

**The London Borough of Richmond upon Thames (Twickenham Riverside) Compulsory Purchase Order 2021**

**Application for a Certificate under section 19 of the Acquisition of Land Act 1981**

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**OUTLINE LEGAL SUBMISSIONS  
ON THE USE OF S. 19 ALA 1981  
ON BEHALF OF THE TWICKENHAM RIVERSIDE TRUST**

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**Introduction**

1. These legal submissions respond to the request in the Acquiring Authority's Opening Statement to set out its legal arguments in more detail in advance of the s. 19 part of the public inquiry. They are designed to assist the Secretary of State in applying the evidence which will be heard to the correct legal tests and generally to ensure that a decision is not susceptible to legal challenge.
2. At the outset, it is essential to recognise that the s. 19 procedure and consideration of whether the CPO should be confirmed are entirely separate decisions and in no way dependent on each other. In other words, confirmation of the CPO is not dependant on the AA succeeding in arguing that certificates should be granted under s. 19(1)(a) and s. 19(1)(aa) of the ALA 1981, and vice versa. Similarly, the decisions on s. 19(1)(a) and s. 19(1)(aa) are also entirely independent of each other: one or other or both can succeed or fail.
3. The consequences of the AA failing to meet the statutory tests in s. 19 simply means that, in order to deliver the scheme subject to the CPO, the Order would need to go through the 'Special Parliamentary Procedure' (SPP) in respect of the open space<sup>1</sup>. The SPP is thus the default position whenever open space is proposed to be compulsorily acquired. Section 19 simply provides a short-cut for the Secretary of State to certify that an AA can bypass that procedure.

**Section 19(1)(a)**

4. The statutory test may be broken down insofar as is relevant as follows:

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<sup>1</sup> Under the Statutory Orders (Special Procedure) Acts 1945 and 1965. In broad summary, this procedure requires that the order is laid before Parliament and there is then an opportunity for persons to petition against the order or seek amendments to it. The petitions will normally be considered by a joint committee of both Houses of Parliament which then reports whether or not the order should be approved, with or without amendments. If the joint committee recommends that the order should not be approved, or it recommends approval subject to amendments which the Minister does not accept, the order cannot take effect unless it is confirmed by an Act.

Insofar as a CPO authorises the purchase of any land forming part of an open space, the order shall be subject to SPP unless the Secretary of State is satisfied that there will be given in exchange for such land other land which is:

- (a) Not less in area; and
- (b) Equally advantageous to the persons entitled to rights over the land; and
- (c) Equally advantageous to the public; and
- (d) The exchange land will be vested in the persons in whom the land purchased was vested;  
and
- (e) The exchange land will be subject to the like rights, trusts and incidents as attach to the land purchased.

5. I will consider each element in turn.

*Insofar as a CPO authorises the purchase of any land forming part of an open space*

6. Section 19(1)(a) applies where the CPO authorises the purchase of any land forming part on open space. It is irrelevant whether the land is to be retained or lost as open space post-purchase: simply that it is being purchased as part of the CPO. Hence, the AA was originally (quite correctly) proposing to utilize s. 19(1)(a) for the whole of the open space to be purchased (including that part which is to be retained as open space). However, since they were unable to provide a sufficient amount of exchange land, they changed tack in September 2021 and proposed using s. 19(1)(a) only in relation to the part of the open space which is to be lost as open space to built development. Consideration of the use of s. 19(1)(aa) in relation to the remainder which is to be retained as open space is considered separately below.

*Not less in area*

7. This is clearly a matter of mathematical calculation and evidence. The land given in exchange cannot already be open space. It must be land to be newly created as open space.
8. The newly created exchange land open space must actually function as ‘open space’ (i.e. not as highway, as is accepted by the AA: see Chadwick PE at 10.15.6).
9. ‘Open space’ is defined, insofar as is relevant, in s. 19(4) as: “any land laid out as a public garden, or used for the purposes of public recreation”. Thus, any land which is either laid out as a public garden (even if not in use for public recreation e.g. by virtue of being inaccessible due to planting) is open space, as is any land used for the purposes of public recreation which is not a ‘garden’ (e.g. areas of hardstanding used for recreation). ‘Recreation’ is an activity carried out specifically for enjoyment. It is not an activity such as walking from A to B along a path to get to a destination; it is not carrying out retail transactions such as at a market; it is not parking a car.

