

CURRENT TOPICS

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1. This paper is divided into two parts. The first considers the changes introduced by the Planning Act 2008 in so far as they affect compulsory purchase procedures. The second considers the future of the Lands Tribunal in the light of the new tribunal system introduced by the Tribunals, Courts and Enforcement Act 2007.

Compulsory Purchase under the Planning Act 2008

Introduction

2. The Planning Act 2008 received the Royal Assent on 26 November 2008. Most of its provisions are not yet in force, and flesh is to be placed on the bones of the Act by Regulations and statutory guidance which has yet to be issued.¹

3. The introductory wording to the Act says that it is

“An Act to establish the Infrastructure Planning Commission and make provision about its functions; to make provision about, and about matters ancillary to, the authorisation of projects for the development of nationally significant infrastructure; to make provision about town and country planning; to make provision about the imposition of a Community Infrastructure Levy; and for connected purposes.”

4. So far as compulsory acquisition is concerned, it is in the area of nationally significant infrastructure projects that are subject to authorisation by the Infrastructure Planning Commission where the main changes will come about.
5. This part of my paper examines the implications of the 2008 Act for cases involving nationally significant infrastructure projects. First, it gives an overview of the relevant legislative provisions. Secondly, I highlight some issues to which the provisions give rise.

I. An over-view of the relevant provisions

6. The Act creates a new consent process for nationally significant infrastructure projects. To the extent that “development” is or forms part of such a project,

¹ At the time of writing, the following draft regulations are subject to consultation: draft Infrastructure Planning (Applications and Procedure) Regulations 2009 (on the consultation and publicity activities to be undertaken prior to submission of an application for a development consent order and the manner and form in which an application is submitted), a draft Infrastructure Planning (Model Provisions) Order 2009 (on model provisions to be included in draft development consent orders), draft Infrastructure Planning (Environmental Impact Assessment) Regulations 2009 (to transpose the EIA Directive to the new IPC regime), draft Conservation (Natural Habitats etc) (Amendment) (No 2) Regulations 2009 (to transpose the Habitats Directive to the new IPC regime). Also under consultation is draft guidance on the application form and pre-application consultation, and draft guidance on what constitutes associated development for which the IPC may grant development consent when consenting a nationally significant infrastructure project.

“development consent” must be obtained under the Act.² An application for an order granting development consent must be made to the Infrastructure Planning Commission.³ The Commission is created by the Act itself, and its functions are those given by or under the Act.⁴

7. An applicant may request that the order granting development consent authorises the compulsory acquisition of land or of interests in or rights over land.⁵ Such a request is called a “compulsory acquisition request”.⁶ If no such request is made, the development consent cannot authorise the compulsory acquisition of land unless all those interested in the relevant land consent to the acquisition or prescribed procedures have been followed.⁷ The detailed provisions relating to compulsory acquisition are discussed later on in this paper.
8. “Development” is given a wider meaning under the 2008 Act than under the Town and Country Planning Act 1990.⁸ For example, it includes works which would require listed building or conservation area consent.⁹ The enlarged definition of development seeks to ensure that the development consent procedure is unified so that the single consent is competent to authorise all the proposed works. As a result, where development consent is needed under the Act, the Act disapplies the requirement for consent under other regimes where this would result in duplication.¹⁰ Consequential amendments are made to other enactments as a result of the new development consent regime.¹¹
9. The Act gives a list of the categories of nationally significant infrastructure projects to which the requirement for development consent applies.¹² The list is subject to certain threshold criteria which must be met if a project within one of the defined categories is to be treated as a nationally significant project.¹³ These criteria relate, broadly speaking, to the size, location and capacity of the type of development in question. By way of example, the construction or extension of on shore generating stations are nationally significant infrastructure projects provided they are within England and Wales and have a capacity of 50 megawatts. For offshore stations the capacity threshold is 100 megawatts.¹⁴
10. The Secretary of State may make additions or amendments to the list of types of nationally significant infrastructure projects Act by order.¹⁵ A copy of the statutory

² S31.

³ S37(2).

⁴ S1.

⁵ S59(1). It may include the creation of new rights over land: see s159.

⁶ S59(1)(b).

⁷ S123.

⁸ S32.

⁹ S32.

¹⁰ S33.

¹¹ S36 and schedule 2.

¹² S14(1).

¹³ Ss14(2) and 15 to 30.

¹⁴ S15.

