UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2009] UKUT 126 (LC)
LT Case Number: ACQ/196-199/2006

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

COMPENSATION – compulsory purchase – land on edge of village acquired for bypass – planning permission granted for residential development of retained land – whether highway objection to residential development in no-scheme world – whether residential planning permission would have been granted for the acquired land and the retained land in the no-scheme world – whether land possessed hope value and, if so, the degree of hope – cancellation assumption – Spirerose considered – whether compensation to be reduced to reflect betterment – interim decision – Land Compensation Act 1961 ss 2, 6, 9 and 14 – Highways Act 1980 s 261

IN THE MATTER OF A NOTICE OF REFERENCE

BETWEEN	**(1) PERSIMMON HOMES (MIDLANDS) LIMITED** **(2) ST ALBANS DIOCESAN BOARD OF FINANCE** **(3) OLD ROAD SECURITIES PLC**	**Claimants**
	and	
	THE SECRETARY OF STATE FOR TRANSPORT	**Acquiring Authority**

Re: 2.4515 ha. of land at
Oakley Road
Clapham
Bedfordshire

Before: N J Rose FRICS and A J Trott FRICS

Sitting at Procession House, 110 New Bridge Street, London EC4V 6JL
on 15/16 and 19/23 January 2009

Robin Purchas QC and Philip Petchey, instructed by Williams & Co, solicitors of Ampthill for the Claimants
Timothy Morshead, instructed by Treasury Solicitors, for the Acquiring Authority

The following cases are referred to in this decision:

Transport for London v Spirerose Limited (In Administration) [2009] RVR 18 (CA)
Transport for London v Spirerose Limited (in Administration) [2009] 4 All ER 810
Urban Edge Group Limited v London Underground Limited [2009] UKUT 103 (LC)
Essex County Showground Ltd v Essex County Council [2006] RVR 336 (LT)
Esso Petroleum Company Limited v Secretary of State for Transport [2008] RVR 351
Portsmouth Roman Catholic Diocesan Trustees Registered v Hampshire County Council [1980] 1 EGLR 150
Leicester City Council v Leicestershire County Council [1995] 2 EGLR 169
Pointe Gourde Quarrying and Transport Company Limited v Sub-Intendent of Crown Lands [1947] AC 565 (PC)
Jelson Ltd v Blaby District Council [1977] 1 WLR 1020
Melwood Units Pty Ltd v Main Roads Commissioner [1979] AC 426
Davy v Leeds Corpn [1965] 1 WLR 445
Fletcher Estates (Harlescott) Ltd v Secretary of State for the Environment [2000] 2 AC 307

The following cases were referred to in argument:

Margate Corporation v Devotwill Investments Limited [1970] 3 All ER 864 (HL)
Trocette Property Company Limited v GLC [1974] RVR 306 (CA)
Waters v Welsh Development Agency [2004] 1 WLR 1304 (HL)
RMC (UK) Limited v Greenwich LBC [2005] RVR 140 (LT)
Greenweb Limited v Wandsworth LBC [2008] RVR 294
Spirerose Limited (In Administration) v Transport for London [2008] RVR 12 (LT)
Transport for London v Spirerose Limited (In Administration) [2009] RVR 18 (CA)
Fletcher Estates Ltd v Secretary of State [2000] 2 AC 307
Myers v Milton Keynes Development Corporation [1974] 1 WLR 696
Director of Buildings v Shun Fung [1995] 2 AC 111
South Eastern Railway v LCC [1915] 2 Ch 252
Cooke v Secretary of State for the Environment (1974) 27 P & CR 234

INTERIM DECISION

Introduction

1. These four references are to determine the compensation payable by the Secretary of State for Transport, the acquiring authority, for the compulsory acquisition of 2.4515 ha. (6.058 acres) of land at Oakley Road, Clapham, Bedfordshire (the reference land). The freehold interest in the reference land was sold to Persimmon Homes (Midlands) Limited (Persimmon) prior to the date of entry by the St Albans Diocesan Board of Finance (SDBF). Persimmon agreed that SDBF and Old Road Securities plc (ORS) – who were granted an option to purchase the subject land in 1994 – would retain the right to negotiate and receive any compensation arising from the Secretary of State for Transport's acquisition. Four references were made to the Tribunal, one in the name of each of the parties and one in joint names. It is agreed that these references are to be dealt with together as one claim.

2. The reference land was compulsorily acquired under the A6 Trunk Road (Clapham Bypass) Compulsory Purchase Order (No.PS10) 2000 and the A6 Trunk Road (Clapham Bypass) Supplementary Compulsory Purchase Order (No.PS11) 2000. Notices to treat were served on 17 May 2000. Entry was taken on 5 January 2001, which is the valuation date.

3. In the light of the evidence we find the following facts. The reference land comprised an irregularly shaped parcel of land, occupying the south western corner of the Clapham Folly site, which lay on the north western side of the village of Clapham. The Folly site had an area of approximately 15 ha. It had a frontage on the east of 632 metres to the A6 Trunk Road (Milton Road) and on the south a frontage of 248 metres to Oakley Road, from which access was taken. Oakley Road was a county road, which linked Clapham to the nearby village of Oakley.

4. The Folly site was formerly glebe land of Clapham and Biddenham, owned by SDBF. The entire western side of the reference land (195 metres) was enclosed by a substantial boundary hedgerow. On the northern and eastern sides the reference land boundaries did not follow any established physical features. They ran across an area of relatively open land, enclosed by a mix of trees, other vegetation and open land. That area comprised old gravel workings, subsequently filled with inert waste, open storage, grazing and allotments. The open storage use was unsightly. There were areas of contamination within that part of the Folly site. A public footpath crossed the Folly site, linking Clapham with the village of Oakley, one kilometre to the west. About 128 metres of the footpath ran across the reference land.

5. The physical circumstances of the reference land were the same at the valuation date as at the date of notice to treat. These circumstances in turn were generally the same as those at 23 September 1999, when outline planning permission was granted for comprehensive development of the Folly site (including the reference land) for residential, commercial, community and open space purposes. The only difference was that the use of the land for storage, grazing and allotments had ceased by 17 March 2000.

6. The outline planning permission included a condition, No.22, that

> "There shall be no development on any land required for the A6 Clapham Bypass. In particular, there shall be no development on land identified on the Compulsory Purchase Order plan or the Supplementary Compulsory Purchase Order plan for the A6 Bypass. [The reference land]"

7. Prior to the opening of the bypass the A6 through the village of Clapham was a single carriageway road of varying width. The built-up frontage of the village extended over a distance of some 2½ km. The provision of a bypass for Clapham had been Government policy since 1985, when it was included in the White Paper "Policy for Roads in England". Between November 1987 and January 1988 a public consultation exercise was undertaken on three alternative routes. Three draft Orders were published for the Clapham Bypass in April 1991 and were the subject of a public inquiry between 17 September and 4 October 1991. The Inspector's report on the Orders was dated 1 December 1991 and he approved the route to the west of the Folly site.

8. In their statement of agreed facts the expert valuers agreed the following two issues to be determined by the Tribunal:

> "3.1 The principal issue to be determined by the Lands Tribunal is whether or not the subject [reference] land is to be valued on the basis that planning consent for residential development would have been granted in the 'no-scheme world';
>
> 3.2 If the Lands Tribunal decides that planning consent would not have been granted it will be necessary for the tribunal to decide whether or not the subject land is to be valued on the basis that it had hope value and, if so, the 'degree of hope value' to be adopted in the valuation."

9. It was further agreed between the experts that on the assumption that the subject land had no development value and no hope value for residential development at the valuation date, the compensation would be £60,000. If in the 'no-scheme world' planning permission would have been granted for residential development of the subject land then the compensation would be £4,938,130.

