



# Local authority land acquisition in Germany and the Netherlands: are there lessons for Scotland?

## A discussion paper

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# LAND LINES

A series of independent discussion papers on land reform issues

# Background to the ‘Land Lines’ discussion papers

The Scottish Land Commission has commissioned a series of independent discussion papers on key land reform issues. These papers are intended to stimulate public debate and to inform the Commission’s longer term research priorities.

The Commission is looking at land acquisition as it is inherent in Scotland’s framework for land reform and underpins our [Strategic Plan](#) and [Programme of Work](#). This, the sixth paper in the Land Lines series, is looking at examples of land acquisition in the Netherlands and Germany and the lessons that Scotland could learn.

The opinions expressed, and any errors, in the papers are those of the author and do not necessarily reflect those of the Commission.

## About the Author

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# Summary

## Keywords

land value capture, compulsory purchase, land values, development, land assembly.

## Background

This report provides information for debate in Scotland about giving planning authorities the ability to acquire development land at values closer to its existing use value. It considers practice elsewhere in Europe and suggests what lessons Scotland might learn from this experience.

## Key Points (Main Findings)

- Many nations, including Scotland, are looking for new ways to fund affordable homes and the infrastructure needed to support new developments, including transport and schools, and examining how the increase in land values that generally results from planning permission and new development could be captured to fund these.
- Although learning from other countries is not straightforward, looking at others' experience can often be helpful, provided care is taken to examine their different legal and planning systems and how far these mean policy and practice can be transferred and embedded in one's own country.
- The paper looks at how municipalities in Germany and the Netherlands acquire land for new development and the extent to which their policies and practices enable them to 'capture' increases in land value which can be used to fund infrastructure and new affordable homes.
- German municipalities capture development values when they zone land for new development. They do this by temporarily pooling sites in mixed ownership, service them and return them back to their original owners, net of the land needed for public uses, at prices that cover municipalities' infrastructure costs and the impact of the readjustment on values. In designated regeneration areas municipalities can freeze existing land values allowing them to acquire land at these values, install infrastructure and sell on to developers. Where developers undertake new development themselves they pay a share of municipalities' infrastructure costs.

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- In the Netherlands, when municipalities were very active in acquiring development land, especially for affordable housing, they captured some development value by buying land at prices that reflected planned new uses, but without infrastructure. They then serviced it and sold it on to developers (many being housing associations) at prices covering their infrastructure costs. Municipalities are now less active in the land market because of the financial risks of land holding. Infrastructure is funded by developer contributions and municipalities can now use planning powers to require developers to build new affordable housing.
- One option for capturing more development value in Scotland is to enable local authorities to acquire land in the proposed new Master Planning Consent Areas including entering into joint ventures with land owners to pool land providing the necessary infrastructure and sell to developers at prices that cover these costs and the value created by the consents. If this land is acquired compulsorily at existing use value consideration needs to be given to creating financial equivalence between those who land is acquired in these areas in this way and those outside the zones who get planning consent and market value in new use and one possible way to achieve this is to ensure such owners make appropriate contributions to the infrastructure to support their development and provide new affordable homes on the sites.

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# 1. INTRODUCTION

## Background

Land values are a residual, the difference between income from land and all the costs of securing this, including construction costs, fees, financing costs and profits. The difference is the maximum it is worth bidding for land, with competition enabling land to be put to the 'highest and best use', subject to regulatory matters including planning. Development value is the difference between the value in a new use and existing use – and in certain circumstances this might be negative, for example on sites where remediation costs are high.

Land values increase for three reasons: (i) the grant of planning permission enabling a higher value or different use, often creating significant development value; (ii) new infrastructure improving the attractiveness of existing locations and property; (iii) increased prosperity creating more demands for housing, shops, and leisure facilities and, hence, higher property and land prices.

In many cases owners have done little to create these increases because they result from the activities of others, including local or central government. It has long been argued that these increases should be taxed – with many assuming this would not reduce land supply or economic activity. Explicit taxes on increases have largely been restricted to 'capturing' development value when planning permission is granted, although both capital gains and stamp duty land taxes capture other increases when land and/or property is sold. Development value has been 'captured' in two ways: first, through national taxation of all or some of the development value but with no hypothecated spending of the tax levied; second by requiring developers to make contributions through planning obligations (cash or in kind) to the infrastructure required for development and other local needs, especially affordable housing. The costs of these obligations have generally been passed on to landowners in lower prices (*a de facto tax, and used locally*). Although planning obligations (and related Community Infrastructure Levy – CIL) are not explicitly about land value capture but about making development acceptable, they nonetheless generally have the effect of capturing land value. National taxation has generally been unsuccessful in capturing development value but planning obligations have had more success (*Crook et al, 2016, 2018a; Jones et al, 2018*).

Although for most of the post war period public bodies have had to pay full market value when acquiring land for development, there were limited times when they were able to buy land at its existing use value, that is to say a value that ignores the impact of a planned development and any prospective planning permission on its value. In the early New Towns, when there was a national development charge of 100 percent on development values under the 1947 Planning Act, public bodies, such as New Town Development Corporations, were able to buy land compulsorily at its existing use value effectively capturing development value when development took place, either selling on serviced land to developers at its full market value in a new use or using the acquired

land to ensure that social housing could be built at affordable rents. After development charges were abolished in the 1950s public bodies were initially able to continue buying at existing use value but because of a perceived unfairness between owners whose land was 'CPOd' and those who got planning consent and sold land to developers at full market value in a new use, compensation returned to paying full market value when land was compulsorily acquired. Only during the limited periods when national development taxes were reintroduced in the 1960s and 1970s were public bodies able to buy development land net of any development tax value being levied, thereby being able to recoup some development value.

In recent years the issue of whether and how to capture more development value through public acquisition of land has come to the fore again in Scotland and the rest of Britain. This renewed interest reflects a sense of unfairness about the 'unearned gains' landowners and/or developers secure when getting planning consent and about how to ensure those building affordable homes can pay land prices that will enable them to let them at genuinely affordable rents.

In particular a number of organisations and individuals have argued that local authorities should be able to compulsorily acquire land at its existing use value – and observed that the backstop threat of a compulsory purchase order (CPO hereafter) with compensation at existing use value will actually result in landowners agreeing to sell voluntarily at prices closer to existing use than market value for housing land. Proposals by MSPs to amend the Scottish Planning Bill to provide for this change have been made (Wightman, 2018; Scottish Parliament, 2018) as well as by many giving written and oral evidence to the Westminster Parliament's Select Committee on Housing Communities & Local Government inquiry into land value capture (HCLG Select Committee, 2018). Those putting forward these proposals argue that there is relevant experience in other parts of Europe, specifically Germany and the Netherlands, and that this practice is consistent with the principles behind the European Convention of Human Rights.

## Land and development values in Scotland

Many making these proposals argue that there is significant land value to be captured, enabling provision of infrastructure and affordable housing to be funded from it (for example the Centre for Progressive Policy, 2016, 2018). Although national taxation has, in the past, captured little, planning obligations have in aggregate captured much more. There is limited time series data for Scotland (see below) but the most recent of a series of five studies in England from 2003-04 to 2016-17 showed that £6bn was agreed in 2016-17, an increase over previous years and due as much to higher housing output, prices and land values as to improved policy and practice in negotiating agreements (*Crook, et al, 2016, 2018a*). Not all is delivered of course but estimates based on this evidence (*Crook, et al 2018b*) indicate that agreed obligations capture about 30 percent of development values on greenfield sites in England with another 20 percent 'captured' by capital gains and stamp duty land taxes (although these latter amounts depend heavily on who is involved in the transactions on which depend both tax rates and allowances).