¹⁵ S14(3). In certain case the Secretary of State may direct that a particular application for consent or authorisation which has been to a different authority is to be treated as an application for a nationally significant project falling within the Act: see s35.

list as it currently stands is attached as appendix 1 to this paper.¹⁶ Reference should also be made to the qualifying criteria applicable to each type of development.¹⁷

National policy statements

11. Central to the determination of applications for development consent under the 2008 Act is the consideration of any national policy statement that has effect in relation to the development in question. The Secretary of State may designate a statement as a national policy statement for the purposes of this Act if the statement (a) is issued by the Secretary of State, and (b) sets out national policy in relation to one or more specified descriptions of development.¹⁸ He may also designate policy as a national policy statement even if it pre-dates the coming into force of the relevant provisions of the 2008 Act.¹⁹
12. No statement of policy can be designated a national policy statement unless a sustainability appraisal of it has been carried out, and it has been subject to the publicity, consultation and parliamentary requirements contained in the Act.²⁰ It is not the purpose of this paper to discuss those requirements in detail. The courts have acknowledged that planning policy having the status akin to a national policy statement is likely to be accorded significant weight in planning decisions, consistent with the extensive process of consultation and consideration leading to its designation as such.²¹
13. Subject to certain exceptions, the Act requires the Commission to decide applications in accordance with a relevant national policy statement.²²
14. The policy set out in a national policy statement may in particular²³
 - (a) set out, in relation to a specified description of development, the amount, type or size of development of that description which is appropriate nationally or for a specified area;
 - (b) set out criteria to be applied in deciding whether a location is suitable (or potentially suitable) for a specified description of development;
 - (c) set out the relative weight to be given to specified criteria;
 - (d) identify one or more locations as suitable (or potentially suitable) or unsuitable for a specified description of development;
 - (e) identify one or more statutory undertakers as appropriate persons to carry out a specified description of development;
 - (f) set out circumstances in which it is appropriate for a specified type of action to be taken to mitigate the impact of a specified description of development.
15. Where land is in a location identified in a national policy statement as suitable (or potentially suitable) for a specified description of development, it will fall within the

¹⁶ The appendix reproduces the text of s14(1) to (3).

¹⁷ Ss15-30.

¹⁸ S5. National policy statements are not confined to nationally significant infrastructure projects.

¹⁹ S12.

²⁰ S5(3) and 5(4). For the detail those requirements, see ss7-9 of the Act.

²¹ *R (Essex County Council) v Secretary of State for Transport* [2005] EWHC 20 (Admin) at [226], in relation to the Air Transport White Paper (which states that it is a national policy statement, albeit it precedes the 2008 Act).

²² S104.

²³ S5(5).

blighted land provisions under schedule 13 to the Town and Country Planning Act 1990.²⁴

Applications

16. The Act contains express provisions in respect of pre-application consultation.²⁵ Guidance on how to comply with the provisions may be issued by the Commission or the Secretary of State.²⁶ Consultation of certain bodies and persons is mandatory.²⁷ Among those who must be consulted are those who the applicant, after making diligent inquiry, knows to be an owner, tenant, lessee, and occupier of the land, or to have an interest in or the power to convey or release the land.²⁸ “Land” is given the same meaning as under section 5(1) of the Compulsory Purchase Act 1965.²⁹
17. Applications for orders granting development consent must specify the development to which it relates, be made in the prescribed form, be accompanied by “the consultation report”, and be accompanied by documents and information of a prescribed description.³⁰ The Commission may give guidance on how the requirements for applications are to be met and such guidance must be published.³¹
18. “The consultation report” means a report giving details of what has been done in compliance with Acts provisions in respect of pre-application consultation in relation to a proposed application that has become the application, any relevant responses, and the account taken of any relevant responses.
19. The applicant must also consult those who he knows, after making diligent inquiry, would or might be entitled to make a “relevant claim” if the order were made and the development were fully implemented.³² A relevant claim means a claim under section 10 of the Compulsory Purchase Act 1965 (compensation where satisfaction not made for the taking, or injurious affection, of land subject to compulsory purchase) or a claim under Part 1 of the Land Compensation Act 1973 (compensation for depreciation of land value by physical factors caused by use of public works).³³
20. Provision is made allowing the Commission to authorise applicants or proposed applicants to obtain information about interests in land in order to comply with the consultation procedures.³⁴ The Commission may also authorise persons to enter land.³⁵
21. The public in the vicinity of the proposed development must also be consulted at the pre-application stage,³⁶ and details of the proposal must be publicised.³⁷

²⁴ See the amendments made to schedule 13 by section 175.

²⁵ See Chapter 2 of the Act, entitled Pre-application Procedure.

²⁶ S50(1) and (2). Applicants are required to “have regard” to any such guidance: s50(3).

²⁷ S42. This includes consultation of the relevant local authority for the area.

²⁸ S44(1) and (2).

²⁹ S44(3).

³⁰ S37(3).

³¹ S37(4) and (6).

³² S44(4), but see the qualifications thereunder.

³³ S44(6).

³⁴ S52.

³⁵ S53.

³⁶ S47.

³⁷ S48.