10. At the hearing the parties proceeded on the assumption that the principal issue was whether planning permission would have been likely to be obtained by the valuation date for residential development of the reference land in the absence of the bypass scheme. Four subsidiary issues arose for determination. Firstly, whether in the no-scheme world there would have been a sustainable objection on highway grounds to residential development. Secondly, whether in the no-scheme world there would have been a sustainable objection to such development on planning grounds. Thirdly, if there were any such sustainable highways or planning objections in the no-scheme world, what was the hope at the valuation date that residential planning permission would be granted in the future on some or all of the Folly site, including the reference land. Fourthly, whether there should be any set-off for betterment in respect of contiguous lands belonging to the claimants.

11. The agreed approach of the valuers to the assumption of planning permission in the no-scheme world and to hope value reflected that held to be correct by the Court of Appeal in *Transport for London v Spirerose Limited (In Administration)* [2009] RVR 18 (CA). The decision of the Court of Appeal was subject to appeal to the House of Lords. The parties' final submissions, which were made in writing, were delivered to the Tribunal during the first week of March 2009. The House of Lords hearing was on 7 and 8 June 2009. On 10 July 2009 we told the parties that although our decision was completed in draft we considered that it would not be appropriate to issue it until after the House of Lords had given its decision. The House of Lords gave its decision on 30 July 2009, *Transport for London v Spirerose Limited (in Administration)* [2009] 4 All ER 810, reversing the Court of Appeal on the correct approach in law to the assumption of planning permission and hope value. On 20 August 2009 we wrote to the parties and invited them to make further submissions in the light of it (and also with reference to the President's decision in *Urban Edge Group Limited v London Underground Limited* [2009] UKUT 103 (LC), which had been given on 4 June 2009). We received submissions, the last of them on 23 October 2009. The interpretation and application of the decision of the House of Lords seemed to us to be difficult and the issues of law potentially far-reaching. We therefore sought guidance on this from the President before issuing this interim decision. Paragraphs 12 to 111 below are the decision that we had prepared in draft prior to the House of Lords decision. What follows the heading "***Spirerose***" incorporates the advice on the law that we have received from the President and our further conclusions in the light of it.

12. Mr Robin Purchas QC and Mr Philip Petchey of counsel appeared for the claimants. They called three expert witnesses. Highways evidence was given by Mr Paget Fulcher BSc(Eng), CEng, MICE, MIEI, MIHT. Planning evidence was given by Mr Simon James MRTPI, MIEAM. Valuation evidence was given by Mr A.W. Horton BSc (Hons), MRICS. Mr Timothy Morshead of counsel appeared for the acquiring authority. He called expert highways evidence from Ms Rebecca Jo France BA (Hons), MSc, and planning evidence from Mr Craig Alsbury BA (Hons), BTP, MRTPI. Mr R.B.L. Snell MRICS produced two expert reports dealing with valuation matters, but he did not give oral evidence.

Statutory provisions

13. It is agreed that the valuation of the reference land should be based on rule (2) of section 5 of the Land Compensation Act 1961 (the 1961 Act), namely the amount which the land if sold in the open market by a willing seller might be expected to realise.

14. Section 6 of the 1961 Act provides:

> "Disregard of actual or prospective development in certain cases
>
> 6 (1) Subject to section eight of this Act, no account shall be taken of any increase or diminution in the value of the relevant interest which, in the circumstances described in any of the paragraphs in the first column of Part I of the First Schedule to this Act, is attributable to the carrying out or the prospect of so much of the development mentioned in relation thereto in the second column of that Part as would not have been likely to be carried out if –

(a) (where the acquisition is for purposes involving development of any of the land authorised to be acquired) the acquiring authority had not acquired and did not propose to acquire any of that land; …"

Case 1 of the First Schedule is expressed in these terms:

Case	*Development*
1. Where the acquisition is for purposes involving development of any of the land authorised to be acquired	Development of any of the land authorised to be acquired, other than the relevant land, being development for any of the purposes for which any part of the first-mentioned land (including any part of the relevant land) is to be acquired.

15. Section 9 of the 1961 Act states:

"No account shall be taken of any depreciation of the value of the relevant interest which is attributable to the fact that (whether by way of designation, allocation or other particulars contained in the current development plan, or by any other means) an indication has been given that the relevant land is, or is likely, to be acquired by an authority possessing compulsory purchase powers."

16. Under section 14(2) of the 1961 Act the outline planning permission granted on 23 September 1999 is to be taken into account.

17. Section 14(3) states:

"Nothing in those provisions [sections 15 and 16] shall be construed as requiring it to be assumed that planning permission would necessarily be refused for any development which is not development for which, in accordance with those provisions, the granting of planning permission is to be assumed."

18. There was no planning permission in force at the date of the service of the notices to treat for the construction of the scheme (the A6 Clapham bypass) and, pursuant to section 15(1) of the 1961 Act, permission is to be assumed for the development of the reference land for bypass purposes. It is agreed that such permission has no market value.

19. None of the special assumptions in respect of certain land comprised in development plans contained in section 16 of the 1961 Act apply to the reference land.

20. Neither party applied for a certificate of appropriate alternative development under section 17 of the 1961 Act.

21. Section 261 of the Highways Act 1980 applies to the compulsory acquisition of the reference land. This states:

> "(1) ... in assessing the compensation payable in respect of the compulsory acquisition of land by a highway authority ... the Lands Tribunal –
>
> (a) shall have regard to the extent to which the remaining contiguous lands belonging to the same person may be benefited by the purpose for which the land is authorised to be acquired."

Summary of the claimants' case

22. The claimants' case is that, but for its acquisition for the construction of the bypass, the reference land would have been developed for housing. The reference land was included in the planning application for residential development that received planning permission in September 1999 but was made subject to a condition preventing its development as it was required for the bypass. When considering what would have happened in the absence of the bypass it was necessary to have regard to what the actual authorities such as the parish council, the Local planning authority, the county council, the Highways Agency and the Secretary of State would have done. The Tribunal should proceed on the basis of how those bodies acted in the real world to inform its conclusions about how they would have acted in the no-scheme world. The claimants contended that the grant of planning permission for the residential development of the Folly site did not depend upon the construction of the bypass.

23. In reaching this conclusion the claimant considered in detail the evolution of Structure and Local plan policies and argued that the context for such policy development was that the bypass might not go ahead within the plan period or at all. The claim of the acquiring authority - that the planning context of the Folly site was one in which it was never contemplated that there would not be a bypass - was wrong.

24. Additional residential development at Clapham was strategically necessary and sustainable and would have met a wide range of aims and objectives in the emerging Local plan during the mid 1990s. Following the lifting of a drainage embargo in 1994 both the parish council and the borough council would have supported development in Clapham to enable it to catch up with other settlements. The Folly site was the most suitable site within Clapham for major residential development and was preferable to the alternative site at Green Lane. It was unconstrained and available for early release to help meet a serious housing land deficit. The existing natural boundaries of the site would have led to its allocation as a whole.

25. The claimants' highway consultants submitted an initial traffic appraisal report concerning the proposed residential development of the Folly site (in the context of a Local plan allocation) as early as May 1994. The report presented the data for the position with and without the bypass. The Highways Agency responded that it would not accept an access arrangement involving a roundabout junction at Twinwood Road because this would interrupt the traffic flow along the A6. However it said that a limited amount of housing would be acceptable with access from a priority junction, subsequently identified as a ghost island with a

right turn facility. The claimants argued that the Highways Agency was content with the proposed development with or without the bypass and that the acquiring authority was wrong to suggest that the Highways Agency's approach was always on the basis that the bypass would proceed. The claimants argued that the attitude of the Highways Agency would have been unchanged in 1998 when the planning application was made.

26. The claimants' position was that in the no-scheme world residential planning permission would have been granted on the retained land and that therefore the question of betterment did not arise. But if they were wrong about this they argued that the construction of the bypass was for the purpose of removing through trunk traffic from Clapham and not to provide a containment boundary to the village. When considering betterment the question was what, if any, benefit accrued to the value of the retained land for that purpose. The claimant said that, since the construction of the bypass made no difference to the acceptability of access for the proposed residential development onto the A6, there was no relevant betterment in respect of the acquisition of the land for the purposes of the highway.

