

STATES OF JERSEY



FIELDS 85, 84 AND 80, LA RUE CARRÉE, ST. BRELADE: ACQUISITION OF LAND BY THE PUBLIC (P.78/2018) – COMMENTS

**Presented to the States on 9th July 2018
by H.M. Attorney General**

STATES GREFFE

COMMENTS

These comments are prepared in the light of Proposition [P.78/2018](#) lodged by the Minister for Education.

As the Proposition comments on the legal position under the [Compulsory Purchase of Land \(Procedure\) \(Jersey\) Law 1961](#), it seems to me that it would be helpful for members to have legal advice on some of the issues in advance so that the debate can take place against a background where members are informed about the legislation.

Introduction

1. This document contains legal advice for the benefit of the Assembly in respect of Proposition P.78/2018 (“the Proposition”) on the compulsory purchase process.
2. Although the Law and process in Jersey is different to that in England and Wales, there is a useful comment by Lord Nicholls in *Waters v. Welsh Development Agency* [2004] 1 WLR 1304 at [1] as to the utility of compulsory purchase, where he stated –

“My Lords, compulsory purchase of property is an essential tool in a modern democratic society. It facilitates planned and orderly development. Hand in hand with the power to acquire land without the owner's consent is an obligation to pay full and fair compensation.”

3. It may also assist Members that in *Burt v States of Jersey* [1994 JLR 341], a Jersey case that concerned a compulsory purchase for housing, Commissioner Hamon commented at 346 –

*“The procedure laid down by the legislation is unusual because although the Housing (Jersey) Law creates a power of compulsory purchase, the power is to be exercised not by the Committee itself but by the States. **The power is, apparently, rarely used and when it is used, usually occurs where the owner is willing to sell but the price for the property cannot be agreed.**”*
[My emphasis]

Powers and process

4. Article 2(1) of the Compulsory Purchase of Land (Procedure) (Jersey) Law 1961 (“the 1961 Law”) provides that the provisions of the 1961 Law only apply where another Law, referred to as a Special Law in the 1961 Law, confers power on the States to acquire land by compulsory purchase in accordance with the provisions of the 1961 Law.
5. The [Education \(Jersey\) Law 1999](#) is a Special Law, Article 63 of which provides –

“63 Power to compulsorily acquire land

- (1) *The States may acquire land by compulsory purchase on behalf of the public for the purposes of this Law, in accordance with the Compulsory Purchase of Land (Procedure) (Jersey) Law 1961.*
- (2) *The power to acquire land by compulsory purchase conferred by paragraph (1) shall include the power to –*
 - (a) *acquire any interest in land or a servitude or other right in, on or over land by the creation of a new interest, servitude or right; and*
 - (b) *extinguish or modify any interest in land or a servitude or other right in, on or over land.*
- (3) *For the purposes of this Article, “land” means any corporeal hereditament, including a building and land covered with water and also includes any interest in land or water and servitudes or rights in, on or over land or water.”.*

6. Article 3 of the 1961 Law provides –

“3 Plan to be prepared and money voted

No land may be acquired by compulsory purchase on behalf of the public unless –

- (a) *a plan showing the land to be acquired has been approved by the States; and*
- (b) *a credit of the monies necessary to meet the expenses to be incurred in the acquisition of the land has been voted by the States.”.*

