how the well-being power can be used to promote the sustainable development of its area by delivering the actions and improvements identified in its community strategy.
9. It is in this context that acquiring authorities may find the new section 226(1)(a) power useful. Section 39 of the 2004 Act requires regional and local plans to be prepared with a view to contributing to the achievement of sustainable development, and sections 1 and 17 require them to adopt a spatial planning approach. Further guidance on this is given in Planning Policy Statement 1: *Creating Sustainable Communities*⁶, which points out that spatial planning goes beyond traditional land use planning to bring together and integrate policies for the development and use of land with other policies and programmes which influence the nature of places and how they function.
10. That may well include policies relating to such issues as tackling social exclusion, promoting regeneration initiatives and improving local environmental quality. All such issues can have a significant impact on land use, for example by influencing the demands on or needs for development, but they are not necessarily capable of being delivered solely or mainly through the granting or refusal of planning permission. They may require a more proactive approach by the relevant planning authority including facilitating the assembly of suitable sites, for which the compulsory purchase powers in section 226(1)(a) may provide helpful support where such acquisitions can be justified in the public interest.
11. The re-creation of sustainable communities through better balanced housing markets is one regeneration objective for which the section 226(1)(a) power might be appropriate. For example, it is likely to be more appropriate than a Housing Act power if the need to acquire and demolish dwellings were to arise as a result of an oversupply of a particular house type and/or housing tenure in a particular locality. A greater diversity of housing provision may be needed to ensure that neighbourhoods are sustainable in the long term, and improved housing quality and choice may be necessary to meet demand. This may involve acquiring land to secure a change in land use, say, from residential to commercial/industrial or to ensure that new housing is located in a more suitable environment than that which it would replace. In urban areas experiencing market renewal problems, the outcome may be fewer homes in total.

Planning matters

12. Any programme of land assembly needs to be set within a clear strategic framework, and this will be particularly important when demonstrating the justification for acquiring land compulsorily under section 226(1)(a) powers as a means of furthering the well-being of the wider area. Such a framework will need to be founded on an appropriate evidence base, and to have been subjected to consultation processes including with

⁶ Consultation draft published in February 2004 and accessible on the ODPM website at: http://www.odpm.gov.uk/stellent/groups/odpm_planning/documents/page/odpm_plan_027494.pdf

those whose property is directly affected. The Regional Spatial Strategy provides the regional planning context with which local development documents have to be in general conformity under section 24 of the 2004 Act and which will set out more detailed proposals. Where there is a conflict between policies in any of these documents section 38 provides that the conflict must be resolved in favour of the document most recently adopted, approved or published.

13. The planning framework providing the justification for an order should be as detailed as possible in order to demonstrate that there are no planning or other impediments to the implementation of the scheme. Where the justification for a scheme is linked to proposals identified in a development plan document which has been through the consultation processes but has either not yet been examined or is awaiting the recommendations of the Inspector, this will be given due weight.
14. Where the local plan is out-of-date and local development documents are still in preparation, it may well be appropriate to take account of more detailed proposals being prepared on a non-statutory basis with the intention that they will be incorporated into the local development framework at the appropriate time. Such proposals may relate, for instance, to accommodating the need for further growth in an area. Or they might be in the form of detailed proposals for handling the consequences of low housing demand. Such proposals might, for example, be in the form of masterplans or other detailed delivery mechanisms prepared by the relevant local authority and giving a spatial dimension to the prospectuses of market renewal pathfinders. Where such proposals are being used to provide additional justification and support for a particular order, there should be clear evidence that all those who might have objections to the underlying proposals in the supporting non-statutory plan have had an opportunity to have them taken into account by the body promoting that plan, whether or not that is the authority making the order.
15. It is also recognised that it may not always be feasible or sensible to wait until the full details of the scheme have been worked up, and planning permission obtained, before proceeding with the order. Furthermore, in cases where the proposed acquisitions form part of a longer-term strategy which needs to be able to cope with changing circumstances, it is acknowledged that it may not always be possible to demonstrate with absolute clarity or certainty the precise nature of the end-use proposed for the particular areas of land included in any particular CPO. In all such cases the responsibility will lie with the acquiring authority to put forward a compelling case for acquisition in advance of resolving all the uncertainties.