Summary of the acquiring authority's case

27. The acquiring authority's case is that from November 1993, when the review of the Local plan commenced, the influence of the bypass, which was by then in its confirmed alignment, began to make itself felt. From then onwards the bypass proposals significantly shaped the relevant planning policies in the scheme world, in ways which made those policies materially different from the policies that would otherwise have emerged. The relevant question was what planning permissions would the Local planning authority have granted in the no-scheme world. That required the Tribunal to consider what a reasonable planning authority could have been expected to decide in the circumstances to be assumed at the valuation date rather than considering what permissions the actual Local planning authority might in fact have granted in the no-scheme world as the claimants suggested.

28. A proper consideration of the emerging Local plan showed that the only way in which a reasonable planning authority could have proceeded to treat Clapham in general, and the Folly site in particular, as suitable for substantial residential development was if the bypass was sufficiently certain to proceed in the reasonably near future. In the absence of the bypass there was nothing special about Clapham that would have justified the release of the Folly site for housing. It was the bypass that provided a physical boundary strong enough to demarcate the new village envelope and not the existing hedgerow. Without such an amended envelope the planning authority could not have made a cogent case for any development at the Folly site. In all the relevant policy documents the development of the Folly site was inextricably linked with the bypass. There was no suggestion that the reference land had development potential independently of the Folly site and therefore its prospects for development were also dependent upon the bypass.

29. In the no-scheme world the Folly site would have had to compete with all the other potential development sites in the borough. The claimants had not established that the Folly site would have been favoured by comparison with those other sites. There was never a critical

shortage of housing in the borough and no local needs had been identified. In any event any housing need would not have outweighed the conflict resulting from the release of the Folly site with the Structure Plan's main locational policies.

30. The claimants could not sustain their position that the dialogue between their highway consultant and the Highways Agency had always proceeded on a no-scheme basis. In fact the consultant had asked the Agency to consider the proposals on a pre scheme basis and the Agency's whole approach was predicated on the assumption that the bypass would be built in due course. The acquiring authority argued that the Highways Agency had relaxed its requirements in respect of the Folly site because, if the bypass was constructed, the A6 was likely to be detrunked. The claimants also completely ignored the critical road junction between Oakley Road and the A6, which the Highways Agency said would need to be improved in the event that the bypass did not proceed.

31. The acquiring authority said that there would be betterment to the retained land and that the claimants' view of the purpose of the acquisition was too narrow. The relevant statutory provision brought into account the increase in the value of the retained land that was due to the scheme underlying the acquisition.

Issue 1: Would there have been a sustainable objection on highway grounds to residential development of the Folly site in the no-scheme world?

32. It is convenient to consider this question as at four separate dates. Firstly in 1994 when, in the real world, SDBF's advisers were in communication with the Highways Agency regarding the forthcoming review of the Bedford Borough Local plan; secondly in 1996/1997, when an application to erect 150 dwellings on a site in Green Lane, Clapham was refused by Bedford Borough Council (BBC) and the decision upheld by the Secretary of State on appeal; thirdly in 1998, prior to submission by SDBF of a planning application for the development of the Clapham Folly site and, fourthly, in the months leading up to the valuation date, 5 January 2001.

33. Mr Fulcher is an associate director with URS Corporation Limited (URS) based at its office in Bedford. In February 1994 ORS appointed Thorburn Colquhoun (TC), an associated company of URS, to undertake a traffic appraisal that would be used to support a proposal to have the Folly site allocated for residential development in the review of the Bedford Borough Local plan. Mr Fulcher considered that the positive attitude which the Highways Agency demonstrated in the real world towards the development of the land was consistent with official policy at the time and would have been replicated in the no-scheme world.

34. Ms France, who is an associate director of Faber Maunsell based in their Birmingham office, disagreed. She said that, in the scheme world, the Agency seemed to be "relatively relaxed" about the prospect of additional traffic exacerbating conditions on the A6. In her opinion, the policy basis which should have been adopted was set out in the following extracts from Planning Policy Guidance 13: Transport (March 1994) and Circular 4/88 The Control of Development on Trunk Roads (November 1988):

> "In particular, land use policies should be adopted to ensure that: trunk roads and other through routes (including bypasses) serve their purpose as corridors of movement and do not have their national and strategic role undermined by development which encourages their use for short local trips; developments do not compromise the safe movement and free flow of traffic or the safe use of the road by others." (PPG13 para 6.1)
>
> "It [investigations into accidents] indicates that accidents on main roads cluster significantly around road junctions and accesses, and that there is a clear correlation between the total accident rate and the number of accesses permitted." (4/88, para 7)
>
> "If trunk roads are to fulfil this function [of facilitating the safe and expeditious movement of traffic over long distances], regard must clearly be had to the consequences of allowing development which would either increase road accidents or create traffic congestion." (4/88, para 5)
>
> "A more dangerous situation [than tail end collisions] is an access which provides for a right turning movement across the opposing traffic flow". (4/88, para 6)
>
> "If trunk roads are to continue to perform their function as routes for the safe and expeditious movement of long distance through traffic, it is clearly necessary to restrict the formation of new accesses to them". (4/88, para 11)

35. In her written report Ms France expressed the view that

> "It is very difficult to feel confident that the Highways Agency applied the above policies to proposals for development at Clapham Folly. My own opinion is that the Highways Agency did not apply them."

36. Ms France said that in her view, the only policy based justification for the Agency's approach was that set out in para 12 of 4/88, as follows:

> "Where roads are **likely** to be de-trunked, either because of the provision of a bypass or for other reasons, this will of course have a bearing on the **extent** to which it is justifiable to restrict development on them." (Emphasis added by Ms France).

She considered that there was no reason to believe that the bypass would not be brought forward in the Local plan period (1996-2001) and that the A6 through Clapham would be de-trunked as a consequence. As a consequence, the Highways Agency adopted a more relaxed approach to the development proposed in 1994 and also subsequently in 1998.

37. In the introduction to her report Ms France pointed out that her views were based on an examination of the surviving material "which unfortunately is extremely sketchy". In oral evidence she conceded that Mr Undrell, who had been the officer at the Highways Agency responsible for considering the proposed development in 1994, was still employed by the Agency, but he had not been called to give evidence because he "could not recall the decisions he took at the time or the reasons behind those decisions."

38. We are unable to accept Ms France's criticisms of Mr Undrell's approach. We have reproduced above Ms France's quotation from para 12 of Circular 4/88. Para 12 was the second paragraph in a section entitled "The General Policy Applying". In our view this is the appropriate place to find the relevant policy against which the Highways Agency should have tested the development proposal. The section starts at para 11, which reads as follows:

> "If trunk roads are to continue to perform their function as routes for the safe and expeditious movement of long distance through traffic, it is clearly necessary in general to restrict the formation of new accesses to them. A particularly strict policy is appropriate to fast stretches of rural trunk roads and to trunk roads of near motorway standard inside and outside urban areas."

39. Thus, the general advice given was that on a trunk road there should not be a proliferation of new accesses and that this was particularly important on certain types of trunk road. The A6 through Clapham cannot be described as a fast stretch of trunk road, as it had speed limits of 30 mph and 40 mph. The road was not near motorway standard. Accordingly, a "particularly strict policy" of restricting new accesses would not apply there.

40. Moreover, as Mr Fulcher pointed out, Ms France had been somewhat selective in her quotation from para 12 of 4/88. In full, this read as follows:

> "In the case of roads already subject to numerous direct accesses in urban areas, urban fringe areas, and the more substantial villages, it may be reasonable to allow additional accesses, particularly if building plots would otherwise be sterilised. If splayed accesses cannot be incorporated because of site limitation the access should be permitted if and only if there is no significant road safety hazard involved (Department of Transport Standards TA 20/84). More substantial developments will need service roads, and it will be necessary to take into account the general effects of the new access on traffic capacity and flow. It is desirable for Local planning authorities, with county councils, to formulate a general policy for dealing with these situations. Where roads are likely to be de-trunked, either because of the provision of a bypass or for other reasons, this will of course have a bearing on the extent to which it is justifiable to restrict development on them."

