IFA submission
to the Law Reform Commission of Ireland's review of the current law on compulsory acquisition of land.

The Irish Farm Centre
Bluebell
Dublin 12

February 2018

Introduction

The Issues Paper published by the Law Reform Commission of Ireland as part of this review provides an important opportunity to address current inequities in existing legislation on compulsory acquisition of land. Specifically IFA considers it both unjust and wrong that existing compulsory acquisition legislation grants state agencies rights and powers to enter onto private lands, compulsorily acquire such lands and construct infrastructure on these said lands, **without any obligation** to have agreed terms or compensate the landowners impacted. This situation is unacceptable and this basic inequity must be addressed.

The responses to the specific questions raised in the Issues Paper are set out below.

Issue 1 - Guiding principles[1]

The aim of any compulsory purchase order should be to leave the affected party, in so far as money can, in the same position as before the property/land was acquired. It follows therefore, that the affected parties should be duly compensated for their loss/disturbance, based on the following guiding principles:

- The basis of compensation for property acquired is market value.
- Principle of Equivalence. This requires that the affected party is left in the same financial position after the CPO as they were prior to the process.
- The compensation should reflect both the actual land acquired and the diminution in value (if any) of the retained area as a result of the CPO.
- The extent of a CPO and the right to use one should be carefully considered. For example, whether it is appropriate for an acquiring authority to CPO lands for commercial gain, such as the provision of a service station network, when such services are also being provided by private commercial operators, without recourse to CPO legislation. Also, proposals by some acquiring authorities to use CPO legislation to carve up farm holdings for non-critical recreational infrastructure, such as walk ways and cycle tracks, stretch the provisions of CPO legislation and must be resisted.
- The basic principle of goodwill, as provided for in the 2001 IFA, NRA and Department of Environment roads infrastructure agreement must be recognised.

Issue 2 - Interest in land that can be compulsorily acquired

Proposals in the Issues Paper to "see compulsory acquisitions legislated for in a manner that would differentiate the system based on the type of landowner…..and the amount of land being acquired" runs counter to Principle of Equivalence. They seek to introduce an unacceptable gentrification into the compulsory land acquisition process by introducing scope for higher compensation valuations for smaller land takes from non-farming landowners.

Currently the assessment of compensation payable by an Acquiring Authority is based on 17 rules laid out by statute[2] and by the relevant case law. The assessment of compensation regardless of location must continue to fall under the general heading, including:

- Value of land acquired.
- Diminution in value of retained lands, if any.
- Costs resulting from acquisition.
- Disturbance.
- Loss of profits, goodwill.
- Loss or depreciation of stock in trade.
- Professional fees necessary for acquisition.

[1] SCSI – *A Clear Guide to Compulsory Purchase Orders and Compensation*
[2] SCSI – *A Clear Guide to Compulsory Purchase Orders and Compensation*

Issue 3 – Agreement between landowner and acquiring authority
The Issues Paper correctly identifies that "there is no statutory obligation to attempt to facilitate an agreement between the landowner and the acquiring authority under the 1966, 1960 or 2000 Acts." This fact led to the introduction of an agreement in 2001 between the Irish Farmers' Association (signed by the then IFA President Tom Parlon) and the Department of the Environment and Local Government (signed by the then Minister, Noel Dempsey) and the National Roads Authority (signed by the then CEO Michael Tobin) to establish additional arrangements and procedures, supplementary to those provided in legislation to enable acquiring authorities to efficiently and cost effectively deliver infrastructure, while providing a formal structure for reaching an agreement between landowners and the acquiring authority.

The authors of this Issue Paper have regretfully chosen to ignore the value delivered by the 2001 agreement, which was subsequently renewed by the three parties and have instead chosen to negatively focus on the costs associated. Reflection should perhaps be given to the escalated costs associated with situations where no such agreements take place, for example in the construction of renewable energy projects and commercial gas projects.

The 2001 and subsequent agreement provides a clear rationale that a statutory obligation should be enacted requiring acquiring authorities to enter into negotiations with landowners and reach agreement before entering onto lands and carrying out development.

Issue 4 – Power to request information
The wording of this issue in the Issues Paper seems to forget the fact that the involuntary interaction between the acquiring authority and the landowner is only arising because of a forced imposition of the situation by the acquiring authority.

Therefore it would be unfair to place additional legal obligations on the occupier and the responsibility for the examination of title must rest with the acquiring authority.

