

# Compensation Where No Land Taken & Noise Insulation Regulations

## CBRE Briefing Note

### SUMMARY

- 1.1 This is a briefing note regarding:
1. Compensation entitlements that can arise from schemes reliant on statutory compulsory purchase powers where claimants do not have any of their land acquired; so called "compensation where no land taken" claims.
  2. Noise insulation regulations as they apply to significant construction or infrastructure works.
- 1.2 The briefing note covers the issues as follows
- **Section 10 Claims** – Compensation arising from execution of works enabling the scheme.
  - **Part 1 Claims** – Compensation arising from the use and operation of the scheme.
  - **Noise Insulation Regs** – Triggers and requirement to offer and install insulation measures.

### SECTION 10 CLAIMS

#### Summary

- 1.3 Section 10 of the Compulsory Purchase Act 1965 provides persons with an interest in land, but where no land is acquired, to a right to compensation for injurious affection to the claimant's interest caused by the execution of the works.
- 1.4 In order to succeed, a claim for compensation must pass each of four tests that derive from various decisions that were consolidated by the House of Lords in *Metropolitan Board of Works v McCarthy* (1874) LR 7 HL 243. These are known as the McCarthy Rules and are:
- 1. The injurious affection must be the consequence of the lawful exercise of statutory powers otherwise the remedy is by legal action.**

In other words, this limits the ambit of a valid s10 claim to injurious affection that arises from lawful conduct or operations relating to the scheme.
  - 2. The injurious affection must arise from that which, if done without statutory authority, would give rise to a cause for action.**

This sets the bar as to the level of injurious affection that would be actionable. It essentially means if the impact is such a degree that an actionable remedy could be pursued and be admissible against a private entity (for example an injunction against private nuisance) then it would be admissible against the statutory authority under s10.
  - 3. The value of the land or interest must be directly affected by physical interference with some legal right, public or private, that the claimant is entitled to make use of in connection with the claimant's property.**

In other words, the owner is entitled to compensation only for loss as reflected in a depreciation of value of land. Owners cannot ordinarily claim for loss of business or inconvenience.
  - 4. The damage must arise from the execution of the works and not from their authorised use.**

This prevents an overlap or double claim; a claimed based in the execution of works can be claimed under s10. A claim based on the use of the land can be claimed under Part 1.

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## Detail

### Limit on Claims

- 1.5 A claim cannot be progressed under section 10 for injurious affection arising from the use and operation of the works. Loss arising from operation is addressed in Part 1 Land Compensation Act 1973 ("LCA")(see below).

### Compensation

- 1.6 Compensation is paid as damages arising from the natural and probable consequence of the execution of the works. The causation of the damages must not be too remote.
- 1.7 The measure of compensation is the diminution in the value of the claimant's land. In more straightforward case this means a 'before and after' capital valuation is undertaken assuming the works are being executed and another where they works are not. Claims can be mitigated by re-provision of the right(s) interfered with.

### Section 10 Claims in practice

- 1.8 Section 10 claims are not common. It is typically the case that satisfying all four *McCarthy* tests is challenging and it is very rare for any valid section 10 claims to arise on a scheme.
- 1.9 It should be noted that this claim relates to execution of the works not those losses caused by a contractor operating outside its remit – these are frequently dealt with as a claim against the contractor directly.

## PART 1 CLAIMS

### Summary

- 1.10 Part 1 of the LCA1973 provides persons with an interest in land an ability to claim compensation for diminution of value of their interest caused by physical factors (defined in statute) arising from the use and operation of public works.
- 1.11 Save for a limited number of circumstances claims can only be lodged one year after the public works opens to the public with the valuation date (the 'relevant date') being the date the scheme opened.

## Detail

### What can trigger a claim

- 1.12 Part 1 compensation arises where an owner of a property can demonstrate that the value of their property has been reduced by physical factors arising from the use and operation of the scheme.
- 1.13 Physical factors are defined in the LCA 1973 as noise, vibration, smell, fumes, smoke, artificial lighting, discharge on to land of any solid or liquid substance – the principal factor is noise (in the case of a road this will be the noise generated by cars using the road). Non-physical factors cannot be taken into account, for example the mere presence or visibility of a new highway or other infrastructure.
- 1.14 Public Works are defined as any highway, aerodrome or other works or land provided or used in the exercise of statutory powers.
- 1.15 Part 1 claims may only be lodged from the first claim date which is defined as the date one year after the 'relevant date'. In the case of a road, this is the date on which it opened to the public and in the case of other public works, the date on which the works were first used after its completion.

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## Eligibility

1.16 Eligible claimants must;

- Hold an 'owner's interest' defined as freehold or a tenancy with not less than three years unexpired. Where the owner's interest entitles the owner to occupy then they must be in occupation. The effect of this is that vacant property needs to be occupied prior to a claim being submitted.
- In the case of agricultural land, hold an 'owners interest' and be an owner-occupier of the whole agricultural unit.
- In the case of other commercial property, such as small businesses premises, hold an 'owners interest' and occupy premises with a rateable value set by statutory instrument and which is currently not greater than £36,000 or £44,200 in Greater London. *(correct as of December 2021)*
- Submit their claim within six years of the first claim date.