41. Mr Fulcher considered that the section of this paragraph which was applicable to the development proposed at Clapham Folly was contained in the third and fourth sentences. He said that the requirement for a service road was a means of avoiding multiple accesses onto the trunk road, that is frontage development. The proposal at Clapham Folly was for a single point of access, joining the trunk road at a location where a junction already existed. The internal distributor road was effectively a service road that collected the traffic and avoided any direct accesses onto the trunk road. We accept that evidence from Mr Fulcher. We are satisfied that, by restricting the number of accesses, and being on a section of road that was not fast or of near motorway standard but was already subject to numerous accesses in one of the more substantial villages, the proposal for the development of the Clapham Folly site was fully compliant with the policy set out in Circular 4/88.

42. We are also satisfied that, contrary to Ms France's suggestion, the highway authority, when considering the proposed development in 1994, did indeed pay attention to the possibility that the bypass would not be built before it agreed to Clapham Folly being allocated as a housing site. Early in 1994 TC suggested to the Highways Agency – which was the highway authority responsible for trunk roads – that the access to the proposed development should be by way of a new roundabout that would replace the existing priority junction of the A6 Milton Road and Twinwood Road. This location was chosen so that there would be no increase in the number of junctions on the A6 Milton Road. TC produced an assessment which considered the impact on the proposed access roundabout and the existing A6 Milton Road/Oakley Road priority junction of developments of 50, 300 and 400 dwellings on the Clapham Folly site. A report was prepared entitled "Traffic Appraisal of Residential Development at Church's Land, Clapham" and submitted to ORS. It showed that a satisfactory site access could be provided for the largest of these development options, whether or not the bypass was in place.

43. Because there was no likelihood of the site being developed with 400 dwellings, the report was revised to exclude the assessment of that option and issued in April 1994. It assumed a build rate of 50 completions per year. The appraisal concluded that the new roundabout would have sufficient capacity to serve a development of at least 300 dwellings both with and without the presence of a bypass. It also found that the junction of Milton Road and Oakley Road was already over capacity.

44. In May 1994 TC sent a copy of the revised report to the Highways Agency under cover of a letter seeking its views on the proposal with the access formed as a roundabout junction. The Highways Agency responded in a letter dated 3 June 1994. Its response to the principle of development was contained in the second and third paragraphs, as follows:

> "Whilst your report shows that a roundabout would operate satisfactorily at the Twinwood Road junction without the Clapham Bypass, I consider this form of junction inappropriate whilst the A6 through Clapham remains a Trunk Road. As a consequence I consider that only a limited development of the site could take place prior to the construction of Clapham Bypass.
>
> Should Clapham Bypass not be built I would then wish access to the site to be taken from Oakley Road with improvements to the A6/Oakley Road junction."

45. TC telephoned the Highways Agency in order to clarify the reference to the limiting of development. A letter from TC explaining the clarification was sent to ORS on 8 June 1994. It said:

> "I have spoken to Paul Undrell regarding his letter and he confirmed that by 'limited' he meant that the number of dwellings would be restricted to those which could be satisfactorily accommodated by means of a ghost island junction from the A6.
>
> His objection to the proposal in the pre-bypass situation relates to the additional delays to trunk road traffic associated with a roundabout junction."

46. In view of the Highways Agency's objection to a roundabout on the trunk road, TC considered the potential for the site access to be formed by the creation of a staggered priority junction on the A6 Milton Road, with minor arms being formed by Twinwood Road and the site access, on the basis that trunk road traffic would not be hindered. A supplementary report was prepared that presented the analysis of the operation of a staggered priority junction. A copy of the report was sent to the Highways Agency, which responded by letter on 14 September 1994 with the following comments:

> "I refer to our discussions concerning access to the above land from the A6 in Clapham.
>
> I am now content that the ghost island right turn facility you suggest for access to the site will operate without detriment to the safety and free flow of traffic on the A6."

47. TC's report had presented the Highways Agency with data on the traffic position with and without the bypass. It is clear from their letter of 3 June 1994 that the Agency had considered the no bypass situation. They were only prepared to accept a limited form of development prior to the construction of the bypass and, in the absence of the bypass, they wanted access to be taken from Oakley Road with improvements to the A6/Oakley Road junction. In our judgment the Highways Agency's letter of 14 September 1994, approving the proposed junction, must be considered in the light of the material to which it was a response, which specifically addressed the position in the absence of a bypass.

48. We therefore conclude that, in the no-scheme world in 1994, the Highways Agency would have indicated its approval to residential development on the Clapham Folly site. We would add that Mr Undrell's letter to TC dated 3 June 1994 concluded with the following words:

> "The above comments are made without prejudice to our assessment of any planning application."

A similar caveat would, in our view, have been made in the no-scheme world.

49. We next consider the Highways Agency's approach to residential development on another site in Clapham (Church Farm, Green Lane). An application for outline planning permission for residential development of 9.8 hectares of land incorporating part demolition/conversion of barns to form B1 business use was submitted to BBC in 1996. The maximum number of residential units for which permission was sought was 150. The site was to have two points of access. On the east side there was to be a connection to Green Lane and on the west side of the site to Highbury Grove by way of The Slade.

50. The application was refused. The applicants appealed and the Secretary of State called in the application for decision. The inquiry took place on various dates in May, June and July 1997. There had been seven reasons for the original refusal. The seventh related to highway matters and was based entirely on the Highways Agency's objection. The Highways Agency withdrew its objection prior to the commencement of the inquiry, on the basis that improvements to the proposed access arrangements had been agreed and that the number of

units proposed would be reduced from 150 to 85 prior to the Clapham Bypass being opened to traffic.

51. Mr Fulcher said that the case for the planning authority included the potential impact of the scheme on the Clapham Folly site, so that the cumulative effect was considered at the inquiry. It was clear that the objection by the Highways Agency related solely to the local disruption caused by turning traffic at the junctions of High Street with Green Lane and Highbury Grove. Therefore the Highways Agency was content at least with an additional 85 dwellings in Clapham over and above the number at Clapham Folly. The background against which this view must have been taken was an assessment of 300 units at Clapham Folly. There was no indication in the Inspector's Report that the Highways Agency would have objected on the basis of the impact of traffic along the A6, as opposed to inadequate junctions.

52. Ms France pointed out that, in para 2.1 of its statement prepared for the appeal, the Highways Agency had said that it had advised the Local planning authority to refuse the application because "Fundamentally, this proposal would add to existing peak time congestions." She accepted that this reason was not repeated in the conclusions section of the Agency's statement. It is, moreover, inconsistent with the Agency's subsequent decision to withdraw its objection subject to conditions. We agree with Mr Fulcher that the history of the Green Lane appeal supports the conclusion that the Highways Agency would not have objected to residential development on the whole of the Clapham Folly site – and thus on the reference land – in 1997.

53. Thirdly, we consider the Highways Agency's reaction when it was consulted on the proposed planning application on the Clapham Folly site in 1998. On 21 January 1998, prior to submission of the planning application, TC again contacted the Highways Agency, seeking their confirmation that the form of access which had been acceptable to them in 1994 was still acceptable. They wrote:

> "Further to our telephone conversation earlier today, I enclose for your information and re-confirmation, relevant correspondence leading to the Highways Agency's acceptance to the ghost island right turn facility...
>
> Our client has been requested by the Borough Council to apply for planning permission on the Clapham Folly site and therefore we are seeking re-confirmation that the Highways Agency stand by their letter dated 14 September 1994."

54. On 28 January 1998 the Highways Agency replied as follows:

> "I can confirm that a ghost island right turn lane remains an option which the Highways Agency would be content with bearing in mind the time lag from when this matter was last under discussion."