22. Where the applicant intends to proceed with the application it must take into account any responses to the consultation that were received within the relevant deadline for such responses, when deciding whether the terms of the application should be the same as those of the proposed application on which consultation took place.³⁸
23. Where the Commission duly accepts an application for an order granting development consent, the Act sets out classes of persons who must be notified of the application. The provisions mirror those relating to pre-application consultation in terms of who must be notified.³⁹
24. Where a compulsory acquisition request is made, the applicant must give the Commission notice of those persons who the applicant knows, after diligent inquiry, has an interest in all or part of the land to which the compulsory acquisition request relates. These persons are called “affected persons” under the Act.⁴⁰

Local Impact reports

25. When an application is accepted by the Commission and relevant notification procedures have been followed, the Commission will invite the relevant local authority and the Greater London Authority (where the land in question is in Greater London) to submit a written “local impact report” to the Commission.⁴¹ A “local impact report” is a report in writing giving details of the likely impact of the proposed development on the authority's area (or any part of that area).⁴²

Panel or single commissioner as the examining authority

26. Applications may be handled by a panel or by the single commissioner. Detailed provisions exist governing how the decision allocating the application to one or other is to be made, and regulating the appointment and function of each.⁴³ Whereas a panel can determine an application where a national policy statement has effect in relation to the development,⁴⁴ the single commissioner must report his or her findings and recommendations, whether or not a relevant national policy statement is in place.⁴⁵ If such a policy statement is in place, the single commissioner's report is made to the Commission who in turn refer it to the Council of the Commission⁴⁶ who will determine the application.⁴⁷ Where no such policy statement is in place, both the panel and the single commissioner must report to the Secretary of State who will determine the application.⁴⁸ This ensures that decisions are taken by central government where no national policy statement exists.

³⁸ S49.

³⁹ Ss55 – 57.

⁴⁰ Ss59(2) and (4).

⁴¹ Ss60(1) and (2). For the meaning of relevant local authority, see s102(5).

⁴² S60(3).

⁴³ See generally ss61 to 85.

⁴⁴ S74(1).

⁴⁵ S83(1).

⁴⁶ “the Council” under the Act means the Commission's Council: see s235(1). For the constitution of the Council, see schedule 1, paragraphs 6 to 10.

⁴⁷ Ss84 – 85.

⁴⁸ S74(2)(b), s83(2)(b) and s103.

27. It is important to note that the panel or single commissioner has the function of “examining the application”.⁴⁹ This expression connotes a more inquisitorial role than currently exists at planning and CPO inquiries. This inquisitorial role is reflected in the procedural regime created by the Act.
28. Chapter 4 of the Act applies to the examination of applications by a panel or a single commissioner, who are called “the examining authority” under this chapter.⁵⁰

Procedures for examining applications

29. The Act expressly states that it is for the examining authority to decide how to examine the application.⁵¹ In making its decision, the authority must comply with any relevant provisions of the Act, including any procedural rules published under the Act.⁵² It must have regard to any Guidance issued by the Secretary of State or the Commission for the purpose of making such decisions.⁵³
30. The examining authority may in examining the application disregard representations if the examining authority considers that the representations are vexatious or frivolous, relate to the merits of policy set out in a national policy statement, or relate to compensation for compulsory acquisition of land or of an interest in or right over land.⁵⁴
31. The Act introduces a procedure whereby the examining authority makes an initial assessment of the issues involved in the application and then holds a meeting with the applicant and interested parties to enable invitees to make representations on how the application should be examined, and on other matters.⁵⁵ At or after the meeting the examining authority makes its decision as to how the application is to be examined,⁵⁶ though it retains a discretion to make its decision otherwise than in accordance with this procedure.⁵⁷
32. The default position is that applications are to be examined by way of written representations, subject to four main exceptions.⁵⁸
33. Importantly for present purposes, the Act makes express provision for a “compulsory purchase hearing” to be held, provided that a request for such a hearing is made in accordance with the relevant procedures under the Act. Where the application includes a compulsory acquisition request, the examining authority must fix, and cause each affected person to be informed of, the deadline by which an affected person must notify the Commission that the person wishes a compulsory acquisition hearing to be held. If the Commission receives notification from at least one affected person before the deadline, the examining authority must cause such a hearing to be held.⁵⁹

⁴⁹ Ss74(1)(a) and 2(a), s83(1)(a).

⁵⁰ S86.

⁵¹ S87(1).

⁵² S87(2)(a).

⁵³ S87(2)(b).

⁵⁴ S87(3). This qualification reflects the existing procedural rules applicable to compulsory purchase inquiries.

⁵⁵ S88.

⁵⁶ S89(1), (2) and (5).

⁵⁷ S89(3).

⁵⁸ S90.

⁵⁹ S92(1) – (3).