By contrast, land and development values are much lower in Scotland than in England with the exception of the Edinburgh region. Although the evidence is somewhat limited, estimates extracted from Valuation Office Agency data for the period 1995 to 2001 showed that the price of 'bulk' housing land (2ha) with planning consents was generally similar to that for Northern England, with the exception of the area around Edinburgh where values were high even relative to South East England (DTZ Peda, 2002). With that exception market values of land for new (for example housing) development were not greatly above the value of the land in its existing use, such as farmland. Thus the development values on land for new housing were generally not adequate to pay 'in kind' or cash payments towards planning obligations for infrastructure and/or affordable housing.

This is reflected in the amounts agreed for planning obligations in Scotland. The most recent evidence for Scotland is for the years 2004 to 2007 (*McMaster et al., 2008*) which showed that obligations were largely associated with major housing developments and with only £159m secured over the period with a forecast of approximately the same amount (of £167m) in the following years up to 2010. Other evidence suggested that using obligations to deliver affordable housing was challenging as development values were not always sufficient to support contributions despite developers becoming more willing to accept they should make provision (Newhaven Research, 2008). Evidence of what development value might be available across the whole of Scotland in the future comes from a recent study for the Scottish Government of a potential infrastructure levy (Brett Associates, 2016). This suggested that by calculating residual land values on an annualised basis and then netting off current negotiated S75 contributions for affordable housing (£45m) and infrastructure (£85m) would leave only c£100m available for a contribution towards other infrastructure (c3.5 per cent of the costs of all new infrastructure needed in Scotland). This suggests that if all development land were acquired at existing use value at best £230m could be generated each year from all housing sites across Scotland of which £130m is currently captured by obligations. The study showed that the value to be captured was insufficient in many parts of Scotland to produce much funding for infrastructure. In contrast another recent but very preliminary estimate of what might be available by acquiring development land for housing at its existing use value in the Edinburgh city region suggested that £8.6bn might be available in nominal terms over 20 years, given that the new infrastructure financed by this would stimulate housing development (Built Environment Forum Scotland, 2017). On an annual basis this represents 'capture' of about £430m much higher than other estimates but this difference reflects both the nature of the market in Edinburgh compared to the rest of Scotland and the consequence of investing in the infrastructure that would enable such values to be secured through new development.

## Purpose of briefing paper

The context for this briefing paper is the current policy debate in Scotland about giving local authorities powers to acquire development land at the value in its existing use. Participants in this debate believe that practice elsewhere in Europe enables such acquisition to take place at existing use value and have implicitly suggested that this practice is relevant and transferable to Scotland.

Existing use value is defined as the market value of land in its existing use ignoring any additional value market value that would result from a new use whether or not the land was allocated in a plan or had planning permission for a new use. The simplest example is farmland where its existing use value would be agricultural value (e.g. arable or grazing) ignoring any additional value that might arise were planning permission to be given, for example for housing. In practice market values do not ignore any hope value that might be attached to farmland values if there is any prospect that one day permission for a new use might be granted. What that hope value might be depends on valuers' judgements about what the realistic prospects are of such permission for change of use.

The paper is designed to be a contribution to this debate by examining:

- the experience elsewhere in Europe, specifically whether local (and other public authorities) in Germany and the Netherlands acquire land at its existing use value and what mechanisms are used;
- the planning and legal framework which underpins mechanisms by which public authorities acquire land in Germany and the Netherlands and the extent to which they comply with the provisions of the European Commission on Human Rights (ECHR);
- the extent to which practice in Germany and the Netherlands is transferable to Scotland, taking particular account of the way practice in all three countries is shaped by context, including their specific legal traditions and their different planning and administrative structures;

to examine ways in which public authorities in Scotland could acquire land for development closer to its existing use value and whether such ways would require changes in planning and compulsory purchase legislation as well as in policy and practice.

## Basis and structure of report

The report has been compiled on the basis of a literature review, including research reports, policy documents, peer reviewed academic papers and the 'grey' literature (i.e. discussion papers, reports in professional magazines etc). Specifically it updates the author's own recent work on this issue (see Crook & Monk in Crook et al 2016). The author has also held valuable discussions with members of the relevant policy and practice communities in Scotland, including local government planners, planning and other consultants and government officials. Any views expressed in this report are the author's own and do not necessarily reflect the views of anyone consulted.

The remainder of the report is structured as follows:

- comparing and learning from other countries;
- land value capture in Germany: policy and practice;
- land value capture in the Netherlands: policy and practice;
- capturing development value in Germany and the Netherlands: a summary
- compulsory purchase compensation in Scotland and England;
- options for capturing more development value in Scotland.

## 2. COMPARING AND LEARNING FROM OTHER COUNTRIES

Policy transfer is about finding out if others do things better. For example, The Netherlands is often seen at the forefront of planning innovation but because 'policy tourists' tend to be keener looking at outcomes rather than understanding processes, little is transferred (Pojani & Stead, 2015).

Nonetheless, Germany and the Netherlands have much experience in capturing development value and it is useful to see if there are lessons for Scotland. Despite the challenges of comparing ourselves with others (especially understanding their different contexts), looking at the experiences of these two countries helps us to define what is distinctive about the Scottish experience and to explore the limits of policy transfer.

Land-use planning is rooted in the political and administrative culture of each country and their legal frameworks. Differences between planning systems in Europe are deep seated. Key variables that help us understand differences include differences in market economies, social and welfare policy approaches (the latter being related to countries' approaches to affordable housing), constitutional arrangements and different legal traditions. In relation to market economies, we can distinguish between liberal market and coordinated market economies (Hall and Soskice (2001). In the

former, competitive market arrangements (such as in Britain) dominate the economy while in the latter, including Germany and the Netherlands, there is more reliance on non-market relationships. In relation to welfare policy approaches Esping-Anderson (1990) distinguished between liberal welfare states, such as Britain, and conservative or corporatist systems (such as Germany and the Netherlands). In the former means tested assistance and modest universal transfers dominate with the state encouraging market provision. In the latter, welfare emphasises social integration and family and non-state provision of welfare. Relevant to how land value is captured to fund affordable housing the three countries are examples of Kemeny's (1995) binary classification of rental markets into unitary and dualist. In the former (of which Germany and the Netherlands are examples), private and non-market provision is integrated. In dualist rental markets (of which Britain is an example), not-for-profit provision is restricted to a residual social rented sector.

Importantly Germany, the Netherlands and Scotland have different legal traditions. Many European countries are part of the Napoleonic 'family' where the law is based on complete systems of rules or codes derived from abstract principles. Local administration is very small in scale but has a much greater degree of independence from central government than in England and Scotland (Loughlin, 2013; Newman & Thornley, 1996). The legal style in Scotland and England is different from other European countries, being based on a common law approach in which judge made law develops on a decision-by-decision basis, the case itself and precedent being important bases of a cautious evolutionary approach, not rules. Although the origins of law in Scotland lie in part in the Roman law tradition of codes and rules there was a gradual increase in the influence of common law after the Act of Union in 1707 (Clark & Keegan, 2012). A key character of Scotland (and England) is the importance of discretion in the operation of planning systems. Although national and local policy are clear frameworks for planning decisions, local authorities must also have regard to any other material considerations enabling much greater flexibility when deciding on applications (House of Commons Library, 2016). This can be contrasted with the greater codification and more rules bound zoning approach in Germany and the Netherlands where the provisions of zoning plans are much more determinative of what can (and cannot) be allowed.