55. TC sent the Highways Agency copies of the proposed modifications to the A6 Milton Road/Twinwood Road junction to provide access to the Clapham Folly site under cover of a letter dated 11 February 1998. The Highways Agency replied on 17 February 1998, saying:

> "I can confirm that the layout shown is acceptable subject to physical islands being placed in the ghosting at the start of the turning lanes. This will reduce the potential for overtaking through the turning lane and also reinforce the speed limit."

56. On 22 May 1998 Mr James submitted an application on behalf of SDBF for outline planning permission for comprehensive development of the Clapham Folly site for residential, commercial, community and open space purposes. The site included the reference land and the A6 Milton Road access. Access and highway issues were presented in the supporting development brief that formed part of the planning application documents, as follows:

> "Access into the proposed residential development will be via the creation of a new access/spur road off the existing Milton Road (A6T). This has been designed to the requirements of the Highways Agency, with whom agreement has been reached and comprises footpath/pedestrian crossing point in the form of a toucan crossing, the installation of ghosting islands to prevent overtaking into the A6(T), a bus lay-by, a spur road leading into and providing access to the main development and a series of cul-de-sacs allowing residential servicing and forming effective traffic calming measures."

57. As a statutory consultee, Mr Pitt of the Highways Agency responded to the planning application by letter dated 2 July 1998, as follows:

> "Having assessed the proposed development I am able to confirm that we would not wish to object. As such I have attached our TR110 form directing conditions which must be applied to safeguard our position."

58. The directed conditions were as follows:

> "1. The development shall not commence unless and until the new junction has been constructed and approved by the Local planning authority, in consultation with the Highways Agency.
>
> 2. The junction shall be built in accordance with drawing No.... as produced by Thorburn Colquhoun consulting engineers and dated February 1998 to the satisfaction of the Local planning authority, in consultation with the Highways Agency.
>
> 3. The final construction shall comply with DoT's Design Manual for Roads and Bridges.
>
> 4. There shall be no development on any land required for the A6 Clapham Bypass. In particular there shall be no development on land identified on the Compulsory Purchase Order plan or the Supplementary Compulsory Purchase Order plan for the A6 Clapham Bypass."

59. The stated reasons for these conditions were:

"To ensure that the new junction is built to a safe and proper standard and to protect the Secretary of State's interests in safeguarding the A6 Clapham Bypass."

60. On 29 July 1998 the Government published "A New Deal for Trunk Roads in England". It identified the A6 through Clapham as being excluded from the core trunk road network and reported that the Clapham Bypass was one of 37 schemes on which work was intended to start within 7 years. On 6 August 1998 Mr Pitt responded to two letters from BBC. He said:

"I appreciate that you have received various representations raising concerns about the traffic levels associated with this particular development and the speed of vehicles on this section of the A6 in general. Forgive my delay in responding to both yours and John Copeland's letters on this issue. I did however consider that it would be preferable to provide you with a response once the outcome of the roads review was known. As you are aware, we did not receive any prior indication about the future provision of the Clapham Bypass, which has now been confirmed. Unfortunately I am still unable to provide you with a definitive time scale only that a start on site is intended within seven years, as with all schemes within the programme.

Whilst at this moment in time I am unable to give you a clear indication of when the bypass will be built, I am sure that all concerned will be content in the knowledge that it is to progress in a relatively short time period.

Since negotiating with the developer's consultant about the provision of access to Clapham Folly, the Government have announced both the Integrated Transport White Paper and the roads review which is entitled 'A New Deal for Trunk Roads in England'. With the introduction of this Government policy we are now able to give greater weight to local considerations on 'non-core trunk roads'. With this in mind I am happy to agree to a suitably designed roundabout in place of the right turn lane, as approved by our TR110 dated 2 July.

I understand that the applicant intends to submit a roundabout design in the near future, which I shall be pleased to assess. As long as the roundabout successfully meets the design criteria then I shall provide you with a revised TR110 as soon as I am able.

With regard to concerns raised about the additional traffic on the A6 I have again looked at the traffic figures put forward. Obviously the most crucial time is through the am and the pm peak periods. In the morning peak hour the development will create approximately 61 new vehicular movements travelling south along the A6, which equates to one vehicle per minute. This situation will be reversed throughout the evening peak. Whilst the congestion problems along the Clapham High Street are obvious to each and every one of us, these additional movements will not exacerbate the problem beyond the level of what normal national traffic growth would. The problem is not necessarily the lack of theoretical capacity along the High Street but the fact that as with any High Street there are many conflicting movements, thus interrupting the steady flow of traffic.

Whilst I can understand the concerns raised, I would advise that in this situation the level of traffic associated with the development is insufficient to warrant a refusal. In

addition with the timescales associated with a site of this nature I would expect the bypass to be imminent by the time a large percentage of the site has been developed."

61. We consider that the penultimate paragraph of this letter reinforces our conclusion, reached in relation to the position in 1994 and 1997, that the Highways Agency had no objection in principle to a development which would increase the flow of traffic along the A6. By the time the letter was written it was clear that this section of the A6 would be de-trunked whether or not the bypass was built and that accordingly greater weight should be given to local considerations. In 1994 BBC had made it clear that it would prefer a roundabout to the priority staggered junction, with or without a bypass, and this was now accepted by the Highways Agency. There is in our view no reason for the Agency not to have taken an identical position in the no-scheme world once "A New Deal for Trunk Roads in England" had been published. We think the Agency would have insisted on improvements being carried out to the A6/Milton Road junction with Oakley Road. Such improvements had been suggested by the Highways Agency in their letter of 3 June 1994 and by the Borough Engineer in a memorandum dated 6 July 1998 in response to the planning application. In cross-examination Mr Fulcher agreed that it would have been reasonable for the Highways Agency to have requested such improvements. Indeed, his firm had advised ORS in 1994 that the traffic situation at that junction was critical and that a contribution towards the cost of improving it might be sought from the developers. We find that, in the no-scheme world in 1998, the Highways Agency would have insisted upon such works being carried out at the developer's expense as a condition of the grant of planning permission for residential development of the Folly site.

62. We should mention that a letter from Mr Bailey, Planner and Deputy Director of BBC to Clapham Parish Council (CPC) dated 22 June 1998 referred to the Highways Agency as having confirmed in 1996 that the development of Clapham Folly could take place in advance of the bypass. No contemporaneous documents were available in respect of that confirmation and we have attached no weight to it.

63. We now turn to the period leading up to the valuation date, 5 January 2001. Mr Fulcher said that, including the reference land, the application of PPG3 densities as published in 2000 would have produced 323 dwellings on the Clapham Folly site. That is the 263 that were permitted in 2001 by way of approval of reserved matters, together with an additional 60 dwellings on the reference land. The only technical assessment that had been produced for the Clapham Folly site set out the impact of 300 dwellings including a scenario with no bypass. That had been accepted by the Highways Agency in 1994 and the outline planning permission granted in 1998 did not impose a condition restricting the scale of development. Applying the trip rate and spatial distribution that was used in the transport assessments and agreed with the Highways Agency in 1994, the additional volume of traffic travelling south on the A6 through Clapham during the morning peak hour and relating to the excess over the 300 dwellings referred to in the original technical assessment would have been just eight vehicles. That would have represented an increase in traffic flow through the main part of the village of less than one per cent. Mr Fulcher therefore concluded that there would have been no grounds upon which the Highways Agency would have recommended a refusal relating to the capacity of the access or the impact on the operation of the A6, had there been no proposal for the provision of an A6 Clapham Bypass. We agree. We find that, subject to a condition requiring

improvements to the A6/Oakley Road junction at the developer's expense, there would have been no highway objection to the residential development of the Folly site if the highway authority had been consulted on the subject in the period leading up to the valuation date in 2001. This is the case whether the relevant authority was the Highways Agency or, following the de-trunking of the A6 pursuant to "A New Deal for Trunk Roads in England", BBC as agent for the County Council.