34. At a compulsory acquisition hearing, the applicant and each affected person are entitled (subject to the Examining authority's powers of control over the conduct of the hearing) to make oral representations about the compulsory acquisition request.⁶⁰
35. The three other exceptions to written representations are (i) where the examining authority decide that it is necessary for it to consider oral representations made at a hearing on certain issues in order to ensure adequate examination of the issue or to ensure that an interested party⁶¹ has a fair chance to put its case; (ii) where the Commission is duly notified by an interested party that it wishes to make oral representations at an open-floor hearing and (iii) where the examining authority decides that any part of the examination should be neither by written representations or by oral representations.⁶²
36. Where the oral representation procedure is followed – and this includes the compulsory acquisition hearing – the hearing is to be held in public, but it is for the examining authority to decide how the hearing is to be conducted.⁶³ In particular, it is for the examining authority to decide whether any person making representations may be questioned and if so, on what and by whom.⁶⁴
37. There is a statutory presumption that any such oral questioning will be carried out by the examining authority, unless the authority thinks that oral questioning by another person is necessary in order to ensure adequate testing of any representations, or that a person has a fair chance to put the person's case.⁶⁵ The examining authority may appoint an advocate to carry out oral questioning on its behalf.⁶⁶
38. It is clear that the oral representations procedure is nothing like a public inquiry.⁶⁷ Neither the applicant nor a objector with an interest which it is sought to be acquired has the express right under the Act to call witnesses or to cross-examine anyone.
39. The Act provides extendable time limits for concluding the examination of the application and reporting on it.⁶⁸ The presumption is that decisions will be made relatively quickly.

Determining applications

⁶⁰ S92(4). An affected person is a person interested in any of the land to which the compulsory purchase request relates: ss92(5) and 59.

⁶¹ "Interested party" is defined in section 102. It includes someone specified in regulations as a "statutory party". Regulations have not yet been made, but they may well identify owners of land subject to a compulsory purchase request as statutory parties.

⁶² Ss91, 93, and 90(2)(b). Where the hearing is in respect of specific issues and the panel is the examining authority, express provision is made allowing concurrent sessions to be held: s91(4).

⁶³ S94(3).

⁶⁴ S94(4).

⁶⁵ S94(7).

⁶⁶ S101.

⁶⁷ Though the examination is a statutory inquiry for the purposes of of Schedule 7 to the Tribunals, Courts and Enforcement Act 2007 (functions etc. of Administrative Justice and Tribunals Council): see s95(3).

⁶⁸ S98.

40. In deciding the application the Panel or Council must have regard to (a) any national policy statement which has effect in relation to development of the description to which the application relates (a “relevant national policy statement”), (b) any local impact report submitted to the Commission before the relevant deadline, (c) any matters prescribed in relation to development of the description to which the application relates, and (d) any other matters which the Panel or Council thinks are both important and relevant to its decision.⁶⁹
41. Importantly, the Panel or Council must decide the application in accordance with any relevant national policy statement, except to the extent that one or more statutory exceptions to this rule applies.⁷⁰
42. These exceptions are:⁷¹
- (i) if the Panel or Council is satisfied that deciding the application in accordance with any relevant national policy statement would lead to the United Kingdom being in breach of any of its international obligations;
 - (ii) if the Panel or Council is satisfied that deciding the application in accordance with any relevant national policy statement would lead to the Panel or Council, or the Commission, being in breach of any duty imposed on it by or under any enactment.
 - (iii) if the Panel or Council is satisfied that deciding the application in accordance with any relevant national policy statement would be unlawful by virtue of any enactment.
 - (iv) if the Panel or Council is satisfied that the adverse impact of the proposed development would outweigh its benefits.
 - (v) if the Panel or Council is satisfied that any condition prescribed for deciding an application otherwise than in accordance with a national policy statement is met.
43. The Act expressly provides that the fact that any relevant national policy statement identifies a location as suitable (or potentially suitable) for a particular description of development does not prevent one or more of the above exceptions from applying.⁷²
44. Interestingly, where the Secretary of State is the decision-maker the Act is far less prescriptive as to the approach to the taken to the decision. In deciding the application the Secretary of State must have regard to (a) any local impact report submitted to the Commission before the relevant deadline, (b) any matters prescribed in relation to development of the description to which the application relates, and (c) any other matters which the Secretary of State thinks are both important and relevant to the Secretary of State's decision.⁷³
45. If the application is granted, it may be granted in terms different from those proposed in the application. Where the decision maker proposes terms that are materially different to those applied for, the Secretary of State may make regulations governing

⁶⁹ S104(2).

⁷⁰ S104(3).

⁷¹ S104(4) – (8).