In a classification of European planning systems Germany and the Netherlands were characterised as examples of 'comprehensive integrated' approaches where spatial planning is conducted in a very systematic way with a formal hierarchy of plans and large public investments in the implementation of those plans. In contrast, systems in the UK were classified as being examples of 'land-use management' approaches with a much narrower focus on controlling urban growth and land-use changes (Buitelaar & Bregman, 2016; Gielen & Task, 2010). In land use management systems local plans merely give an idea of the thinking of the local authority, and it can be departed from without complicated procedures. In integrated plan-led systems, the zoning plan is more important. The local authority fixes the land-use regulations in a land-use plan, which becomes legally binding before interested developers discover whether their intentions conform to these regulations.

However, the differences between the certainty of zoning systems and the flexibility in discretionary planning systems are more apparent than real (Booth, 2003). Allocations in zoning systems can be changed whilst the introduction of 'plan led' clauses in British legislation have made them more determinative. At the heart of every planning system lies a trade-off between flexibility and legal certainty. The English and Scottish systems put more emphasis on flexibility. And whilst the Netherlands is part of the Napoleonic legal family its planning practice is more flexible than the general perception of the Dutch planning system would suggest (Buitelaar & Sorel, 2010). Moreover as Booth (2017) has also observed the Scottish and English common law approaches themselves involve principles derived from decisions on particular cases which set precedents on later cases.

Nonetheless, in so far as planning policy and decisions influence land values, zoning plans in Germany and the Netherlands have a bigger effect than adopted plans in Scotland and England since the flexibility inherent in decisions related to the latter cases means that values do not crystallise until the point of an application being fully decided whereas zoning plans tend to determine the value at the outset. However, as recent comparative work on planning obligations has showed, certainty rather than flexibility is still important in capturing land value. This can be achieved in both development led and plan led systems because both can contain planning policies (as distinct from zoned land use allocations) which set out clearly the contributions expected to be made by developers to the funding of infrastructure and affordable housing (Gielen & Task, 2010).

### 3. LAND VALUE CAPTURE IN GERMANY

German municipalities play key roles in bringing land to the market and capturing development value to fund infrastructure by acting as 'first movers'. They intervene in the land market, assembling (and sometimes buying) sites, and delivering infrastructure before returning land to the market. Notably, Germany's housing development sector is diverse including small regional builders and not for profit developers and municipalities have access to loans from local banks (Centre for Cities, 2014; Davies *et al.*, 2016; Lord *et al.*, 2015; National Economic and Social Council, 2018).

#### Planning authorities and the planning system

Planning is a mixture of plan and development-led approaches. It is characterised by a strong legal framework and hierarchical planning powers shared by all three levels of government: federal state, regional and (approximately) 14,000 municipalities, but power is effectively devolved to the lowest possible level (Putz *et al.*, 2011; Sieverts, 2008; Van den Berg, 2008). Under the Federal Spatial Planning Act, the federal

government sets the overall framework and policy to ensure consistency and focuses on sectoral planning and public investment (Schmidt and Buehler, 2007). Regional governments administer federal government financial incentives for development, supplementing them with their own resources. They set quantitative housing targets which the municipalities then translate into land-use plans (Needham, 2012). The key decisions are taken at the lowest political level, and a higher political level rarely intervenes. Municipalities have the main spatial planning power and their autonomy is constitutionally guaranteed.

Land-use planning is regulated by the Federal Building Code covering the content of and procedures for adopting local land-use plans and the rules for assessing development proposals outside areas covered by these plans. Municipalities produce: (i) preparatory land-use plans setting out objectives for future land use and preliminary zone designations and (ii) binding urban land-use plans with site-specific recommendations and measures. Municipalities are also responsible for providing the infrastructure to support development. There is little discretion in the German land-use planning system (Putz *et al.*, 2011) and municipalities operate within a planning system that requires the cooperation of all levels of government. As such, decisions concerning land use, taxation and economic development usually have to be consistent with the wider regional and federal government frameworks (Schmidt and Buehler, 2007).

## Land readjustment

This is a process regulated by the Federal Building Code (BauGB: Articles 45–79) by which municipalities temporarily combine the ownership of land earmarked for new development or of existing developed, but under-used, land. It has been the key mechanism for the de facto capturing of land values. It can only be carried out as a means of realising a plan and is a means of reallocating and redistributing rights in land without expropriating or acquiring it. When an area is designated for new development in the ‘preparatory plan’ (see above) all owners are obliged to pool their land and land values are frozen at their market values at the time to avoid speculation. Unless landowners are able to implement an agreed plan themselves and within a specified timescale the municipality pools the land, and resells serviced sites, having deducted the land needed for public infrastructure. The municipality’s relevant land re-adjustment committee is responsible for determining land values before and after the readjustment process. The pooling process is generally undertaken voluntarily by all landowners but the municipality can ultimately compel participation.

This process has been used for many decades to enable the costs of infrastructure to be shared by all the landowners and the municipality. It initially involved rural land for development but was later extended to built-up land. In the 1960s it was used to provide large-scale urban development land for new residential areas. In the 1970s, its purpose changed to the redevelopment of inner city areas and in the 1990s it changed again in order to address housing shortages as well as to provide land for industries and office buildings (Hayashi, 2000). Land readjustment can be carried out either by voluntary arrangements or through compulsory measures. It can be a total reallocation

of land to provide owners with plots suitable for building and to provide the municipality with land for local infrastructure. It can also be a more limited adjustment of adjacent plot boundaries (Konursay, 2004). This allows the municipality to influence the form of development, recoup the costs of servicing and infrastructure, and possibly to receive some of the uplift in land value, as well as to remove delays caused by a lack of infrastructure.

Municipalities decide the scheme boundaries and the rights and claims of all plots within the area are established and added together. The cost of the infrastructure can be financed with a short-term loan from local banks and then quickly recovered by the sale back of the new building plots (Davey, 2007; Hartmann and Spit, 2015; Falk, 2016). After the temporary consolidation of the land holdings the land needed for public use is deducted and the remaining land returned to land owners on the basis of the size or value of their land prior to readjustment but for a payment on the basis of the market value after the readjustment and the provision of infrastructure because these in themselves increase value. Landowners are obliged to pay this value or, if they receive less land in return (because it is taken for public uses), this is taken into account and might even involve compensation. Moreover if the land they give up for local infrastructure is not sufficient to pay the value increase due to readjustment, they have to pay an additional amount in cash or with additional land. Redistribution according to land area occurs where the values of all former plots are similar so, that if, for example, a landowner possessed in total 5 percent of all former plots s/he would receive back 5 percent of the value of the reallocated plots. If it is returned to the original owners, the municipality retains the increase in value up to 30 percent on greenfield land and up to 10 percent on brownfield land (Davy, 2007; Gielen, 2016). Owners may then develop their plot for themselves or sell to developers (capital gains made this way are exempt from land transfer tax). Doebele (2002) showed how land readjustment not only overcomes hold-out and free-rider problems and recovers the cost of installing infrastructure, but also captures the additional socially created value that can be then used to subsidise low-cost housing and other public purposes.

The German constitutional court has held that land readjustment is not a breach of property rights as it does not involve the permanent ‘taking’ of land because land is ultimately returned to its original owners. The capturing of land value was also held not to be a ‘taking’ as the value is invested in the scheme for which land pooling was undertaken (Davey, 2007).