64. We would make two additional observations. Firstly, Ms France suggested that the Highways Agency's approach in 1994 and 1998 was inconsistent with the reasons it gave for promoting the bypass at the roads inquiry in September and October 1991. We do not think that is a valid criticism. Ms France said in her report that at the inquiry "a very strong and compelling case was made for the bypass by the Department of Transport ... largely based on the delays of traffic on the A6 and the above average accident rate." Mr Fulcher said that he had reviewed the evidence of the Department's representatives and could find no reference to an urgent need for the bypass. He added that, although the case put to the Inspector had been that the accident rate in Clapham was twice the average for this type of road, in fact the statistics showed that it was below the national average. In oral evidence Ms France accepted that Mr Fulcher was right on the latter point. In her written report she conceded that the conclusions she had drawn about the Department's approach in 1991 "cannot now be demonstrated by reference to documents and the persons directly involved are no longer contactable". We obtained no assistance from this part of her evidence.

65. Secondly, we heard legal argument as to whether the Lands Tribunal was right to hold in *Essex County Showground Group Ltd v Essex County Council* [2006] RVR 336 that the correct approach is to examine what a reasonable planning authority – and, as the acquiring authority submitted, by extension a reasonable highway authority – could have been expected to decide rather than what would have been decided by the actual authority. Since we have found that the Highways Agency's approach in this case was consistent with the relevant policy it is not necessary for us to determine the point.

Issue 2: Would there have been a sustainable objection on planning grounds to residential development of the Folly site in the no-scheme world?

66. The claimants' witness on planning matters, Mr James, has been involved in town planning since 1981. During this time he has worked for planning authorities at both county and district council levels, in South Wales, southern and south eastern England. In 1988 he took up the position of planning director with ORS before establishing, in 1991, Development Land and Planning Consultants Limited, now the DLP Consulting Group Limited, a multi-disciplinary Bedford based development consultancy, of which he is the managing director.

67. Mr James gave both factual and expert evidence. From 1993 he acted for SDBF and ORS in promoting the development of the Clapham Folly land, through the then emerging review of the Bedford Borough Local plan. He advised the same parties in preparing the planning application for the development of the land, outline planning permission for which was granted by BBC on 23 September 1999. He also gave evidence on behalf of SDBF and

ORS at a planning inquiry held in 1997 in respect of the development proposals at Church Farm, Clapham.

68. Mr James's evidence to the Tribunal may be summarised briefly as follows. In the real world the identification of Clapham as a principal rural settlement and the allocation of the Clapham Folly site for development occurred as a result of the evolution of planning policy. So far as is relevant, this evolution comprised the revision of the Bedfordshire Structure Plan Alterations No.3, adopted 12 July 1990, and its replacement by the Bedfordshire Structure Plan 2011, adopted 25 March 1997 – reflecting changes in central planning policy and regional guidance – and then the review of the Bedford Borough Local plan and the changes in policy direction arising from that review.

69. After 20 years of constraint due to a drainage embargo, Clapham was in planning policy terms an appropriate and sustainable location for development. The Clapham Folly site was the most appropriate and sustainable site for development in Clapham having regard to its location, use and accessibility. The site was capable of development, for which planning consent should have been (and was) granted. The reference land was only excluded from the Clapham Settlement Policy Area (or village envelope) in the Local plan because of the Highways Agency's proposed use of that land for the bypass, as it otherwise shared a common boundary with and was an integral part of the Clapham Folly site. The planning permission issued in 1999, authorising development of the Clapham Folly site (including the reference land), only restricted development of the latter by condition 22 in order to reserve the land for the construction of the Clapham Bypass and for no other reason. In the no-scheme world, the underlying reason given for condition 22 would not exist. Consequently, upon an application made under section 73 of the Town and Country Planning Act 1990, a reasonable planning authority would not have restricted development of the reference land that was otherwise approved by the planning permission dated 23 September 1999.

70. Regard must be had to the pressure upon the Local planning authority to provide sufficient land capable of development in accordance with Structure Plan development targets, which would have given considerable impetus to the grant of planning consent on the reference land. That land was without other constraints and capable of development for housing in accordance with principles established for the wider Clapham Folly site. Accordingly, in the no-scheme world planning permission would have been forthcoming for the residential development of the reference land with approximately 60 units.

71. Mr Alsbury gave expert planning evidence for the acquiring authority. He has had two years undergraduate and twelve years post-qualification experience, firstly with the City of Stoke-on-Trent and, since 1999, with GVA Grimley, where he has been a partner since November 2005. Unlike Mr James, Mr Alsbury has had no prior involvement with the land at Clapham Folly or the A6 Clapham Bypass.

72. Mr Alsbury considered that the claimants' representations in support of the development of the Folly land, made between late 1993 and the end of 1994, were instrumental in persuading BBC to propose allocating the land for development in its Local plan. By 1993,

Orders for the Clapham Bypass had been considered at a roads inquiry and had been approved by the Secretary of State. Neither during the roads inquiry, nor at any time prior to the line of the scheme being fixed, and the Secretary of State confirming that it should be constructed, did the claimants argue that either the reference land or the retained land had development potential. The prospect of development in this location was not raised by the claimants before 1993, even though they had had opportunities to make representations of this nature, not least in late 1990, when BBC consulted on the Deposit Draft version of what later became the 1993 Local plan.

73. The allocation which BBC proposed on the back of the claimants' representations was first articulated in the Consultation Draft Local plan in 1995, and this was rolled forward into the Deposit Draft Plan in 1997. In 1998, before the Local plan was adopted – indeed before it was examined at Inquiry – the claimants applied for permission to develop the land and that application was eventually approved.

74. In Mr Alsbury's opinion, the chain of events that led to the claimants receiving planning permission for the development of their retained land was influenced, to a fundamental extent, by the scheme. Had there been no-scheme there would, in his view, have been no allocation proposed in respect of the Folly land and no planning permission sought or granted for its development. In 1993, in the scheme world, CPC learned of the claimants' proposals. They had to give thought to how their village could be expanded in response to an approach from BBC. It was highly likely that, at that time, CPC was expecting significant changes as a consequence of the scheme. In particular, it would have been expecting the bypass to be built on the line and in the form approved by the Secretary of State and that it would take out of the village up to 90% of the traffic currently passing through it. It would have a major impact on the appearance of the open countryside between Clapham and Oakley to the west, changing the character of the area for ever. As a consequence, Mr Alsbury thought that CPC concluded that the village would have the infrastructure capacity for new development in due course. More significantly, with the bypass going ahead, the village would have the physical works associated with a major new structure on its western side and it could do no additional harm to expand the village towards that structure.

75. Mr Alsbury considered that similar thoughts drove the claimants when they promoted the release of the Folly land during 1994, and drove BBC as well. Furthermore, the claimants' proposals, because they constituted a natural fit with the way the village and the landscape on its western side were expected to change, came to be regarded as acceptable, and perhaps also inevitable, long before the merits of the proposals were ever examined formally. When, in 1998, the time came to assess the proposals formally, this long-established acceptance meant that a less than full analysis was undertaken. Certainly, the proposals were not subjected to the kind of detailed appraisal that the Green Lane scheme had received less than one year earlier. There was no attempt by BBC to reconcile the conclusions it reached on the Folly land with the view, expressed by the Secretary of State in the Green Lane case, that residential development on the outskirts of Clapham would be seriously contrary to the locational strategy of the development plan. In the no-scheme world, there would have been no expectations in respect of traffic relief, accident reductions or environmental improvements in the village centre. Nor would there have been any proposal to construct a major and highly visible piece of infrastructure within the open countryside between Clapham and Oakley. Accordingly,

perceptions of the village, and views about what it could and could not accept in the way of new development, would have been very different. For example it was likely that, in the no-scheme world, the claimants would not have even contemplated developing the Folly land. Even if they had, and they had argued for a development allocation in the Consultation Draft Local plan in 1995, they would have faced serious opposition from the CPC, BCC, the County Council and MAFF. The concerns advanced by these bodies would have been similar, if not identical to the objections raised in respect of the Green Lane proposals in 1997. In the no-scheme world there would have been no possibility of BBC comparing Clapham to the strategy villages (that is, those best placed to accommodate development pressures) and, without BBC pushing hard for the development of the land, MAFF would have maintained its very serious objection to the allocation of the site.