⁷² S104(9)

⁷³ S105(2).

the procedure to be followed.⁷⁴ Reasons must be given for any decision to grant or refuse an application.⁷⁵

Legal challenges

46. Legal challenges to decisions granting an order must be made within 6 weeks of the day on which the order is published or 6 weeks from the publication of the reasons, if later.⁷⁶ Challenges to a refusal must be brought within 6 weeks of the publication of the reasons for refusal.⁷⁷ The challenge is to be brought by way of judicial review.
47. The Act also imposes clearly defined 6 week time periods on challenges to other decisions made under its provisions.⁷⁸

Specific provisions relating to compulsory acquisition

48. In addition to these general provisions relating to development consent, the Act sets contains specific provisions applicable to compulsory acquisition.⁷⁹
49. An order granting development consent may include provision authorising the compulsory acquisition of land⁸⁰ only if the decision-maker is satisfied that two conditions are met.⁸¹ The first condition is that either (a) the land is required for the development to which the development consent relates, or (b) it is required to facilitate or is incidental to that development, or (c) it is replacement land which is to be given in exchange for the order land.⁸² The second condition is that there is a compelling case in the public interest for the land to be acquired compulsorily.⁸³ The second condition puts on a statutory footing the test which is already applicable to compulsory purchase by reason of relevant case law and policy.⁸⁴
50. So far as the land that may be included in the order is concerned, an order granting development consent may include provision authorising the compulsory acquisition of land only if the decision-maker is satisfied either (i) that the application for the order included a request for compulsory acquisition of the land to be authorised, or (ii) that all persons with an interest in the land consent to the inclusion of the provision in the order, or (iii) that the prescribed procedure has been followed in relation to the land.⁸⁵

⁷⁴ S114.

⁷⁵ S116.

⁷⁶ S118(1).

⁷⁷ S118(2).

⁷⁸ See s118(3) to (7), but note the curiously worded proviso in section 118(9). This appears to be addressing the time period within which challenges need to be made, rather than purporting to oust challenges all together.

⁷⁹ See especially ss122-134. See also ss135 (Crown Land), 136-138 (public rights of way, statutory undertakers), 139 (common land), 144(3) (appropriation of highways). Note also schedule 9, which amends enactments conferring the power to override easements and other rights, such as s237 of the Town and Country Planning Act 1990.

⁸⁰ Which may include the creation of new rights in land: see s159(3).

⁸¹ S122(1).

⁸² S122(2). On exchange land, see section 131 and 132(3).

⁸³ S122(3).

⁸⁴ See *Chesterfield Properties Plc v SSE* (1998) 76 P&CR 117 at 129-131 (confirmation "it must . . . be demonstrated that in confirming it [the Minister] has concluded that there exists a substantial public interest or interests outweighing the landowner's rights.") and circular 6/2004, paragraph 17.

⁸⁵ S123.

51. The Secretary of State may make guidance on the making of orders that include the authorisation for the compulsory acquisition of land, to which the Panel or Council must have regard.⁸⁶
52. The Act makes certain amendments to the blighted land provisions under schedule 13 of the Town and Country Planning Act 1990. If either (a) the compulsory acquisition of the land is authorised by an order granting development consent, or (b) the land falls within the limits of deviation within which powers of compulsory acquisition conferred by an order granting development consent are exercisable, or (c) an application for an order granting development consent seeks authority to compulsorily acquire the land, then the land will fall under schedule 13.⁸⁷
53. Where the order granting development consent authorises the compulsory acquisition of land, part I of the Compulsory Purchase Act 1965 applies in the same way that it applies to compulsory acquisition under part 2 of the Acquisition of Land Act 1981, as if the order granting development consent were a compulsory purchase order under the 1981 Act.⁸⁸
54. Notably, however, the time limit for the exercise of compulsory purchase powers under section 4 of the 1965 Act and the entitlement to compensation under section 10 (which usually applies to injurious affection) are disapplied.⁸⁹ These provisions are replaced by the Act's own time limits and provisions for compensation for injurious affection.
55. So far as time limits are concerned, where an order granting development consent authorises the compulsory acquisition of land, steps of a prescribed⁹⁰ description must be taken in relation to the compulsory acquisition before the end of either (a) the prescribed period, or (b) such other period (whether longer or shorter than that prescribed) as is specified in the order granting development consent.⁹¹ If steps of the prescribed description are not taken before the end of the applicable period, the authority to compulsorily acquire the land under the order ceases to have effect.⁹²
56. So far as injurious affection caused by authorised works are concerned, the Act provides that the developer is immune from an action in nuisance arising from those works.⁹³ However, where the statutory defence to an action in nuisance applies, the person by whom or on whose behalf any authorised works are carried out must pay compensation to any person whose land is injuriously affected by the carrying out of the works.⁹⁴ Although the wording of the Act is not entirely clear, it appears to be

⁸⁶ S124.

⁸⁷ See section 175. The section also provides that land identified in a national policy statement may fall within schedule 13 (see the section on national policy statements, above).

⁸⁸ S125(2).

⁸⁹ S125(3). Paragraph 3(3) of Schedule 3 to the 1965 Act is also disapplied (the giving of bonds).

⁹⁰ "prescribed" means prescribed by regulations made by the Secretary of State: see s 235(1).

⁹¹ S154(3).

⁹² S154(4).