Through land re-adjustment, municipalities (or other agencies involved) benefit from the sale of plots to fund infrastructure and avoid paying compensation for land taken for public uses. They also avoid the task of extracting value from owners after development and the combined problems of compulsory purchasing land and compensating owners. However any landowner whose plot is (and this happens very rarely) compulsorily acquired goes without any financial gain from the new development as their land is acquired at the value of their plot in its existing use at the time when the land readjustment process is initiated.

Where compulsory purchase is necessary the principle of equivalence applies. The German building code requires compensation at open market value of land in its existing use. This is defined as the price which would be achieved in an ordinary transaction at the time when the assessment is made, taking into account the existing legal circumstances and the actual characteristics, general condition and location of the property. This excludes any element of the market value that could be attributed to the prospect of future planning permission which would allow change of use and/or development. Thus no account is taken of any alternative use possible under planning policies. Hence land trades close to existing use value where private rights to property are preserved and an owner whose land is compulsorily acquired is allocated land of equivalent size or value to that owned prior to land assembly.

## Infrastructure charges

Land readjustment can cover all of the costs of the local public infrastructure but sometimes less, depending on the land values and market circumstances of the specific area. Where land values are high it can recoup all the local infrastructure costs, sometimes even some of the infrastructure costs beyond the development area itself including meeting other community needs (such as schools and affordable housing). However, in areas with low land values, municipalities must compensate landowners or designate less land for local public use.

If taking into account the costs of supra-local public infrastructure and other community needs, land readjustment is not sufficient to cover these, public subsidies are necessary. One reason for municipalities preferring temporary land readjustment and avoiding compulsory acquisition is that they can also negotiate a voluntary development agreement for additional contributions for supra-local and community needs (Hobma *et al.*, 2014).

When a developer acquires a building site itself, it is the responsibility of the municipality to service the land and provide the infrastructure (streets, parking areas, technical services, green space and also 'social infrastructure' such as playgrounds). This puts municipalities in a strong position to influence common facilities and to recoup the related costs. The applicant for a building permit on such a site is required to contribute to those costs, to a maximum of 90 percent with the remaining costs (at least 10 percent) paid by the municipality (Needham, 2012). Special local laws are used by municipalities to vary the level of charges for landowners (Oxley *et al.*, 2009).

## Regeneration

The German concept of 'poorly or under-utilised land' is used to identify locations for planned intensification as a prelude to applying urban development measures to recover the costs of infrastructure from development (Falk, 2016). It is government policy to stimulate housing building within existing built-up areas, especially through regeneration projects in the east and north of the country. Municipalities have a high

degree of government involvement in the housing development process (Schmidt and Buehler, 2007). They often acquire or own property and can supply housing land actively by offering it from their own land banks and by releasing their land holdings in the built-up area. Also, they can designate urban redevelopment zones where development is desired but is not taking place. In these zones they may freeze land prices at the point of designation at the existing market value of the plots involved (but not taking account of any value arising from prospective planning consent) thus being able to purchase land at its existing use value (Baing, 2010) and then sell it on at a higher value, once infrastructure has been provided to buyers who undertake to build on the land in accordance with the local area plan. Compulsory purchase is a power of last resort (and rarely used) and owners are able to prevent the compulsory purchase if they can evidence their ability to bring the land forward for development themselves in accordance with the plans (Centre for Cities, 2014; IPPR, 2018).

Falk (2016) argued that critical to the success of land re-adjustment is public support, for example the master planner of the scheme may be selected after a competition in which the public can comment on or vote for their preferred scheme. Moreover because land values are 'frozen' after the designation of land for re-adjustment, land speculation is limited as landowners cannot sell land for more than it is worth at that point.

Examining a successful scheme in Freiburg Hall (2014) argues that it depended on both 'good location and brilliant design' generating huge demand, effectively allowing the process to self-fund itself. The city acquired land and funded the infrastructure through a trust funded by local banks and recovered the investment by selling off sites to developers. It involved residents in the master planning and this helped to foster demand for the new dwellings because developers could not get permission to build unless they complied with the plan. By engaging the future residents in the design process many development risks were removed. The process also enabled many small developers and self builders to participate, encouraging diversity of supply and design.

Lord *et al* (2016) commenting on a 157 hectare scheme in former Hamburg docks observed that 'worthy of particular mention in this regard are the restraints created by a risk averse real estate industry and a business model that is not easily adapted to ..... a redevelopment programme of an exceptionally long duration. The central presence of a fiscally strong planning agency backed by a state bank made collective actions such as site assembly and the provision of infrastructure possible.' They also showed how a 'spatial segmentation' approach was used whereby land was divided into small plots with each developer entitled to purchase only a single one, drawing in a wider range of market entrants and maximising quality and covering the cost of the infrastructure. In the context of Hamburg's fiscal autonomy, its financial risk was balanced by major investments and long term tax income.

## Land transfer and property taxes

Landowners and developers also pay direct taxes on the value of their lands (Gansieri & Mattei, 2018). These include a land transfer tax on the purchase of real estate levied by the regions and not municipalities and paid by the buyer (at between 3.5 and 6.5

percent of the purchase price). Property transactions are not normally subject to VAT (rated at 19 percent) if they form part of the transfer of a business as a going concern.

Property taxes are an important source of local income and represent approximately 15 per cent of municipalities' total tax revenue (direct and indirect). They are based on the assessed value of the land/building and not on gains in value or on the circumstances of owners and charges are fixed by municipalities.

## 4. LAND VALUE CAPTURE IN THE NETHERLANDS

For many years municipalities in the Netherlands pursued an 'active land policy' acquiring development land for housing, servicing it and selling it on to developers. This has changed in more recent years owing to a more active private market and the costs facing municipalities. More emphasis is now being placed on seeking developer contributions as ways of funding infrastructure.

### Planning institutions and planning policies

The Netherlands is a decentralised unitary state with a planning system which places great emphasis on environmental protection (Needham, 2007; Oxley *et al.*, 2009). Until recently, land-use planning had a 'top down' and highly prescriptive approach. Central government policy was implemented by each municipality's adopted land-use plan with which consented development had to comply (Oxley *et al.*, 2009). Planning also has a strong master planning and engineering heritage, a reflection of the need to work collectively to reclaim land, create flood defences and build drainage systems (Faludi and van der Valk, 1994). Although property rights rest with landowners, provinces and municipalities have powers to purchase land, service it and parcel it into smaller plots and sell them on to developers at prices covering infrastructure costs.

Under the New Spatial Planning Act 2008 municipal land-use plans have been retained as the most important planning instrument. They are legally binding, over the whole of each municipality, must be prepared and revised every 10 years. If proposed developments conform to the plan, they must be granted permission although municipalities can alter their plans in response to an application, to enable one not conforming to go ahead. Statute allows for a relatively flexible application and does not oblige municipalities to approve the land-use plan beforehand giving consents enabling permission to be given to development before a plan is formally approved (Gielen & Tasan-Kok, 2010).

When faced with giving consent to development on privately owned land, Dutch municipalities mostly wait until negotiations with the developers or landowners have ended. Only after negotiations and the development agreement is signed, do municipalities then approve a new plan to replace or approve a departure from an old one. This is done to ensure land values can be captured by waiting until all negotiations

(for example on infrastructure contributions) are secured before approving the plan or any departures (Gielen & Tasan-Kok, 2010). Hence in the Netherlands, as in Scotland and England, development depends heavily on an agreement with the landowners, and compulsory acquisition rarely occurs (Gielen & Korthals Altes, 2007).

## Changing housing policies

Municipal plans can specify the different types of housing required: social renting (with definitions about maximum rents), social owner-occupied housing (with definitions about maximum prices and stipulations, who owns and for how long) and privately commissioned housing (de Kam, 2014).