### *Equally advantageous*

10. It is agreed that the date for assessing equality of advantage is the date of exchange but that regard may be had to committed improvements to the exchange land (i.e. those proposed within the scheme) (see Chadwick PE 10.43-10.46). However, whilst the long term prospects for the exchange land are relevant to the assessment, regard must be had to the time needed for their completion and the prospects of them being successfully completed within that time. This is ultimately a matter of judgement: see Greenwich LBC v. Secretary of State for the Environment [1993] Env LR 344.
11. 'Equally' advantageous does not mean that the advantages must be the same or that the exchange land must have the same character and features as the order land. However, there must be equality of *advantage* i.e. the exchange land must be equally beneficial as 'open space' to the relevant persons (see below).
12. The 'compare and contrast' must be carried out *solely* in relation to the open space to be acquired and the open space to be provided in exchange. There is simply no 'broader context', as the AA argue, to consider in relation to whether a certificate can be granted (in particular they argue that regard should be had to the public benefits of the 'Future Functioning Open Space' which is open space that falls outside of the definition of 'open space' in s. 19: see e.g. para 48 of the AA's Opening Statement). On the contrary, as is well explained in *Gadsden on Commons and Greens* (3<sup>rd</sup> edition, Sweet & Maxwell, 2020) at 12-04, p. 551: "In effect, while the confirmation of the CPO will have regard to the merits of the scheme as a whole (e.g. whether the public benefits arising from the proposed development outweigh the adverse impact on the owners and occupiers of land which will be compulsorily acquired), the Secretary of State's consideration under s. 19 will focus on the merits of the exchange of land" (emphasis added).

### *Equally advantageous to the persons entitled to rights over the land*

13. The AA seemingly do not consider that the Trust is entitled to any right over the land to be acquired and therefore have excluded consideration of whether the exchange land would be equally advantageous to them. They have focussed their consideration solely on whether it would be equally advantageous to the public.
14. This approach is wrong. The Trust clearly is entitled to a right over the open space to be acquired. It has a long leasehold interest which is a property right enabling it to have exclusive possession of the open space, to control public access to the land, determine how it is used (e.g. what events are held), and how it is managed (in due course in accordance with the terms of that lease). It has no lesser right than, say, someone with the benefit of a right of way over the land, or a right of common, or a right to carry out lawful sports and past-times on the land. The fact that the CPO would extinguish that leasehold interest

is neither here nor there. All such rights (e.g. easements, rights of common etc.) are capable of being extinguished by a CPO.

15. The advantages and disadvantages of the exchange land must therefore be viewed in the context of the advantages and disadvantages to the Trust itself as well as the public at large. Given that the Trust will not be offered any new similarly advantageous lease of the exchange land, the AA has failed to meet this test. Irrespective of this, whether or not the exchange land is equally advantageous to the Trust must be considered more generally as well, which is a matter for evidence.

*Equally advantageous to the public*

16. The Secretary of State takes the view that ‘the public’ means mainly the section of the public who has benefitted from the land. This means, for example, that for land used for recreation by residents of a particular area, the exchange land would normally be expected to be equally accessible for those residents (see CPO guidance at para 199, p. 97). By analogy, where the existing land has been used by various sections of the public (such as children, teenagers, particular groups and societies) regard must be had as to whether the exchange land will be equally advantageous to those particular groups (and not merely theoretical other groups of the public at large who might have an interest in carrying out recreation on the exchange land).

*The exchange land will be vested in the persons in whom the land purchased was vested and the exchange land will be subject to the like rights, trusts and incidents as attach to the land purchased*

17. This is the corollary (or compensation for) the fact that the CPO may acquire all legal interests in the open space and, under s. 19(3)(b), the CPO may provide for discharging the open space purchased from all rights, trusts and incidents to which it was previously subject. In other words, the open space which is acquired is obtained by the AA as a completely ‘blank canvas’. However, in exchange, the AA must not just provide equally advantageous new open space generally, but must provide that new open space specifically to those who had ownership of the lost open space and subject to the same rights, trusts and incidents that the lost open space was subject to.
18. Section 19(3)(a)(1) provides that a CPO may provide for vesting land given in exchange in the persons, and subject to the rights, trusts and incidents. As is again well set out in *Gadsden on Commons and Greens* (at 12-04, p. 552): “The CPO may provide for the vesting of exchange land in certain persons and the CPO should provide that it will be subject to the same rights as the land being compulsorily acquired.” This type of exchange is a fundamental concept of the modern compulsory purchase system and, indeed, almost identical words appeared in s. 11 of the Acquisition of Land (Authorisation Procedure) Act 1946.