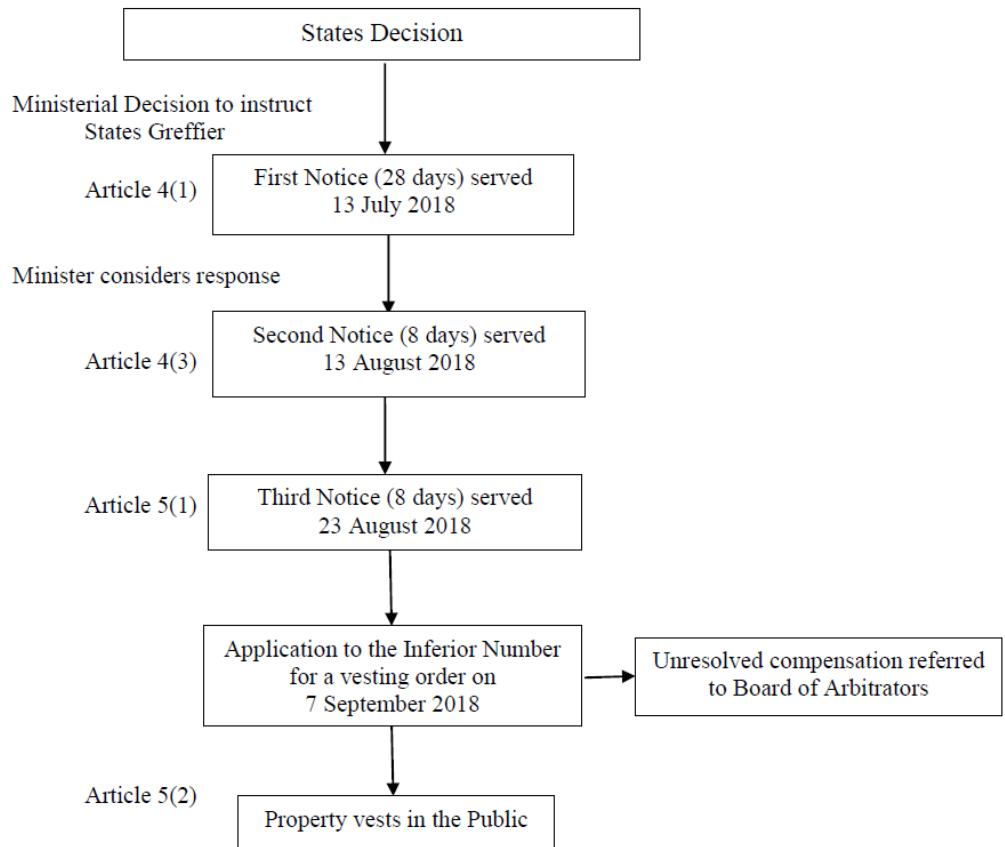
7. The above describes the role of the States in respect of compulsory purchase, and in that role the States will be acting in an administrative, rather than a legislative, capacity. What this means is that the decision is amenable to judicial review. By way of brief explanation, judicial review is a process whereby the Court considers the legality of the decision under review, in other words –

- the States came to a conclusion to which they could not reasonably have come upon proper consideration of the facts before them and of the law;
- the States took into account some matter which they should not have taken into account;
- the States failed to take into account some matter which they should have taken into account; or
- the purpose of the States, or their dominant purpose, was a purpose not permitted (in this case) by the Education Law.

8. If the States adopt Proposition P.78/2018, there is then a process under which the Greffier of the States serves a series of notices on the owners(s) (as well as any lessees or occupiers) of the land to be acquired. Articles 4 and 5 of the 1961 Law provide for the Greffier to serve –
 - A first notice requiring the recipient to notify the Greffier, in writing, within such period as the acquiring authority deems appropriate having regard to the circumstances of the case (which period shall in no case be less than 28 days after the service of the notice), of their interest in the land and the amount of compensation which they are prepared to accept for such interest. The notice may also state the time at which vacant possession will be required. [Article 4(1)&(2) of the Law]
 - A second notice, if the first notice is ignored or the recipient refuses to comply with the requirements in it, or if the acquiring authority considers the amount of compensation sought to be excessive, informing the recipient of the compensation which the acquiring authority offers to pay, and that if the offer is not accepted within 8 days after the service of the second notice, that the interest would be acquired and compensation assessed in the manner provided for by the 1961 Law. [Article 4(3) of the Law]
 - A third notice, if the offer under the second notice has not been accepted, that in accordance with the provisions of Article 5(1) of the 1961 Law of the intention to apply to the Inferior Number for an order that the land be vested in the Public.
9. As the period in the first notice is a matter for the acquiring authority to decide, in practice the Greffier of the States will need a Ministerial Decision from the acquiring authority (the Minister for Education in this instance) as to the period for response. The notice may also state the date on which vacant possession of the land is required.

If the States agree to P.78/2018, the following is an illustrative timeline for the notices referred to above, and assumes that it is not possible to reach agreement without pursuing the process to the conclusion of an application to the Inferior Number for a Vesting Order.

It is possible for the process to be concluded by agreement to pass contract at any point between the States' decision and the Vesting Order.



The above is for illustrative purposes only. It is based on the minimum periods within the 1961 Law, assumes the notices are served promptly, and that the Inferior Number is able to hear the vesting application within a reasonable period of the third notice.