Until the 1990s, there was not a market-led approach to the provision of housing and infrastructure. After the Second World War, the government's strong spatial planning strategy was reinforced by a comprehensive housing policy (Priemus, 1998). About 95 percent of all new housing was subsidised in the 1950s (van der Schaar, 1987) and, through this, the central government exerted a strong influence over location (Faludi and van der Valk, 1994). Land supply and housing was thus driven by both central government and municipalities and, from the 1970s, also by large and well-resourced not-for-profit housing associations. A large social housing sector peaked at 42 percent of all dwellings in the 1980s (Milligan, 2003).

Since the 1990s, there have been fundamental shifts in housing and related planning and regulatory policies. There has been an increasing emphasis on promoting owner occupation which rose from 45 to 57 percent between 1990 and 2010 and social renting declined from more than 40 to 35 percent (Andrews et al., 2011; & Boelhouwer, *et al*, 2006). Housing output was also falling behind demand, declining to around 20,000 units a year in the 1990s, compared with 60,000 in the 1980s. Most direct government subsidies for the provision of social housing and for urban renewal were withdrawn in the 1990s. Since then housing associations have had to rely mainly on their own resources to build new homes (Gurran *et al.*, 2007).

## Providing land and related infrastructure: capturing land value

Capturing land value increase is limited to cost recovery (Gielen & Lenferink, 2018). The state has no right to capture value increase on privately owned land. It can be secured only for the sake of recovering the costs of the public infrastructure necessary for new development. Agricultural land values are high, infrastructure costs are also high and until the recent increase in private sector housing most development land prices were shaped by the scale of social housing production and the need to zone adequate land to meet housing shortages. As a result development values were not – in the past – high (about twice agricultural values) with developers' profits coming from sales of new homes and not from land trading (De Kam, et al, 2014; Korthals Altes, 2009; Oxley *et al.*, 2009).

There have been three ways of de facto capturing land values (Gielen & Lenferik, 2018; Jones et al, 2018). These are: (i) active land policy whereby municipalities buy land and service it before selling plots to developers (including housing associations). Municipalities may compulsorily purchase land if the owner is unable or unwilling to develop it; (ii) as a variant of (i), notably in Amsterdam's old docklands, the municipality retains ownership of the land and leases it to the users thereby retaining its ability to extract increasing values over time; (iii) where private development takes place the municipality will require or (more likely) negotiate direct financial contributions from developers to pay for infrastructure.

## Active land policy

In the past de facto capture of development land was mainly achieved through an 'active land policy', whereby most designated development land was bought and sold by municipal land companies, servicing the land and selling it on to developers (Buitelaar, 2010; De Kam, 2013; Van der Krabben & Needham, 2008; van der Valk, 2002; Vermeulen & Rouwendal, 2007). In the immediate post war period there was a severe housing shortage and the state decided to take the lead providing homes (largely social rented housing) in large urban extension areas. In the mid-1990s, the latest nation-wide urban development programme ('Vinex') was designed to meet the continuing need for more new homes.

In a country where much of the land is below sea level, the state inevitably takes a major role in planning and providing expensive site infrastructure. As Needham (2007) observes, this has shaped Dutch attitudes to land: 'Land can be made usable, but only by joint efforts, and no one can exercise property rights without respect for the water boards. The result is that individual rights in land are regarded as a good that can be traded without much emotion. This is the cultural background that makes it relatively easy for Dutch farmers to buy, sell, and exchange their land in a utilitarian way. The practice spread into the buying and selling of land for urban development, so much so that private developers working in a particular location sometimes take the initiative to pool their land ownership'.

Implementation took the form of large-scale greenfield and brownfield developments, (Buitelaar & Bregman, 2016). Needham (2007) also observed that this active land policy was based on 'a desire to use land efficiently, a businesslike attitude to owning land, the wish to create more valuable landholdings so the rise in value can pay for servicing and infrastructure costs. It was also based on a high degree of trust by the private sector in the honesty and competence of government bodies. The policy could be implemented quickly if land did not have to be compulsorily purchased and with as little expenditure of public money because the infrastructure was paid out of the rise in land prices. Because landowners mainly participated voluntarily, the costs and benefits were distributed in a way that was socially acceptable'. Active land policy was especially relevant to affordable housing because, until 2008, municipalities were not able to specify the proportion of affordable housing within their zoning plans but were able to specify the proportion of any land they sold that had to be used for affordable housing (Lord *et al*, 2016).

As Falk (2016) explains, Dutch municipalities also used this active land approach under contractual agreements with the government's VINEX programme to build new housing with average schemes being around 1500 units. This occurred even though developers had acquired land in advance of where the new developments were to be built preferring to sell to the municipality and work in partnership, instead of acting alone (Lord et al, 2016). Public-private partnerships were set up often using a special purpose vehicle on complex schemes within which land was pooled. After early problems with speculation, these now use the Dutch Building Rights (or 'first choice') model, in which land owners get back an equivalent amount in the form of serviced plots with planning briefs. This enables the local authority to acquire land designated for development from landowners, (rather as if it had compulsory purchase powers), thus avoiding speculation.

And as Buitelar & Bregman (2016) explain these partnerships were not only of scale but also enabled alignment of different sectors and financial streams. On these large development sites, combinations of both profit-generating and cost-incurring land uses were made, where the former were used to cross-subsidize the latter. Commercial property and owner-occupied housing, in particular, have been used to cover the costs of social housing and public goods such as infrastructure and parks.

Municipalities can use compulsory purchase to facilitate land assembly by designating an area within which a landowner who wanted to sell their property was obliged to first offer it to the municipality (Buitelaar, 2010). Where land is compulsorily acquired compensation is paid based on the open market value of the property. Municipalities do not buy at existing (largely agricultural) land value rather at a price reflecting future use. Under Dutch law this is at the market value of un-serviced land in its planned designation, as if no infrastructure investment has taken place. The price paid for each acquisition is the average value for the whole project (i.e. taking account of the mix of uses in the development plan).

Compulsory purchase is only possible if existing owners will not, or are not able to, realise the planned use, and/or will not do that within a certain time. But in practice municipalities are in strong negotiating positions because they can choose whether or not to change the land use plan, buy it compulsorily or buy it on the open market before the owner anticipates a change to the plan (Falk, 2016; Jones et al, 2018; Needham, 2018). Although in the past municipalities paid about twice agricultural values the recent increase in private development and competition between developers for land has meant this has risen to ten times farmland values (Needham, 2007).

### **Demise of active land policy and the increase in facilitative policy**

Although active land policy has been the principal means of post war greenfield and brownfield development there was a marked switch after the mid 1990s to a more 'facilitative approach' for three reasons.

First the much greater emphasis on private house building has made it more profitable for developers to build homes for home ownership and it became more advantageous for them to work together rather than indirectly through the municipality. They needed smaller sites than the housing associations which had been backed by big subsidies from central government. In the early 1990s these subsidies were removed and housing associations were deregulated. As a result the proportion of low-cost social housing in housing construction fell from 73 to 18 percent between 1991 and 2001 (Korthals Altes, 2007). In addition, because land values increased towards ten times agricultural values, landowners decided they could make more money by selling to developers than to municipalities limiting the ability of municipalities to fund infrastructure as well as the potential surpluses they could make from active land policy. Meantime housing associations began to acquire land directly from landowners, with the percentage acquired from municipalities falling from 60 to less than 15 percent between 1995 and 2008 (Buitelaar, 2010).