Issue 5 – Power to enter land
While the Issues Paper cites case law and legislation, which supports the legal position regarding accessing lands (14 days' notice etc), in reality local authorities and their agents, such as contracting firms, have ignored these legal responsibilities.

The current 14 days' notice is insufficient. Where the consent of the landowner is breached, clear fines and penalties should be introduced for infringements of notice periods.

Issue 6 – Terminology
The Issues Paper argues for the removal of the word "purchase" as it "implies that there is a sale involved in the process". There is a sale involved in the process and it is a compulsory sale by a landowner to an acquiring authority, and no softening of the language around this will change this fact. The proposed change from "purchase" to "acquisition" could be understood as removing an obligation on the acquiring authority to fully compensate for the land-take at market value. This legal confusion should not be allowed to take place and therefore IFA suggest that the proposal to change the working from "purchase" to "acquisition" should not take place.

Issue 7 – Advertising and notifying affected landowners
The advertising and notification to affected landowners is often the first time that landowners and local communities become fully aware of the extent and scale of the proposed development. The question exists as to whether letters in the post and advertisements in regional papers represent a real and

genuine effort by acquiring authorities to engage with communities, and create an understanding as to the rationale for the proposed development, as well as listening to the concerns of those impacted.

Issue 8 – When landowners cannot be identified or located
As proposed, provisions should be enacted similar to sections 58 and 64 of the 1845 Act, where reasonable notice would be given and the compensation (as determined by an arbitrator) would be deposited into the bank or other financial institution.

Issue 9 – Establishing a purpose for the CPO
The *informal* CPO process for landowners usually begins with the initial publication of several route options, before a defined route is selected and then the formal CPO is issued on landowners impacted by this route. However, the *informal* route selection part of the CPO process can last for years and even decades, for example in the case of the proposed M20 Cork-Limerick route. The publication of route options introduces an effective land sterilization and impacts on the development activity on these lands. Therefore IFA does not support the current system, whereby no specific plans, funding or planning permission are approved before a CPO is made. Clear and defined timelines, as set out in the 2001 Agreement, are required throughout the CPO process commencing at the route options appraisal stage.

Acquiring authorities should be required to show evidence of assessment of suitability carried out on alternative sites and this must be achieved within a defined timeframe.

Issues 10 & 11 – Objecting & Jurisdiction to hear and determine objections
The planning process in Ireland is generally quite *open*, given that citizens from any part of the country can comment on, support or object to a planning application regardless of proximity to the proposed development. This *open* planning process provides the widest possible scope for the provision of comment and expertise, to support the delivery of a planning outcome, which considers the widest possible views.

It would not be appropriate, as suggested in the Issues Paper, to limit the rights of citizens to participate in the planning process in Ireland, by restricting third party members of the public from submitting views about CPO applications. The views of all citizens should be considered equally without any questioning of their motives, which could arise if different tests based on the “type of objector” and awarding of costs are introduced as proposed.

To allow an acquiring authority to confirm its own CPO, would effectively allow the project promoter to adjudicate on their own projects and therefore should not be permitted.

The scope of An Bord Pleanala when making a decision on a CPO should be the maximum possible to consider all aspects of the case presented, including specific hardship that may arise for landowners.

Currently the benchmark remains unclear as to when and if An Bord Pleanala conducts an oral hearing. Legislative guidance should be provided on this matter and An Bord Pleanala should be required to publish a reasoned decision where an oral hearing does not take place, which can be subsequently adjudicated on.

Issue 12 – Outcome of the oral hearing
All parties who made an objection, observation or comment, but may not have appeared or be requested to appear at the oral hearing, should be notified of the outcome.

Issue 13 – Judicial review of decision of confirming body
The right to pursue a judicial review of the decision of a confirming body represents an important *access to justice.* However, the ability to pursue a judicial review is often restricted by the limited financial and professional expertise in the case of the citizen compared to the resources of the state, as the acquiring authority. Consideration should be given to the establishment of a resource network to empower citizens to equitable challenge decisions of confirming bodies.

Issue 14 – Notice to Treat and the valuation date
The proposal to move the valuation date to the date of arbitration, assumes that an arbitration of compensation will take place, where in practice the majority of CPOs are concluded by agreement with landowners. Other than the timeframes in the 2001 IFA, Department of Environment and NRA agreement there is no defined timeframe that an acquiring authority must conclude negotiations and reach agreement with landowners. Therefore, there is scope for the acquiring authority to take an inequitable position by deciding to avail of market movements and hold off concluding CPO compensation negotiations. This runs counter to the Principle of Equivalence and can facilitate the delaying of negotiations.