76. Had the Folly land not been allocated in the Consultation Draft Local plan in 1995, it is possible (although unlikely) that the claimants would have argued for policy changes in response to the publication of that document or, later, at the Deposit Draft stage in 1997. They would, however, have failed to convince BBC of the merits of their proposals on various grounds including, by then, the fact there would have been no need for an allocation in this location. Both the Consultation Draft Plan and the Deposit Draft Plan would have made ample provision for new housing development, without having to resort to a greenfield site in an inappropriate location.

77. Against the background of a Deposit Draft Plan which would have presumed against the development of the Folly land (rather than allocating it for development), and a recent Secretary of State appeal decision which found residential development beyond the Clapham village boundary to be seriously at odds with the locational strategy of the development plan, Mr Alsbury thought it unlikely that the claimants would have sought planning permission for the development of the land in 1998. In addition, he did not believe that they would have argued for the allocation of the land at the Local plan Inquiry in 1999. If, however, they had done either, they would have failed.

78. There would therefore have been little or no chance of planning permission being granted for the development of the Folly land (including the reference land) at the valuation date in the no-scheme world. Moreover, in the light of the policy framework that the development plan would have set in the no-scheme world, together with the provisions of PPG3 (2000), there would also have been little or no prospect of planning permission being granted in the period to 2006 (the period covered by the Local plan). Beyond 2006, the claimants might have a modest degree of hope, stemming from the possibility that Bedford/Kempston and the Strategic Corridors would eventually run out of capacity. It was not possible, however, accurately to quantify that hope, or to put a timescale on when the planning potential of the reference land might have improved.

Issue 2: Conclusions

79. The first public document formally to identify the Folly site for housing development was the Consultation Draft of the Bedford Borough Local plan (February 1995). Thereafter,

BBC actively promoted the development of the site, encouraging SDBF to submit a planning application for such development, countering objections received from time to time from individuals, the County Council, CPC and Oakley Parish Council, ward councillors, MAFF and the Farming and Rural Conservation Agency (FRCA). BBC eventually granted outline planning permission on 23 September 1999 and approval of reserved matters on 18 May 2001.

80. On 10 March 1994, about a year before publication of the Consultation Draft, Mr Waterman, the Clerk to CPC, wrote to Mr Woodall, the planning policy manager at BBC. The letter was written in response to a Planning Briefing leaflet issued by BBC in November 1993, seeking the co-operation of parish councils in selecting specific villages to accommodate the growth required in the borough to meet the housing and employment requirements contained in the approved County Structure Plan. Mr Waterman wrote as follows:

> "Further to the meeting held on 24 February 1994, my Council has discussed the issue with the various options as detailed in your Planning Briefing leaflet.
>
> My Council's thoughts and decisions are as follows.
>
> For development there is land to the west of the A6 Trunk Road and to the east of the proposed bypass, from Oakley Road, Clapham, in a northerly direction to the NULADE Poultry Farm. This equates to an area of some 40-50 acres with access from the A6 trunk road at its junction with Twinwoods Road culminating with a roundabout.
>
> Part of the aforementioned area is used by allotment tenants and it is considered that some of this area could be retained as an open space for leisure and play. There is alternative land available for allotments within the village.
>
> When considering surplus allotment land my Council would hope that an agreeable mix of housing needs be incorporated, eg, executive and semi-detached properties, together with garage provision etc.
>
> Incorporated in the envelope of our village there is our village hall which could provide leisure facilities.
>
> I trust this information will prove useful. If you require further information no doubt you will let me know."

81. Before the meeting on 24 February 1994 to which Mr Waterman referred, Mr James had made a submission to BBC in respect of the Folly site. It is probable that this included a drawing along the lines of BE179 dated 19 November 1993 and an outline development brief along the lines of a subsequent document dated 22 April 1994. Paragraphs 2.11 and 2.12 of the latter, under the heading Site Location and Description, read as follows:

> "The character and appearance of the southern part of the site will itself be greatly affected by the construction of the proposed A6 Clapham Bypass which has been approved in detail. This runs broadly in a north westerly direction from its junction located at Oakley Road, at which point it is proposed to be grade separated and lies

within the land owned by the St Albans Diocesan Board of Finance, to Highfield Road further to the north.

This proposed junction type, together with the consequent realignment of Oakley Road will, when implemented, take up a substantial amount of the south western area of the site extending to some 2.3 ha."

The location of the proposed Bypass in relation to the proposed development was shown on BE179.

82. BBC's decision to identify the Folly site for development in the Consultation Draft was strongly influenced by Mr Waterman's letter dated 10 March 1994. This is demonstrated by the following paragraph in the Planning Briefing leaflet issued in November 1993:

> "It is hoped that the Parish Councils will wish to play a positive role in site selection and appreciate the requirements and duties placed upon the Borough Council in reviewing the Local plan. The Borough Council would very much prefer that such designations are made in the context of a consensus of opinion shared with Parish Councils or if this is not possible, with the knowledge that the sites selected, though not actually supported by the Parish Council, are considered locally as the best otherwise available."

83. It is clear that the bypass was in the minds of CPC in March 1994, when it decided that the Folly site was suitable for development. Indeed, Mr Waterman described the site as being "to the east of the proposed bypass".

84. In our judgment, the key matters to be resolved in relation to issue 2 are, firstly, how CPC would have responded following the meeting with BBC on 24 February 1994 if the bypass had not been proposed and, secondly, how BBC would then have reacted to CPC's response.

85. In relation to the first question, it is in our view necessary to consider the documentation which was presented to CPC during the relevant period. There were two such documents. The first was sent out by BBC in March 1993 under the heading "The Parish Initiative". It was an introduction to the planning system operating in Bedford. It took the form of some overheads which were presented to representatives of the town and parish councils by BBC's chief planning officer at planning workshops in April and May 1993.

86. By way of introduction to "The Parish Initiative" BBC said that it was keen to encourage the constructive participation of the town and parish councils in local affairs. A range of policies had been adopted to ensure that participation could go beyond simple consultation to develop a new and positive sense of common purpose and partnership. The most obvious area in which to start was town and country planning, since there were already well-established arrangements for consultation that could form a firm foundation for the initiative.

87. The overheads presented by BBC contained such headings as "So what is a Local plan? What does it do? How does it work? Do Local plans matter? Who says what they contain and what role can Town and Parish Councils play?" The slides then explained that the current Local plan would run until 1996 and that a review was under way. They indicated what were termed the big issues. The first of these was "We are told how many new homes but where to put them?"

88. Other headings in the slides included the following: "How can the Parishes get involved? Statutory opportunities. Participation. Recognising the realities. Accepting that some change is inevitable. Defining local needs. Village envelopes. Important open spaces. Priorities for environmental and other benefits."

89. In November 1993 BBC issued a further Planning Briefing, supplemental to The Parish Initiative. This document would in our view have formed the main backdrop to the meeting with CPC on 24 February 1994 and CPC's subsequent decision to identify the Folly for development. It was clear from the Planning Briefing that, at the end of 1993, BBC was under considerable pressure to identify villages with a capacity for future growth and that it was determined to do so, preferably with the agreement of the relevant parish councils, but if necessary without it. The position in this respect was summarised in the following passage:-

> "There will be many views as to the capacity of existing rural communities to accommodate new housing on anything other than the most modest scale. Village development is generally resisted – 'not in my backyard' as the saying goes, but there needs to be a sense of reality. Changes in the character and fortune of village communities are to a degree inevitable, and it may be advisable to work with the grain rather than against it if the positive benefits of development are to be achieved."

90. In our judgement, several sections of the Planning Briefing pointed to Clapham as being a suitable site for expansion, with or without a bypass. The relevant sections, and their relevance to Clapham are as follows:

(i) **"In future, greater energy efficiency, less reliance on the motor car and more self-sufficient communities will be important themes."** The centre of Clapham was only some 3km from the town centre of Bedford to the south-east. Clapham had very good levels of public transport, with up to seven bus services an hour, providing links to Bedford town centre and from Bedford by bus and train to other population centres.