⁹³ S158. The wording of the provision is broad, but it is assumed that it would be construed in accordance with the principle in *Allen v Gulf Oil Ltd* [1981] AC 1001, to the effect that the nuisance must be the inevitable result of the authorised operations if it is to be immune from action.

⁹⁴ S152(3).

intended that the principles applicable under section 10 of the Compulsory Purchase Act 1965 are to be applied to a compensation for injurious affection under the 2008 Act.⁹⁵ Any dispute as to compensation is to be referred to the Lands Tribunal.⁹⁶

57. Part I of the Land Compensation Act 1973 applies with amendments to provide compensation for the depreciation of land by reason of physical factors arising from the use of the authorised works.⁹⁷
58. An order granting development consent may not contain any provision the effect of which is to modify the application of a compensation provision,⁹⁸ except to the extent necessary to apply the provision to the order land.⁹⁹
59. Particular provisions apply imposing constraints on the compulsory acquisition of land of a statutory undertaker, of a local authority, of the National Trust, and on the acquisition of commons, open spaces, and fuel and field garden allotments.¹⁰⁰

II. Implications of the 2008 Act for compulsory purchase and nationally significant infrastructure projects

60. It will be readily apparent that the Act puts in place a very different regime from that which presently exists. Some of the implications of the Act are outlined below.

(i) The central role of the National Policy Statement.

61. This is one of the most controversial aspects of the Act. A national policy statement may be quite prescriptive in its content, so as to identify the quantum and location of development that is appropriate, and the relative weight to be given to specified criteria within it.¹⁰¹ Obviously matters of this kind will have a profound effect on the promoters' and objector's cases.
62. The potency of a national policy statement should not be underestimated. It is well established that a local inquiry is not an appropriate forum to challenge the merits of government policy.¹⁰² The principle has been strongly affirmed by the High Court in the recent challenge that was made to the Secretary of State's decision to raise the passenger and flight movements cap that previously applied to Stansted Airport.¹⁰³ The case considered the status of the Air Transport White Paper¹⁰⁴ and whether points raised by objectors to the expansion of Stansted Airport were material planning considerations or were in substance challenges to the White Paper policy and therefore irrelevant to the merits of the proposal in question.

⁹⁵ See ss152(5) and (6).

⁹⁶ S152(4).

⁹⁷ S152(7).

⁹⁸ which means a provision of or made under an Act which relates to compensation for the compulsory acquisition of land.

⁹⁹ S126.

¹⁰⁰ Ss127 – 132, which are similar to provisions found in part III of the Acquisition of Land Act 1981.

¹⁰¹ See section 5(5).

¹⁰² *Bushell v Secretary of State* [1981] AC 75.

¹⁰³ *Barbone v Secretary of State* [2009] EWHC 463 (Admin)

¹⁰⁴ Which is akin to a national policy statement.

63. It is right to observe that decisions by the Commission need not be made in accordance the national policy statement where the adverse impact of the proposal would outweigh its benefits or where to do so would breach a duty imposed by an enactment. Further, the need for an overriding public interest must also exist before compulsory acquisition can be authorised. These provisions will enable an objector to argue that acquisition of their land is not justifiable because it would place a disproportionate burden on them or is not otherwise justified.
64. In addition, the Act expressly provides that a national policy statement supporting a particular location does not prevent a decision from being made that does not accord with the national policy statement.¹⁰⁵ But in reality, support from a national policy statement for project in question on the land in issue is likely to go a long way towards providing a compelling case, because the public interest will, in practical terms, be evidenced by the national policy statement which will be given significant weight by the decision-maker.
65. In summary therefore, the national policy statement - depending of course in its content - may well have the effect of tightly constraining the matters that an objector can raise to make his case. Conversely, compliance with it will be not only a pre-requisite for the applicant, it will also go a long way to securing development consent.
66. Needless to say, influencing the content of a national policy statement will be one of the most important matters to focus on for those likely to be engaged in the process set up by the Act.

(ii) Changes in circumstances and their effect on national policy statements

67. The Act is alive to the fact that circumstances may change after the national policy statement has been issued. If there has been a significant change in circumstances on the basis of which the policy was made, and the change was not anticipated and would have made a material difference to the content of the policy had it been anticipated, then the Secretary of State may suspend the operation of all or part of the policy statement.¹⁰⁶
68. It is to be expected that parties whose cases are not in accordance with the national policy statement will seek to argue that in fact there has been a material change in circumstances which ought to lead to the policy statement being disapplied in whole or part. Given the scheme of the Act, it would seem that any request to the Secretary of State to make such a decision ought to be made at an early stage rather than in the course of the examination of the application.
69. It should be noted that the applicable criteria are quite narrow: the circumstances must be one of those on the basis of which the policy was made, and the change must be significant and cannot have been anticipated. Moreover, it will always be open to the Secretary of State to say that the matter in question would not have made a difference to the policy. It is to be expected that the Secretary of State's power to suspend part or all of a national policy statement will rarely be exercised at the ad hoc request of a party.