19. The AA's position is that it meets this requirement in relation to the exchange land because it is itself the freehold owner of the land to be acquired and it will be the new freehold owner of the exchange land. However, what of the Trust's long leasehold interest? The AA's position is that it is irrelevant: it is extinguished in relation to the land to be acquired so the AA obtains its 'blank canvas', but the Trust gets nothing in relation to the exchange land.
20. That cannot be right as a matter of principle. There can be no dispute that, had the position been that the AA was compulsorily acquiring the open space from the Trust as freehold owner, it would be *bound* to vest the exchange land in the Trust, in order for a s. 19 certificate to be granted. Similarly, if the Trust were a beneficiary under a deed of trust or had a right of access or a right to lay a water pipe (or anything like that) or even simply a right to carry out lawful sports and pastimes on the land, the AA would be *bound* to afford them the same right in relation to the exchange land. The word 'like' in this context means 'identical'. So, how can the AA extinguish the Trust's lease (without going through normal landlord and tenant procedures), but not be bound to offer them an equivalent new lease of the exchange land?
21. There is no direct legal authority in relation to leasehold interests and s. 19. However, a leasehold interest is the temporary and *exclusive right* to possess, occupy and use land or property for a definitive period of time pursuant to a lease (see Street v. Mountford [1985] UKHL 4). It amounts to a 'legal right'. Even if that is not correct, a lease would fall within the very broad definition of an 'incident'. An 'incident' is defined in the Oxford English Dictionary as: "A privilege, burden, or right attaching to an office, estate, or other holding". At the very least, a lease is a privilege that the Trust enjoys in relation to the existing open space, and that privilege must therefore be replicated in relation to the exchange land, if the s. 19 certificate procedure is to be used. Otherwise, the AA must go through SPP. It cannot bypass that procedure where it proposes to take away on the one hand but not replace on the other.

#### **Section 19(1)(aa)**

22. The statutory test may be broken down insofar as is relevant as follows:
- Insofar as a CPO authorises the purchase of any land forming part of open space, the order shall be subject to SPP unless the Secretary of State is satisfied that:
- (a) The land is being purchased in order to improve its management (or securing its preservation).
23. S. 19(1)(aa) may not be utilized merely when the land to be acquired will remain as open space. It is far more prescribed than that. A s. 19 certificate may only be granted where the open space is being purchased in order to improve its management. As set out above, s. 19(1)(a) can be used whenever open space is being compulsorily acquired, provided exchange land is provided. It makes no difference whether the land to be acquired is to be developed or will remain as open space. Thus, s. 19(1)(a) could have been used in relation to the 'Retained Open Space'. That is the appropriate power. S. 19(1)(aa) is

only to be used where the *purpose* of the acquisition is to improve the open space's management (or secure its preservation). The AA has misunderstood this and has presented a picture of the purpose of s. 19(1)(aa) as being to enable land to be acquired without providing exchange land where the acquired land would remain as open space (see para 53 of its Opening Statement). That is not the position.

*The Purpose or Reason of Acquisition being to Improvement the Open Space's Management*