10. Under Article 5(2) of the 1961 Law the Inferior Number must, if satisfied that the provisions of the 1961 Law have been complied with, order that the land be vested in the Public, and that a record of the title of the Public be registered in the Public Registry of Contracts.
11. It is only the land that is vested in the Public. The very nature of compulsory purchase means that if this proceeds as far as the Vesting Order, then the owner misses the opportunity to negotiate in relation to other matters that the acquiring authority might have been prepared to agree to had the matter been concluded consensually.

Compensation

12. Where it is necessary to determine compensation, the Greffier of the States must apply to the Inferior Number to refer it for determination by a Board of Arbitrators. This application is usually made as part of the application to vest the land. Where compensation is disputed, 75% of the amount of compensation offered must be paid forthwith when the land has been vested. Article 10 of the 1961 Law sets out the rules for the assessment of compensation.

13. It is of note that no allowance can be made on account of the fact that the acquisition is compulsory, which means there is no ransom attributable to the fact the land is needed as part of a scheme. The valuation is on the basis of the amount which the land might have been expected to realise if sold on the open market by a willing seller on the date that the land vests in the Public. The assessment of compensation will also take into account any reduction in value of land in the same ownership that is severed as a result of the purchase.

Finality

14. Decisions of the Board on any question of fact are final and binding on the parties. By virtue of Article 14(1) the Board may, and if the Inferior Number of the Royal Court so directs shall, state at any stage of the proceedings in the form of a special case for the opinion of the Court, any question of law arising in the course of the proceedings. The decision of the Inferior Number on any case stated to it is final and conclusive.

Costs

15. Article 16 of the 1961 Law states that the fees of the Board of Arbitrators and all expenses incurred in proceedings under the 1961 Law shall be paid by the acquiring authority (in this case the Minister for Education) subject to reimbursement by any other party in accordance with an order of the Board under Article 17. Article 17 of the 1961 Law gives the Board power to order costs of any proceedings before it is incurred by any party to be paid by any other party. In considering that power, the Board must have particular regard to any offer of a sum in compensation or any notice of preparedness to accept a sum in compensation made by a party to the proceedings before it. Where costs are awarded against a claimant, the acquiring authority may deduct the amount from the amount of compensation payable.
16. Under Article 16, “*expenses incurred in proceedings under this Law*” are expenses incurred in proceedings before the Board only. Proceedings in respect of Article 5 (i.e. the application to vest), the Board stating a case to the Royal Court under Article 14 of the 1961 Law or an application for judicial review are not “proceedings under this Law” to which the usual principles as to costs before the Royal Court would apply (i.e. in the discretion of the Court).

Power to sell

17. It is lawful for the States to sell any land acquired in accordance with the provisions of the 1961 Law, or any part thereof, to such persons and for such consideration as they may think fit. [Article 21]
18. There is no obligation to offer land back to former owners (or their successors). By way of comparison with other jurisdictions where expropriated land becomes surplus, England and Wales have non-statutory arrangements known as the Crichel Down Rules. As a general rule, former owners are given the first opportunity to repurchase the land previously in their ownership, provided that its character has not materially changed since acquisition. Disposals to former owners under these arrangements are at the prevailing market value.

Human Rights

19. The [Human Rights \(Jersey\) Law 2000](#) (the “HR Law”) makes it unlawful for any public authority to act in a way which is incompatible with one of the rights set out in the European Convention on Human Rights (“ECHR”). The ownership of property is a constitutional right which carries substantial force and can only be overridden if the public interest warrants it. The States is not a public authority for the purposes of the HR Law, but it is unlawful for the States to acquire land by compulsory purchase pursuant to powers contained in any enactment in a way which is incompatible with a Convention right: see Article 7(4) of the HR Law.

20. Article 1 of Protocol 1 of the ECHR (A1P1) provides –

“Article 1 – Protection of property

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”.

21. That provision would usually prevent a compulsory purchase without compensation. It would only be in the most exceptional circumstances that the deprivation of property rights without compensation would not amount to a disproportionate interference with the right to the peaceful enjoyment of possessions under Article 1 of Protocol 1. This is not such a situation, and of course there is provision for the payment of compensation, assessed in accordance with the provisions of the 1961 Law. The existence of compensation is a factor in striking the “fair balance” between public interest and private rights.

22. A compelling case in the public interest reflects the requirements of the ECHR in terms of the need to justify, in a proportionate manner, the exercise of such public powers to override private rights under Article 1 of Protocol 1. This is the weighing of the public interest in the acquisition of land for the site of a new school with the private rights of the owner, and the decision whether the former is sufficiently significant to outweigh the latter.