¹⁰⁵ S104(9).

¹⁰⁶ This paraphrases section 11.

70. Logically, where the Secretary of State refuses a request to suspend all or part of a national policy statement, the presumption will be that the policy continues to apply with full effect, notwithstanding the change in circumstances in question.

(iii) The need for early engagement

71. Active, early engagement is important not only in respect of the national policy statements but also in the pre-application process more generally. The Act places considerable importance on pre-application consultation. The statutory consultation report must be part of any application. It is also likely to inform the local impact report. This latter report is likely to carry significant weight, since it will have been prepared by the local authority for the purpose of informing the Commission about the impacts of the proposals, and it must be taken into account when the Commission makes its decision.
72. Given the limited rights of audience under the Act and the emphasis on written procedures, these influencing the content of these two documents will be an important part of any parties' case.

(iv) Rights of audience

73. The Act does not confer any express statutory right to call oral evidence or cross-examine, even for promoters and objectors whose land is under threat of compulsory acquisition. There is no right to be represented by an advocate, though the examining authority itself may appoint one for its own purposes.¹⁰⁷
74. Generally, the presumption under the Act is that applications are to be examined in writing, and any oral questioning is to be carried out by the examining authority.¹⁰⁸ It is therefore to be expected that any procedural rules and guidance issued under the Act will take a restrictive approach to the extent to which a public inquiry type procedure is appropriate, since otherwise the scheme of the Act will be frustrated.
75. So far as compulsory purchase hearings are concerned, the statutory entitlement at such a hearing is to "make oral representations about the compulsory acquisition request."¹⁰⁹ There is a statutory safeguard that the examining authority's powers to decide how a hearing is to be conducted may not be exercised so as to deprive the person entitled of all benefit of the entitlement.¹¹⁰ The presumption that the examining authority will conduct any oral questioning is also qualified to an extent by the adequate testing and fair chance provisos.¹¹¹
76. Subject to the above, the Act itself provides little guidance, and little comfort, on how the authority's powers will be exercised.
77. There is likely to be considerable controversy surrounding any decision by the examining authority that prevents an objecting landowner from testing the evidence of the promoter by cross-examination, and vice-versa.

¹⁰⁷ The Government voted down opposition amendments in Public Bill Committee to allow parties to appear by their counsel, solicitors or agents.

¹⁰⁸ Subject to the "adequate testing" and "fair chance" provisos – see s94(7).

¹⁰⁹ S92(4).

¹¹⁰ S94(6).

¹¹¹ S94(7).

78. So far as the right to a fair hearing under the European Convention of Human Rights is concerned, the High Court has considered whether local plans determine civil rights for the purposes of article 6 of the European Convention. In *Bovis Homes v New Forest District Council*¹¹² Ouseley J rejected that argument in the context of the land use designations before him.
79. The situation might well be different where land is identified as suitable for development in a national policy statement. However, even if article 6 were engaged, it does not follow that this would give rise to a right to an oral hearing to examine and present evidence. Article 6 gives no such automatic right.
80. A more fruitful line may be for parties to contend that adequate testing of representations made by others, and a fair chance to put their case, means that oral testing of evidence ought to be allowed. The projects that will be the subject-matter of the Act's procedures will be large and complex. There are likely to be topics of particular complexity and controversy where the examining authority will genuinely feel that it would be helped by the rigorous testing of the evidence that is possible through cross examination. Moreover, the need to establish and maintain public and user confidence in the system may in practice mean that decisions to allow oral questioning by parties are more frequent than might otherwise be the case.
81. Equality of arms argument are likely to be raised where one party is allowed representation by an advocate but another is not, or, potentially, where the examining authority has its own advocate but a party does not. In the latter case, interesting arguments on unfairness may well arise when a party is subject to professional cross-examination from the examining authority's advocate without the safeguard of re-examination or the opportunity to cross-examine others. While the examining authority's advocate ought to take an inquisitorial role in examining the application, if questions are to be genuinely probing, they are likely to serve to weaken or strengthen the witness's client's case (depending on the questions and the answers), and thus correspondingly strengthen or weaken an opposing parties' case. In these circumstances it may be difficult for the examining authority to maintain a position where parties affected by questioning in this way are not themselves allowed to ask questions through a professional advocate.
82. Quite apart from issues of fairness, there is a real risk that if a thorough examination of the evidence is not carried out, the decision-maker will fail to have regard to relevant considerations which might otherwise have been more readily apparent to it.

The future of the Lands Tribunal

83. In 2001 Sir Andrew Legatt's report reviewing the Tribunal system was published.¹¹³ Two fundamental recommendations were made by the report. First, the creation of a new independent tribunal service to take over the management of the tribunals from their sponsoring departments. Secondly, the creation of a composite, two-tier tribunal structure under the leadership of a senior judge. A government White Paper in July

¹¹² [2002] EWHC 283 (Admin)

¹¹³ Report of the Review of Tribunals by Sir Andrew Legatt, "*Tribunals for Users, One System, One Service*" (HMSO, 2001).