Lack of timeframes in the legal CPO process is one of biggest factor contributing to delays in the process. The time limit within which a notice to treat must be served is one of the few timeframes that exists and should be retained.

Where property rights are impacted, whether accessing for or completion of archaeological works, site investigation works etc., then all acquiring authorities should be required to make good on this infringement on property rights.

Issues 15 & 16 – Power of entry & assessment of compensation
Acquiring authorities should be required to agree terms and fully compensate landowners before accessing lands. This must replace the existing practice whereby there is no obligation on the acquiring authorities to agree terms with landowners, prior to accessing lands and constructing.

The interest rate applicable needs to be revised and updated to more fairly reflect the time value of money, based on the prevailing interest rates.

Injurious affection is an internationally accepted heading of claim for the assessment of compensation[3], which cannot just be abolished, as proposed. Injurious affection comes about if there is a reduction in value of the retained lands caused by something which happens on the other lands acquired from the affected party. An example of this could be where a sewerage treatment works is built next door to your house on land compulsorily acquired from you.

The over-riding Principle of Equivalence must always apply when assessing compensation. This requires that the affected party is left in the same financial position after the CPO as they were prior to the process. Therefore proposals to short change landowners by limiting the basis for the assessment of compensation must be avoided.

Issue 17 & 18 – Neighbouring landowners & arbitration
The use of *design and build* type construction contracts by acquiring authorities and their agents continues to increase. Such contracts grant considerable flexibilities to the acquiring authorities which for example in the case of road construction, has resulted in new motorways towering over

[3] SCSI – *A Clear Guide to Compulsory Purchase Orders and Compensation*

neighbouring landowners, who did not anticipate nor could they have expected that their right to light etc would be impacted.

In such instances the Edward's Principle should be set aside and neighbouring landowners who may not have a land-take should have recourse to remedy.

In addition, there is a greater need to limit the scope of the acquiring authority to amend the decision of the planning authority by for example, raising or lowering the motorway heights.

The increased use of *design and build* contracts by acquiring authorities creates considerable uncertainties, which may hamper the conclusion of negotiations. Where variations do exist, landowners should be entitled to reach agreement with the acquiring authority and have recourse to arbitration/ assessment where considerable variations take place during construction.

Arbitration is a costly and therefore unrealistic recourse to justice for the majority of landowners, who would not have access to the same resources as the state to attend arbitration. This fact is recognised in clause 11 of the 2001 IFA, Department of Environment and NRA agreement, which includes a lesser costly mechanism.

Issue 20 – CPO taxation
Landowners who are subjected to a compulsory land take are required to pay capital gains tax on the compensation received, despite the fact that the sale was a *forced sale* in the first instance. The current CGT rate is 33%, therefore the state receives one-third of the relevant compensation, despite the fact that the landowner was not a willing seller. The basic question exists, how can the Principle of Equivalence be said to apply in a situation where the state receives 33% of the compensation paid? This Issues Paper broadly ignores the need to address this anomaly.

Issue 21 - Costs
In the first instance, the acquiring authority is imposing a compulsory land-take on the landowner. Therefore the cost of preparing a claim, negotiating the claim of entitlement and completing the associated conveyancing must lay with the acquiring authority. In addition, landowners should have access to relevant professional services such as hydrology etc. where relevant.

Issue 22 – Disposal of land
Where disposals of lands take place, it raises a question as to on what basis did the original excessive land take, take place? A compulsory land take often results in the fragmentation of farm holding and therefore in many instance the only realistic person to dispose of the land is the original landowner. Therefore first refusal must rest with the original landowner.

Issue 23 – Consolidation of legislation
IFA would not support the existing CPO legislation being repealed and replaced by a single consolidated Act, which would include reforms proposed in the Issues Paper. Many of the *reforms* amount to an attempt to reduce the existing entitlements for landowners and provide absolutely no certainty for landowners regarding timeframes of the CPO process or access to cost effective justice (arbitration, etc).

Many of the matters raised in this Issues Paper are complex and require further consideration and IFA would welcome the opportunity to meet to discuss the points made in this submission further.