24. The words "in order to" show that there must be the direct purpose or reason of acquisition to improve management. As the CPO guidance states: "In such circumstances, ie where *the reason* for making the order is to ... improve management of land to which section 19 applies, a certificate may be given in the terms of s. 19(1)(aa)" (para 242, p. 110). In other words, the whole purpose or reason, or at the very least, the primary purpose or reason of the acquisition, must be to improve the management of the open space. That is simply not the case here.
25. The AA is quite candid as to what the actual purpose of the acquisition of the retained open space is. Mr Chadwick states: "As a matter of fact the Scheme and its benefits cannot be delivered without acquiring part of the Existing Designated Open Space which would be Retained Open Space within the Scheme – the reconfiguration of the Future Designated Open Space requires the retention and reconfiguration of part of the Existing Designated Open Space. The acquisition is needed to facilitate the whole site solution and is an integral part of the compelling need for the Modified Order" (PE at 10.54). Similarly, the AA states in its Opening Statement: "The acquisition is essential in order to reconfigure the open space on the Scheme Land and deliver the significant improvements in the quantity and quality of open space" (para 53). It is clear that the open space is being acquired *in order to reconfigure the open space to deliver the whole scheme*. That purpose has nothing to do with improving management. Suggestions to the contrary in its Statement of Reasons and elsewhere in evidence are artificial.
26. It is of course telling that the AA only alighted upon the s. 19(1)(aa) power at a late stage and shortly before making the CPO and was originally proposing to use s. 19(1)(a) in relation to the Retained Open Space as well as the Lost Open Space. It was only when it realised that it could not provide sufficient exchange land (as it was originally seeking to use existing open space as part of the exchange land) that it sought to rely on s. 19(1)(aa). That 'change of tack' evidentially corroborates the position that the purpose of acquisition has nothing in reality to do with improving management. It is matter for evidence whether there are any 'management benefits' to the AA as a result of the scheme at all. But even if there are, any 'management benefits' afforded to the AA (who already manage the open space) as a result of it being part of a wider scheme are purely ancillary or a by-product of the primary purpose of the acquisition which is to reconfigure the space to the AA's design.
27. The AA cannot point to any precedent for this kind of use of s. 19(1)(aa). The CPO guidance gives 'typical examples': where a local authority wishes to acquire part or all of a privately owned common in order to improve its management or the land might be neglected or unsightly, perhaps because the owner

is unknown, and the authority may wish to provide, or to enable provision of, proper facilities (para 242, p. 110). Of course, these are examples only, but they give a flavour of the kind of situation envisaged. It is noteworthy also that s. 19(1)(aa) also deals with the situation where compulsory purchase is required in order to secure the preservation of the open space. Improving maintenance and securing preservation feature together in the same subsection, suggesting that they share a common legislative aim. In both cases, the legislation enables compulsory purchase of open space without going through SPP in order to deal with some kind of existing ‘problem’ which needs remedying. Section 19(1)(aa) has only be used in a few cases, but from research carried out on behalf of the Trust by Carter Jonas and BDB Pitmans LLP, there are three CPOs where the power has been used, and all of those follow the same sentiment as in the CPO Guidance, as is set out in paras 5-8 on p. 70 on the Trust’s Response to the Authority’s case for using s. 19. There is nothing to suggest that s. 19(1)(aa) may be used simply where an AA wishes to reconfigure space which it already itself manages perfectly satisfactorily.

28. Furthermore, the AA’s interpretation opens dangerous floodgates. It would legitimise the acquisition of any perfectly well-managed privately owned open space by an AA without providing exchange land or without going through SPP for any development scheme which wanted or needed new open space. The AA could argue in any case that, by bringing the land within its comprehensive scheme, its management would somehow be improved. That cannot have been the intention of Parliament.
29. The importance of a strict interpretation of the scope of s. 19(1)(aa) is apparent because no exchange land is provided to the owner. The owner is thus severely disadvantaged and is taken out of the equation entirely, which was perhaps considered justified where there was some element of ‘risk’ or ‘peril’ in relation to the existing position forcing the AA to step in and taken over management. Obviously, that mischief which the provisions were designed to address cannot apply here because the AA is acquiring land which it already owns and already manages. This adds to the importance of ensuring that, for the section to be satisfied, the reason for acquisition truly is to improve the management of the open space and not in reality simply to deliver a new scheme.

#### *Impact of Acquisition on the Existing Rights, Trusts and Incidents Enjoyed over the Open Space*

30. Since the AA is only supposed to be acquiring the open space under s. 19(1)(aa) to improve its management, and not for other purposes such as developing a scheme, the land does not come to them as a ‘blank canvas’ (as with s. 19(1)(a)). In s. 19(1)(aa) cases, the CPO may *not* discharge the land purchased from all rights, trusts and incidents to which it was previously subject (see s. 19(3)(b)). Thus, anyone with a right to use the land or anyone who has any kind of legal privilege in relation to it, will continue to enjoy that post-acquisition. As above, the Trust’s lease is a legal right to exclusive possession of the open space for a term. It cannot be discharged under the CPO without exchange land being provided subject to equivalent rights; or else the AA must go through SPP.