## Compensation

1.17 Compensation is assessed as the depreciation in the value of the owner's interest caused by physical factors attributable to the scheme, this being the difference between;

1. The price a purchaser would pay for the property with the presence and use of the public works but without the presence of the 'physical factors', and
2. The price a purchaser would pay for the property with the presence and use of the public works with the presence of the 'physical factors'.

1.18 This is commonly known as a 'switched on and switched off valuation' because it takes account of the valuation impact of the physical factors only.

1.19 In forming a valuation, the effect of any mitigating works carried out by the acquiring authority to the property (such as soundproofing) or to the works (such as barriers) must be taken into account and not ignored in the assessment.

1.20 The valuation date is the relevant date.

## Part 1 Claims in Practice

1.21 Part 1 claim submission is widespread following the opening of new infrastructure schemes. There are a number of 'no-win, no-fee' surveying practices in the market whose business model tends to involve 'sweeping up' a large number instructions with suggestions of no-risk compensation for owners.

1.22 There is no geographical limit to the eligibility to claim and so depending on the nature of the scheme, Acquiring Authorities can sometimes expect a large volume of claims, however only a proportion of them are typically held to be valid and proceed to settlement.

1.23 Whilst much has been made of scientific approaches and use of noise assessments to inform depreciation valuations it is commonly the case that settlements are arrived at by negotiation and agreeing a diminution percentage informed by precedents on the same or other scheme as agreed between parties or directed by Lands Tribunal settlements.

1.24 In negotiating reliance is often placed on noise data. The Council would be well advised to check the extent to which the highway authority proposes measuring noise generated by the scheme and, if not, it should give serious consideration to undertaking its own noise measurements once the scheme is open (in preference to reliance on projected noise readings).

1.25 The relevance here is in respect of the Council's housing stock – be that Council owned or owns by a housing provider.

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## NOISE INSULATION REGULATIONS

### Summary

- 1.26 The Noise Insulation Regulations 1975 (as amended 1988) sets out the criteria under which a Highways Authority must offer to carry out or make a grant for carrying out defined noise insulation works to qualifying residential properties affected by noise from a new or altered highway.
- 1.27 This duty is ordinarily satisfied by undertaking an assessment of impact using computer modelling as set out in The Calculation of Road Traffic Noise, 1988 (CRTN). This is the methodology used to determine entitlement under the Regulations and is the accepted method for the prediction of traffic noise in the UK.
- 1.28 Typically, the CRTN is applied against all eligible dwellings or facades within a set distance from the road to identify qualifying dwellings or facades. Highway Authorities then contact eligible building owners to offer insulation grants or works.

### Detail

#### The Requirement

- 1.29 The duty under the Regulations means it is for the Highways Authority to identify and offer noise insulation to qualifying building owners. Unlike Part 1 and Section 10 claims, the process is not reactive and driven by claims, but proactive and driven by the Authority actively identifying eligible building owners.
- 1.30 Highway Authorities ordinarily commission a specialist consultant to detail an assessment methodology that has been undertaken to identify dwellings which qualify for noise insulation in accordance with the Regulations. Letters are then sent to offer works to be carried out or a payment made.

#### Eligibility - Statutory Traffic Noise Insulation

- 1.31 Regulation 3 of the Act places a duty on the relevant highway authority to offer insulation in respect of a new road, or a road for which a new carriageway has been constructed if the following four requirements are satisfied:
- The 'Relevant Noise Level' must be at least 68 dB(A) L10(18-hour) – which is significant.
  - The 'Relevant Noise Level' must be at least 1 dB(A) more than the 'Prevailing Noise Level'.
  - New roads must contribute at least 1 dB(A) to the 'Relevant Noise Level'.
  - The property must be within 300m of a carriageway forming part of the scheme.
- 1.32 The "relevant noise level" is calculated using the maximum expected traffic flows between 06:00 and 24:00 on a normal working day within a 15-year period after the new or altered road or carriageway opens to traffic. This is ordinarily taken to be the 15th year of operation.

#### Eligibility – Discretionary Traffic Noise Insulation

- 1.33 The Regulations provide Highway Authorities with the ability to offer noise insulation at their discretion, if the four statutory requirements are met in respect of an altered road.
- 1.34 The Regulations also provide the highway authority with discretionary powers to insulate buildings which do not fulfil the four requirements, but which share the same facade as a qualifying building. An example would be a block of flats in which one flat is eligible, but the Highway Authority could offer insulation to all other flats that share the same façade.

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## CONCLUSION

### Summary

- 1.35 As identified there are 3 instances where compensation might be payable in respect of property from which no land interest has been acquired – in turn
- **Section 10 Claims**

It is very unlikely that there will be any s10 claims on this scheme and where they might arise the Acquiring Authority can normally act to mitigate the loss.
  - **Part 1 Claims**

Insofar as the Council's housing stock is impacted by the physical factors then there is scope for Part 1 claims to be made. Experience suggests that on a scheme of this magnitude the Highway Authority will receive thousands of claims.
  - **Noise Insulation Regs**

It is incumbent on the highway authority to identify all those properties which might be entitled to noise insulation and then either undertake the insulating works or make a payment for them to be undertaken. Those properties which are insulated are still eligible for a Part 1 claim.

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