The second reason for the change is that since 2008 municipalities can require developers to provide social housing as part of their developments (before this they could only do it by selling land to them with conditions) and can also require developers to contribute directly (subject to viability) to infrastructure costs.

Thirdly, since the global financial crisis, acquiring and holding land for development has posed much greater financial risks for municipalities, especially as the surplus available for value capture after selling serviced land in many VINEX and brownfield locations is much lower than in greenfield locations (Lord et al, 2016). This has had a major effect on local public finances including losses on land accounts so that gaps in land budgets had to be covered by other financial sources, such as increasing local taxes or cutting municipal expenditure. As a result, pursuing an active land policy has become less desirable and feasible for local governments (Buitelaar & Bregman, 2016) and developer contributions – on the UK model – have become a key alternative to land value capture (Gielen and Lenferink, 2018).

The demise of active land policy did not mean that municipalities became totally uninvolved because in its place more public private partnerships emerged in which developers pool their land to ensure they have the infrastructure required and can start building as soon as possible. In this way they minimise development risks (Lord et al, 2016; Needham, 2007). In some cases developers sell their land to the municipality, which acts as the pooling agent and this helps developers who bought land that was dispersed across VINEX locations. In other (more numerous) cases developers and municipalities set up a private limited liability company to which the developers sell their land, acquiring shares in the company. The company puts in the services and infrastructure and then disposes of the serviced building land to the developers who agree to the amount, price, and location of the building land before they sell their land to the company. Land pooling thus developed as a solution to the heavy costs of active land policy after the global financial crisis, moving to more of a risk sharing model (Lord et al, 2016; Hartmann & Spit, 2015) although even joint ventures have posed risks to municipalities because private partners have run into financial difficulties (Buitelaar & Bregman, 2016).

Where neither ‘active land policy’ nor ‘land pooling/readjustment’ is pursued, a ‘facilitator policy’ has enabled developers to build on their own land provided they get planning consent and pay a fee to cover the infrastructure costs. There are two ways of doing this: mandatory and negotiated contributions.

Mandatory contributions are required when land is formally rezoned and there are infrastructure costs which have not yet been secured. In these cases municipalities must approve a development contributions plan alongside the zoning plan (Gielen and Lenferink, 2018). Contributions are limited to the recovery of costs arising from the development up to the maximum development value. There are options to charge lower fees to those building new social housing – and recovering losses arising from such concessions from private developers. Central government specifies the infrastructure that can be included and community needs, such as social housing, are excluded. Getting planning consent is conditional on developers paying the infrastructure charges. Although these mandatory (post plan adoptions) contributions are less favoured by municipalities than negotiated contributions central government dislikes negotiated agreements because it may encourage ‘selling’ planning consents.

The second way is where there is no land development and servicing plan in place as part of a zoning scheme. Contributions are subject to negotiation provided there is a specific municipality policy prescribing what infrastructure is charged and how much it costs for each development. They are voluntarily negotiated before the approval of a new land-use plan as negotiations cannot be pursued once a plan is formally adopted. These financial or in-kind contributions can cover on-site infrastructure and off-site infrastructure. This approach dominates as most municipalities prefer to negotiate than to draw up a land development and servicing plan because of the latter’s complexity and risks of legal challenge and because it is more flexible, for example in terms of what the contributions can be used for (de Kam, 2014; Gielen & Lenferink, 2018). Negotiations covering such a wide range of contributions can be complex and time consuming and to encourage development following the global financial crisis, central government proposes to limit these contributions to the amount needed to recover related infrastructure costs – as is currently the case for contributions after zoning is changed. Developers as well as municipalities are critical of the proposals (Gielen and Lenferink, 2018).

## Land and Property Taxes

In the Netherlands, a Transfer Tax of 6 percent (2 percent residential) is levied in respect of the acquisition of the legal and/or beneficial ownership of land on the transfer. It is based on the higher of the assessed fair market value or the purchase price paid. There are no allowances for any debt secured on property. In general, the acquisition of real estate property is exempt from VAT (currently 21 percent) but the purchase of new development (liable up to two years after initial occupation) or vacant land is not exempt. Gains from sales of real estate are also liable for corporate and individual income taxes unless the gain is re-invested within three years.

Property tax or land value tax is paid annually to municipalities. A fraction of the value of real estate is taxed and used by municipalities to maintain infrastructure (roads etc.). Property values are estimated independently and updated annually. Taxation varies dramatically over different regions and municipalities. In addition to the property tax itself, there is a complicated additional taxation system for different infrastructural support systems: water-level management, water cleaning, waste management etc.

## 5. CAPTURING DEVELOPMENT VALUE IN GERMANY AND THE NETHERLANDS

Municipalities in Germany and the Netherlands have captured development values mainly by bringing land into temporary or semi permanent ownership and through charging for infrastructure.

In Germany sites are temporarily pooled in a development area through land readjustment. The sites are then sold back to owners at prices covering the costs of infrastructure, with the land for public uses deducted and charging the 'marriage' value of pooling enables some development value to be recouped. In zoned regeneration areas municipalities can freeze land at the existing market value of the plots involved (but not taking account of value arising from prospective planning consent), bring it into public ownership, service it and sell on to developers.

In the Netherlands active land policy enabled municipalities to buy land at market values, historically not much above agricultural values, service it and sell back to developers with conditions about what could be built, especially affordable housing. Now that municipalities are less active in the land market in the Netherlands, municipalities are requiring developers to make contributions to infrastructure costs thus capturing some development value to cover these expenses. They and can now use planning powers to require private developers to supply affordable homes in their schemes. In Germany too infrastructure charges are used to cover servicing costs where private developers are building on their own land.

Compulsory purchase is rarely used in both countries and cannot be used where owners can show they intend to carry out the development being planned. Where it is used compensation arrangements are different. In Germany compensation is paid at open market value, taking into account the characteristics, general condition and location of the property but excluding prospective planning permission and an owner whose land is compulsorily acquired is allocated land of equivalent size or value to that owned prior to land assembly. In the Netherlands municipalities pay compensation based on the open market value of the property of un-serviced land in its planned designation, but as if no infrastructure investment has taken place and paying the average value for the whole project (i.e. taking account of the mix of uses in the development plan). It should be noted that paying compensation based on average value is not a rule followed in Scotland (or in England).

It is also important to stress that using CPO in Germany and the Netherlands is not explicitly a way of capturing land values something that was emphasised in evidence to (and the report of) the Westminster Parliament's MHCLG select committee inquiry into land value capture in England (HCLG Select committee, 2018).

## 6. COMPULSORY PURCHASE OR VOLUNTARY ACQUISITION AT EXISTING USE VALUE: IMPLICATIONS FOR SCOTLAND

In Scotland (as in England and Wales) when land is acquired by compulsion or by voluntary agreement local authorities are obliged to pay the market value for the land, not the value in its existing use. This has not always been the case. In the immediate post war period, when comprehensive planning legislation was introduced, when development rights were nationalised and a 100 percent charge was levied on development value realised by planning consents, the value paid when land was compulsorily purchase was its existing use value, not the value in its consented use. This placed those who had their land compulsorily acquired and those developing it themselves on the same footing. The former got existing use value and the latter paid a 100 percent charge (i.e. tax) on development value leaving them with existing use value. This legislation was critical to enabling the first generation of New Towns to acquire land in places where there was little or no expected alternative use, so the prices offered were at, or near to, existing use value. Uplifts in land value were then captured to fund the infrastructure needed for the new developments.