31. If an Authority wishes to remove a tenant to develop its own open space land (or, indeed, even to improve its management) it must act in accordance with the terms of its lease and landlord and tenant law. It cannot use s. 19(1)(aa) in effect to terminate a tenancy and take back the open space from its tenant in the name of improving its management. It is an unconscionable abuse of the power in s. 19(1)(aa) which was not designed to remove tenants from local authority owned land wherever a local authority considers it might want its land back (even if it wants it back to manage it better than its tenant). Such an interpretation would create an imbalance between the position of private landlords of open spaces and landlords who have powers of compulsory purchase powers and cannot have been intended.

### **Conclusion**

32. The Trust's legal submissions are not misconceived, as the AA has suggested (para 55 of its Opening Statement). The simple position is this:

- (i) If the Trust wishes to compulsorily acquire this open space and rely on the s. 19 certification procedure, it should have:
  - (a) Used s. 19(1)(a) in its entirety (and placed no reliance on s. 19(1)(aa));
  - (b) Provided exchange land which was greater in size than the total area being acquired (and not simply greater than the area to be lost as open space (which in itself is disputed));
  - (c) Provided exchange land which was equally advantageous not only to the public but also to its tenant, the Trust;
  - (d) Vested that exchange land in itself but also with the offer of an equivalent lease to the Trust (and with any other equivalent rights, trusts and incidents).
- (ii) If it was unable or unwilling to do all of the above (a) to (d), then it should have accepted that the CPO needs to go through SPP.

33. By contrast, the AA has:

- (a) Sought to rely on s. 19(1)(aa) in relation to the Retained Open Space in the mistaken belief that that is an appropriate power in any case where land will be retained as open space, post-acquisition. Retention of the land as open space is not enough. S. 19(1)(aa) can *only* be relied on where the *real reason* for the compulsory purchase is to improve the management of the open space. Belated attempts by the AA to 'fit a square peg into a round hole' in relation to arguments about 'improving management' fail. The obvious primary reason why the land is being required is to (erroneously) seek to remove the Trust's leasehold interest so that the AA can reconfigure the space to their own design.



- (b) Failed to recognise that, in any event, a CPO which is subject to certification under s. 19(1)(aa) is incapable of extinguishing the Trust's legal right / privilege of its long lease of the open space with exclusive possession etc.
  - (c) Abused its position by using s. 19(1)(aa) in effect to terminate a tenancy in circumstances which would not be open to a landlord without powers of compulsory acquisition.
  - (d) Failed to consider the equality of advantage of the exchange land versus the Lost Open Space in relation to the Trust who have an existing right over the Lost Open Space.
  - (e) Failed to identify the public who currently enjoy the existing open space and failed to provide a sufficient amount of equally advantageous exchange land to the public (this will be a matter for evidence).
  - (f) Failed to provide the exchange land subject to identical rights, trusts and incidents as the Lost Open Space, in particular by failing to provide it subject to the option to enter into an equivalent lease to the Trust. Whilst there have been some negotiations concerning a potential new lease to the Trust, the Trust has never been offered a lease of the whole of the exchange land and never been offered a lease on identical terms to the existing. Consequently, these negotiations are irrelevant to the question of whether the s. 19 tests have been met. They are merely of general interest as to commercial discussions that have gone on outside of the process.
  - (g) Created an unfair situation whereby, if the Trust had been a freehold owner of the Lost Open Space, it would have been bound to have the exchange land vested in it (and, equally, if it had been e.g. the beneficiary of a trust in relation to the land, it would still get the same benefit in relation to the exchange land), but because it is a long leasehold owner, it gets nothing other than financial compensation.
34. This is unchartered territory and there is no precedent available for what the AA is trying to do. The tests in s. 19(1)(a) and s. 19(1)(aa) have nothing to do with the merits of the scheme as a whole and the merits of confirming the CPO. Irrespective of the position with regard to that (which is subject to separate argument by the Trust), the Secretary of State should not grant the certificates sought in these circumstances. To do so would be wrong in law, and would set a dangerous precedent.

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