Confirmation

16. Any decision about whether to confirm an order made under section 226(1)(a) of the 1990 Act will be made on its own merits, but the factors which the Secretary of State can be expected to consider include:
 - (i) whether the purpose for which the land is being acquired fits in with the adopted planning framework for the area or, where no such up-to-date framework exists, with the core strategy and any relevant Area Action Plans in the process of preparation in full consultation with the community;

- (ii) the extent to which the proposed purpose will contribute to the achievement of the promotion or improvement of the economic, social or environmental well-being of the area;
- (iii) the potential financial viability of the scheme for which the land is being acquired. A general indication of funding intentions, and of any commitments from third parties, will usually suffice to reassure the Secretary of State that there is a reasonable prospect that the scheme will proceed. The greater the uncertainty about the financial viability of the scheme, however, the more compelling the other grounds for undertaking the compulsory purchase will need to be. The timing of any available funding may also be important. For example, a strict time-limit on the availability of the necessary funding may be an argument put forward by the acquiring authority to justify proceeding with the order before finalising the details of the replacement scheme and/or the statutory planning position;
- (iv) whether the purpose for which the acquiring authority is proposing to acquire the land could be achieved by any other means. This may include considering the appropriateness of any alternative proposals put forward by the owners of the land, or any other persons, for its re-use. It may also involve examining the suitability of any alternative locations for the purpose for which the land is being acquired.

Section 226(1)(b)

17. Section 226(1)(b) allows an authority, if authorised, to acquire land in their area which is required for a purpose which it is necessary to achieve in the interests of the proper planning of an area in which the land is situated. The potential scope of this power is broad. It is intended to be used primarily to acquire land which is not required for development, redevelopment or improvement, or as part of such a scheme.

Section 226(3)

18. In addition to land to which section 226(1) applies ('the primary land'), section 226(3) provides that an order made under section 226(1) may also provide for the compulsory purchase of
- (a) any adjoining land which is required for the purpose of executing works for facilitating the development or use of the primary land; or
 - (b) land to give in exchange for any of the primary land which forms part of a common or open space or fuel or field garden allotment.

An authority intending to acquire land for either of these purposes in connection with the acquisition of land under subsection (1) must therefore specify *in the same order*, the appropriate subsection (3) acquisition power and purpose.

Section 226(4)

19. This subsection provides that it is immaterial by whom the authority propose that any activity or purpose mentioned in subsections (1) or (3)(a) of section 226 should be

undertaken or achieved. In particular, the authority need not propose to undertake an activity or achieve a purpose themselves.

Section 245 of the 1990 Act

20. Section 245(1) provides the Secretary of State with the right to disregard objections to orders made under section 226 which, in his opinion, amount to an objection to the provisions of the development plan.
21. Sections 245(2) and (3) have been repealed and replaced by section 13C of the Acquisition of Land Act 1981 as inserted by section 100 of the Planning and Compulsory Purchase Act (see paragraphs 19 to 21 of the Annex to this Part).

INTERESTS IN CROWN LAND

22. Sections 293 and 296 of the 1990 Act apply where an acquiring authority with planning powers proposes to acquire land compulsorily under section 226 in which the Crown has an interest. The Crown's interest cannot be acquired compulsorily under section 226, but an interest in land held otherwise than by or on behalf of the Crown may be acquired with the agreement of the appropriate body. This might arise, for example, where a government department which holds the freehold interest in certain land may agree that a lesser interest, perhaps a lease or a right of way, may be acquired compulsorily and that that interest may, therefore, be included in the order. Further advice about the purchase of interests in Crown land is given in Appendix N.