However land for private development was traded at more than existing use value for a variety of reasons including the shortage of building licences (mandatory at the time of the rationing of building materials) so that those who obtained one also needed the land to build on and were willing to pay more than existing use value to obtain it. Moreover development charges raised very little (Crook *et al*, 2016), land was withheld from the market (partly because of opposition promises to repeal the charge) and there was insufficient public funding to enable the state to step in and compulsorily acquire the land needed (and also because of doubts about the legality of using CPOs to acquire land to pass on to another private body – although there is now no doubt that this is possible and lawful).

Development charges were abolished in the 1950s partly to ensure there were sufficient incentives for landowners to bring land forward at a time when a major expansion of housing construction (including private house-building) was needed. Thus those selling land privately got the full development value but, because CPO compensation was left unchanged, those whose land was compulsorily acquired received only existing use value, creating a significant unfairness between owners. Public concern about this resulted in compulsory purchase compensation later being changed to current market value.

There were two other occasions when those whose land was acquired by public bodies were paid less than full market value. In the first case the short lived Land Commission in the mid to late 1960s charged with levying a betterment levy was able to buy land net of the levy, thus placing those whose land was sold on the private market and those whose land was acquired by the Land Commission on the same footing, albeit that little levy was raised and little land was acquired (Crook *et al*, 2016). Similar arrangements applied to the Community Land Scheme in the mid to late 1970s when local authorities were able to acquire land net of the Development Land Tax which applied to the development value realised when planning consent was granted. As with the Land Commission experience little tax was levied and local authorities acquired little development land (Crook *et al*, 2016).

The position now (with very similar statutory provisions in both Scotland and in England & Wales – see Scottish Law Commission, 2014) is that those whose land is compulsorily purchased must now be compensated by payment of the open market value of the interest to be acquired. The basis is that of a willing buyer and willing seller, taking account of any allocations in development plans and any prospects of planning permission, but ignoring the impact on market value of the ‘scheme’ for which the land is being acquired (Denyer Green, 2014). RICS valuation guidance incorporates an assessment of ‘hope value’ in calculating market value. ‘Hope value’ is the popular term for the element of the difference between the market value of the land with the benefit of the current planning consent and the value with an enhanced, assumed, consent i.e. the prospect of development where there is no current permission for that development. The proportion that can be properly reflected in the assessment of the market value is almost entirely subjective, being based upon comparables and valuers’ experience and knowledge of the market (RICS, 2008).

Under the ‘no scheme’ rule (further clarified in English legislation in 2017) any increases or decreases in the value of the land attributable to the scheme for which the acquiring authority purchases the land, or the prospect of that scheme, are disregarded when assessing compensation. The intention is that persons affected should be left neither better nor worse off (at least in monetary terms) as a result of the compulsory acquisition. So for example, if farmland is being acquired for a new housing development the effect of this on market value can be ignored. However this is only the case when there are no other existing plans or consents in place for this land. These (and the prospects of them being implemented) cannot be ignored in reaching a decision on market value. Thus if the land acquired already has planning consent or is allocated in an adopted local plan this is likely to be close to the average market value being paid for similar land with similar planning background in the locality. And even if the land has neither consent nor plan allocation, the courts have held that, given the discretionary nature of our planning system, account must be taken of the probability of a future housing allocation. The ‘no scheme’ principle does not mean that hope value cannot be part of the market value compensation. Thus some ‘hope value’ may, depending on the specific circumstances, be paid on top of existing use value.

A leading case in the English courts is *Myers*<sup>1</sup> (another is *Spirerose*)<sup>2</sup> and this is also referenced in Scottish decisions (Scottish Law Commission, 2014). Myers owned farmland adjacent to the Milton Keynes new town and this was compulsorily acquired in 1970 as part of the planned expansion and he was offered a figure equivalent to existing use value plus disturbance, thereby excluding hope value. The Court of Appeal in hearing arguments about points of law in relation to compensation argued in 1974 that account had to be taken of the possibility that this land would have received consent at some time in the future given the discretionary nature of the planning system. It held that valuation had to take place in an imaginary state where the New Town had to be ignored but planning consent for development on Myers land had to be assumed on its own with no New Town or New Town infrastructure. The Court referred the compensation decision back to the then Lands Tribunal following which compensation was agreed to take account of this judgement (note that in *Spirerose* the court held that the degree of uncertainty must be taken into account in the valuation). The Scottish Law Commission (SLC) observed how the precision of plans had reduced over the years hence making it more plausible to argue in making the case that land would have been developed at some time in the future. As it also stated ‘...we see no reason to call in question the principle that the price paid for land should reflect its value to the seller. Apart from any other consideration, it is what domestic law and the Convention require. That value should also include an assessment of the potentiality of the land’ (SLC, 2014).

In England there have been changes to the CPO regime in the *Housing and Planning Act 2016* and the *Neighbourhood Planning Act 2017*, intended to make processes clearer, fairer and faster and clarifying the no-scheme principle, ‘replacing obscurely worded statute and 100 years’ of often conflicting case law with a clearer basis for identifying open market value, ensuring that negotiations on compensation can proceed with more speed and certainty (MHCLG, 2018). Some of the evidence to the Westminster Select Committee thought the latter would provide greater scope to capture more of the uplift in land value associated with public sector intervention (HCLG Select Committee, 2018) but not all agreed.

Whilst proponents of acquisition at existing use value have argued that the legislation should be amended so that no account is taken of any prospective planning permission or hope value, many proponents of this change also accept that landowners do need incentives to bring land forward for development given that CPO can be a long drawn out process. The IPPR (2018) and many others (e.g. Centre for Progressive Policy, 2018) urged reform to enable local authorities to acquire land ‘at a fair value’ by removing speculative ‘hope’ value based on prospective future planning permissions but still allowing landowners to receive a sufficient return on their investment, which provides them with an incentive to bring forward their land. One option advocated by the Town & Country Planning Association is to CPO land without the application of speculative hope value but instead paying landowner existing use values plus a percentage of consented use value (TCPA, 2018).

<sup>1</sup> *Myers v Milton Keynes Development Corporation*: CA 1974 1 WLR 696; see also *Denyer Green* (2014)

<sup>2</sup> *Transport for London v Spirerose Limited (In Administration)* [2008] EWCA Civ 1230

Importantly, were the arguments for permitting CPO at existing use value to prevail it would potentially recreate the unfairness of the 1950s between owners of land CPO'd and getting only existing use value (EUV) and owners of land privately developed and getting full development value on top of EUV, an unfairness that was resolved by moving to the current position. Although the European Convention on Human Rights (ECHR) defines compulsory purchase of property as not constituting a breach of rights if the public interest is pursued, paying compensation at existing use value may breach rights because the lack of financial equivalency may breach public interest and proportionality tests. There is no evidence to date that the application of CPO compensation in Scotland has breached the convention (SLC, 2014), but legal experts in England have argued that the greater the discrepancy between the full market value (including hope value) and the price the state is willing to pay, 'the more you have to justify a good public interest reason why you are not paying financial equivalency' (Denyer Green, 2018). Notably, many have argued that this is an area needing clarification.

## 7. OPTIONS FOR CAPTURING MORE DEVELOPMENT VALUE IN SCOTLAND

In the light of the current rules on CPO compensation in Scotland (and in England) and of the experience in Germany and the Netherlands, and acknowledging the risks of failing to take full account of their different contexts (including their different legal systems, local banking and development industries), what does the evidence in this briefing paper suggest about ways to enable local authorities in Scotland to capture more of the development value involved?