2004¹¹⁴ accepted the general thrust of the Legatt Report, and set out proposals for its implementation.

84. This culminated in the enactment of the Tribunals, Courts and Enforcement Act 2007 (“TCEA”), which provides the statutory framework for the re-structuring of the Tribunal system.¹¹⁵
85. Section 2 of the Act provides that the Senior President is to be responsible for the Tribunals. He is to exercise his powers having regard to the need for tribunals to be accessible, for proceedings to be handled quickly and efficiently, for members to be “experts in the subject matter of, or the law to be applied in, cases in which they decide matters”, and for developing “innovative methods of resolving disputes” of the type that come before tribunals.¹¹⁶
86. It is proposed that the Act will create a First Tier Tribunal system divided into a number of different chambers according to areas of work. One of the chambers is proposed to be Land, Property and Housing. A second tier chamber called the Upper Tribunal would be divided into three Chambers: Administrative Appeals, Finance and Tax, and Land. There is provision for appeals to be made from the Upper Tribunal to the Court of Appeal.
87. It is not the purpose of this paper to undertake a detailed description or analysis of the TCEA’s provisions.¹¹⁷ Below I set out some of the implications of the Act for the Lands Tribunal in the context of its function in resolving disputes over compensation for compulsory acquisition.
88. First, on 19 March Ministers approved an Order transferring the jurisdiction of the Lands Tribunal to the Lands Chamber of the Upper Tribunal.¹¹⁸ The Order is subject to Parliamentary approval but is expected to take effect on 1 June 2009. The Lands Tribunal procedure rules will be amended so that they apply to the new Lands Chamber, and the President and members of the Tribunal will be transferred across as a judge and as members of the Upper Tribunal respectively. This is said to be an interim measure to ensure continuity. The Order will amend references to the Lands Tribunal in legislation so that they are read as references to the Upper Tribunal.
89. Secondly, one of the purposes behind this measure is to provide the Lands Tribunal with access to a wider pool of judges than is currently possible.¹¹⁹ This may in turn mean that the Lands Tribunal is able to deal more speedily and efficiently with cases that are brought before it.

¹¹⁴ “*Transforming Public Services: Complaints, Redress and Tribunal*” (Department of Constitutional Affairs, 2004).

¹¹⁵ The first stage of the implementation of the act took place on “T-Day”, 3 November 2008.

¹¹⁶ TCEA, s2(3).

¹¹⁷ For a general overview of how the Act and how it may affect the Tribunal system (not just the Lands Tribunal), see Sir Robert Carnwath “*Tribunal Justice – A New Start*” [2009] PL 48. Carnwath LJ is the Senior President of Tribunals.

¹¹⁸ The Transfer of Tribunal Functions (Lands Tribunal and Miscellaneous Amendments) Order 2009.

¹¹⁹ See the Second Implementation Review of the President of the Tribunals, published in October 2008, at paragraphs 27 and 28.

90. Thirdly, in due course it may be that some of the work of the Tribunal is devolved to the lower Tier Tribunal. Whether and how this will affect the current Lands Tribunal's work in determining disputes as to compensation for compulsory acquisition is unclear. One consequence would be that the Upper Tribunal would serve an appellant function from those aspects of the Tribunal's work devolved to the Lower Tier Tribunal. To that extent this would limit the Upper Tribunal's role to giving guidance and deciding appeals on points of law, and would constrain the ability of parties to appeal further to the Court of Appeal.

APPENDIX 1

14 Nationally significant infrastructure projects: general

(1) In this Act “nationally significant infrastructure project” means a project which consists of any of the following—

- (a) the construction or extension of a generating station;
- (b) the installation of an electric line above ground;
- (c) development relating to underground gas storage facilities;
- (d) the construction or alteration of an LNG facility;
- (e) the construction or alteration of a gas reception facility;
- (f) the construction of a pipe-line by a gas transporter;
- (g) the construction of a pipe-line other than by a gas transporter;
- (h) highway-related development;
- (i) airport-related development;
- (j) the construction or alteration of harbour facilities;
- (k) the construction or alteration of a railway;
- (l) the construction or alteration of a rail freight interchange;
- (m) the construction or alteration of a dam or reservoir;
- (n) development relating to the transfer of water resources;
- (o) the construction or alteration of a waste water treatment plant;
- (p) the construction or alteration of a hazardous waste facility.

(2) Subsection (1) is subject to sections 15 to 30.

(3) The Secretary of State may by order—

- (a) amend subsection (1) to add a new type of project or vary or remove an existing type of project;
- (b) make further provision, or amend or repeal existing provision, about the types of project which are, and are not, within subsection (1).

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