There are four possibilities, which are not mutually exclusive:

- (i) using adopted development plans to help shape land values and capture more development value via planning obligations and infrastructure levies;
- (ii) introduce special development zones where compulsory purchase would be at existing use value but also providing financial equivalency to owners of land changing hands with planning consents outside the zones;
- (iii) creating joint ventures of local authorities and landowners to pool land, finance infrastructure and develop or sell it on in its serviced value with planning consent;
- (iv) changing compulsory purchase legislation to provide compensation at existing use value.

1. Making greater use of local development plans to shape land values and in particular to shape values throughout Scotland before specific developments are proposed. There has been growing use of financial and in kind contributions by developers to infrastructure in Germany and the Netherlands (as alternatives to public land acquisition to finance infrastructure) as well as in Scotland and England. There is good evidence that having clear policies about contributions (via planning obligations and infrastructure levies, the latter operative in England and proposed in Scotland) can shape land values since developers take account of their obligations to pay for infrastructure and affordable housing when deciding what to pay for land. If these are introduced and consistently implemented there is every expectation that developers will take the costs of complying with them into account when deciding what to pay for land (including through options agreements) and that market values will decrease, if not down to existing use value. Land values are captured indirectly this way through the benefits local communities get from developers paying for infrastructure and other community needs. Relevant to this is the recent High Court judgement in England (*Parkhurst*)<sup>3</sup> where the court held that it was the policies in a plan that should determine what developers were expected to contribute through obligations not the price they had paid for land. This helps underpin an approach in which plans are used to shape land values. Of course both obligations and levies need to be justified as necessary to secure development in accordance with plan policies.

This should help shape land values by ensuring that the market price takes full account of policy requirements for infrastructure so that the prices paid in market value terms by a public body voluntarily or compulsorily acquiring and a private transaction of land of similar character, location and planning context will be materially the same.

This approach to securing more land value capture has the benefit of building on and improving existing practice and also builds on the Planning (Scotland) Bill's approach to simplifying the procedures for adopting and updating plans and the Government's commitment to introduce an Infrastructure Levy in due course. This means ensuring development plans are up to date, regularly revised and explicit about what land can be developed and what cannot and also explicit about developer obligations (and any infrastructure levies to be paid). Because the approach would seek to reduce land values across all areas where development takes place and would treat all landowners owning land of the same characters similarly, it would secure financial equivalence between them, subject to any exemptions in obligations policies and potential levies. Its disadvantage is that it will work best in areas where there is significant value to be captured and works best when the market is buoyant. It also works best when the market is well informed and takes account of obligations when agreeing price for land.

Fundamentally this approach needs to ensure that landowners and developers are left with some adequate incentives to bring land forward and to develop it.

<sup>3</sup> *Parkhurst Road Ltd v Secretary of State for Communities and Local Government and another* [2018] EWHC 991 (Admin)

2. Second, to introduce special development zones in adopted plans where planning procedures would be faster and where CPO compensation could be based on the existing use land values prevailing at the time of designation rather than based on the market value which reflect any current consents and relevant policies and proposals in the adopted plans for the area of the zone at the time of designation (including any requirements related to planning obligations and infrastructure levies).

Such an approach would be consistent with the intended simplified planning zones (now Master Planning Consent Areas) proposed in the Scottish Planning Bill (Scottish Parliament, 2017) as well as broadly consistent with the practice in Germany where land prices in designated regeneration areas are frozen at the time of designation

This approach would build on some of the proposals about zones in the Bill but to introduce existing use value compensation into these arrangements (as has been proposed in a recent amendment) runs the risk of introducing added complexities because it could breach the principle of financial equivalence in terms of compensation paid to owners within the zones compared with the market values paid in private transactions outside such zones (and any CPO compensation paid outside the zones). It is likely, *prima facie*, that such an approach to compensation might frustrate the very speeding up which the zones are designed to secure if owners appealed the compensation. Hence if this approach to capturing land values through existing use value compensation was to be sustained it would need a strong public interest argument to be invoked and prevail .

To address this risk, this approach would need to be accompanied by an approach to policies outside the zones set out in possibility (1) above, so that owners of land within the zones should feel there was reasonable financial equivalency in terms of compensation paid to them compared with the market values paid in private transactions outside such zones because the latter were strongly impacted by the requirements of planning obligations and infrastructure. If this is the case there is a reasonable chance that local authorities would be able to assemble any land they needed voluntarily in the zones and not through CPOs. And even if the proposed amendment is not sustained through the final stages of the Bill, the existing 'no scheme rule' would presumably apply to any compensation at market value within such zones.

This approach has some similarities with the proposals made by Sir Oliver Letwin in his review for the Westminster Government of the build our rates on large housing sites in England (Letwin, 2018). He proposed a model by which all large sites identified in local plans would be designated as fully privately funded Infrastructure Development Corporations. The Master Plans would identify a greater diversity of housing, high proportions of affordable housing and the need to invest in the infrastructure – so the land values would be reduced very significantly (to a maximum of ten times existing use value).

3. The third possibility is to follow practice in the Netherlands where local authorities have entered into joint venture arrangements with landowners in an area of major development. Partners could pool land holdings (both public and private) taking shares in accordance with their share of land, borrow to finance the necessary infrastructure and public goods (open spaces etc.) and sell the land back to shareholding members in pre agreed proportions and locations at the market value, after the infrastructure investment. This value would also take account of remaining obligations to be placed on developers (e.g. to provide affordable housing). This would enable the funding debt to be repaid but leave landowners with incentives to carry out the development in the plan. In return for accepting a lower capital gain on land values they would get the guarantee of the investment in infrastructure 'up front'.

One advantage of this approach is that it shares development and some financial risks for potential participants, including landowners, and helps secure funding for infrastructure although it will require aligning incentives for all involved. A key disadvantage from local authorities' perspective is the financial risk they may take on, albeit with the prospect of gains once the development takes off. There are also governance issues for local authorities which would need to be addressed, especially the 'insider trading' challenge if they act both as shareholder and planning authority. And to avoid having to compulsorily purchase the land of any landowners not wanting to be party to the venture they could be paid a price reflecting the marriage value of the pooled but unserviced land and also taking account of the planning and obligations proposals for the scheme (as on the lines of the Netherlands arrangements for compulsory purchase compensation in former active land purchases).

4. The fourth possibility is to amend CPO legislation to place compensation, as proposed in suggested amendments to the Scottish Planning Bill, on the market value in its existing use taking no account of hope value as well as invoking the 'no scheme' rule.

The advantage of this is that it would enable local authorities to acquire land more cheaply than they are currently able. The principal risk is that adopting this approach creates (as in the 1950s) two market values, one for land CPO'd and another for land subject to private transactions and with planning consent for a new use. This might breach financial equivalency and breach human rights. If that proved to be the case, steps would need to be taken to address this. One option (as some have proposed) would be to add a 'mark up' to the CPO compensation. Another would be to ensure that the market value (net of hope value and the scheme) of transactions 'CPO'd' took full account of planning policies including required obligations and affordable housing contributions thus making them more equivalent to development values not subject to CPO and thus matching to an extent the values in private transactions.

Yet another step to deal with financial equivalency and fairness would be to subject the development value secured in private transactions (already influenced by planning policies on obligations and levies) to a higher rate of capital gains and stamp duty land taxes.

None of the approaches would be easy to draw up and administer. However an alternative approach that: (i) pays compensation, excluding the scheme; and (ii) takes account of what S75 contributions would have been expected of a private development could, prima facie, adhere the public interest criterion in terms of human rights.

As the Scottish Law Commission rightly observed holding the balance between these conflicting interests is pre-eminently a subject for decision by Parliament (SLC, 2014, para 56).

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