(ii) **"Growth in housing and employment should be clearly linked to areas of major infrastructure investment ie new roads, sewers, etc."** Since 1974 development in Clapham had been severely constrained as a result of the imposition of an embargo on new building due to drainage problems. The embargo related to the provision of a main orbital sewer which had been planned since 1970. The sewage treatment works serving Bedford and outlying villages was located to the south-east of the town. Although the treatment works had spare capacity, there was a lack of capacity in the sewers serving it, particularly to the west of the town. This affected the villages of Biddenham, Bromham, Stagsden, Oakley, Clapham and Stevington. To resolve the problem the drainage authority embarked in 1970

on the provision of a major new foul sewer around the south and west of Bedford, called the Southern Orbital Sewer.

Phase 1 of the Southern Orbital Sewer, from the pumping station to Woburn Road, Kempston, some 5 miles from Clapham, was completed in the early 1980s. However, phase 2 of the scheme did not go ahead until funding was provided in about 1990, by developers, for the section from Woburn Road, Kempston to Bromham, after which Anglian Water Services completed a connection from Clapham, which came into use in 1994. The embargo was lifted in October 1994. It was, however, predictable from 1992 that the sewer would be completed so as to serve Clapham. By that time the Water Authority had acquired land for and obtained the consents required to build the necessary pumping station. It was thus clear, at the end of 1993, that Clapham would shortly benefit from this major item of infrastructure investment.

(iii) The Planning Briefing asked a number of questions designed to establish whether a village had the physical capacity to absorb growth. These included:

"(a) What facilities like shops, village halls and schools are present or could be provided or improved through planning gain?

(b) Would the existing road system and the arrangements for drainage in the area be adequate or capable of improvement?"

In our judgment it would have been clear to CPC that Clapham was quite capable of absorbing growth. On question (b), we have concluded under issue 1 above that, at least so far as the Folly site is concerned, the existing road system was adequate to support development. We have also noted in paragraphs 72 and 93(ii) above that similar considerations applied to the drainage arrangements. As to question (a), the existing facilities were very good. The existing shops included three small supermarkets, a post office and newsagents, a building society office, a chemist, two hairdressers, a travel agent and a small builder's merchant. There were also four public houses; an Italian restaurant; three takeaway restaurants; a hotel and restaurant; two petrol filling stations, one of which was a Renault car dealership providing a full range of servicing and associated facilities; and a Suzuki car dealership. So far as schools were concerned, there were nursery and pre-school facilities and a lower school for 4 to 9 year olds within the village itself. In addition there was a middle school (ages 9-13) in the village of Oakley, within walking distance and a very highly regarded upper school (13-18) in Sharnbrook, readily accessible by public transport. The other facility referred to by BBC was the village hall. At a meeting with the Clapham Village Hall Committee on 6 April 1994 Mr James made it clear that his clients were prepared to gift the sum of £250,000 to the village for the improvement of the existing hall or the building of a replacement.

(iv) BBC's document expressed the view that the criteria against which growth proposals should be assessed were most likely to be satisfied by the larger villages and by those with better communications. Again, Clapham was well qualified. It was situated on the A6 London to Carlisle Trunk Road, which provided a link between Bedford and the A14 and A45 national transport routes. We have

commented on the high quality of its public transport facilities. Clapham was also the third largest rural settlement in the borough, despite the fact that its population had declined in consequence of the long-standing embargo on development.

91. In our judgment, Clapham satisfied so many of the requirements for growth that CPC would have recognised the inevitability that it would be chosen as one of the villages in the borough to accommodate a significant amount of additional housing. In the absence of any proposals to construct a bypass CPC would have decided to put forward its own preferred location for such development. There was no evidence to suggest that there were any other sites in Clapham which were more suitable than the Folly. The only one which was referred to was the site at Church Farm, Green Lane, to the north-east of Clapham. Planning permission for residential development and B1 use was refused and this decision was upheld on appeal on 8 December 1997. This decision was made in the scheme world. We are in no doubt, however, that in the absence of any bypass proposals the Green Lane site would have been regarded as less acceptable than the Folly site to accommodate further development. In particular, the proposed development of Green Lane would have harmed the setting of a Grade I listed church and would have caused the loss of agricultural land of higher quality than that at the Folly (grade 2 as opposed to 3a).

92. It is to be observed that the Planning Briefing invited parish councils to suggest village envelopes providing scope respectively for only very limited development, a more substantial amount of development and a considerable amount of development with associated improvements for the benefit of the community as a whole. In the scheme world, CPC limited itself to identifying the whole of the Folly site for housing development, comprising a mix of executive and semi-detached properties. In our view this approach is likely to have been influenced by the bypass proposal. The strong case which, as we have concluded, existed for development of the site in the no-scheme world was significantly strengthened in the scheme world by the fact that a bypass was to be constructed close to the western boundary of the site. As Mr James pointed out in paragraph 10 of his development brief dated 22 April 1994, the character and appearance of the southern part of the site would be "greatly affected" by the construction of the bypass. In the absence of the bypass, which would have formed an obvious western boundary for the expanded village, we consider that CPC would have been inclined to put forward an area for further development which was significantly smaller than that suggested in their letter to BBC dated 24 February 1994.

93. As we have said, when it wrote that letter CPC is likely to have seen a document along the lines of the development brief dated 22 April 1994. Paragraph 2.10 of that document stated that the Folly site could be divided into a number of clearly defined parcels in different uses. From north to south these were:

> "(i) approximately 5.5 ha. of land currently in arable use;
>
> (ii) two parcels of land totalling about 2.7 ha. laid to grass. These parcels contain a smallholding adjacent to their northern boundary;
>
> (iii) an area of some 5.2 ha. comprising a mixture of woodland, lagoons, open paddocks laid to grass and a variety of semi-industrial uses, including open

storage. The southern part of this area has in the past been subject to some mineral extraction works although no restoration works have been carried out;

(iv) to the south of the site, fronting onto Oakley Road, with residential properties to the west, are three further parcels of land totalling approximately 1.75 ha. formed mainly of allotment gardens."

94. It is probable in our opinion that CPC would have used this classification as the basis for suggesting that the land suitable for development should be restricted to parcels (iii) and (iv). This land was situated closest to the village centre and, since it was largely in non-agricultural use, its development would minimise any adverse effect on the landscape and protect the land to the north, which was predominantly grade 3a and thus amongst the best and most versatile agricultural land, albeit not as good as the grade 2 land at Green Lane.

95. Parcels (iii) and (iv) extended to some 6.95 ha. That is a significant area of land. We see no reason why it would not have proved acceptable to BBC, who were clearly anxious to reach a consensus with the parish councils if this was reasonably possible. BBC decided to identify the Folly site in the Consultation Draft of the Local plan as allocated for 120 units in the period to 2001, with an ultimate capacity of 170. This allocation compared with the 300 dwellings which Mr James had proposed in his development brief of 22 April 1994. Based on a site area, excluding that required for the bypass, of 12.6 ha, BBC's figure of 170 suggested an ultimate capacity of approximately 13 dwellings per hectare. Applying the same density to the area of parcels (iii) and (iv) would have given an ultimate capacity of approximately 90 houses. This figure is of the same order of magnitude as the total of 80 houses identified in the Consultation Draft for the village of Sharnbrook, a smaller village further to the north-west of Bedford. Sharnbrook and Clapham were the two exceptions to BBC's decision, in the Consultation Draft, to accommodate Structure Plan development pressures generally in five strategy villages, namely Bromham, Wootton, Stewartby, Wilshampstead and Shortstown.

96. We find that thereafter BBC would have promoted the development of the identified site as they did in the scheme world, encouraging SDBF to submit a planning application and dealing with objections from other parties. As in the scheme world, it would have been necessary for SDBF to enter into an agreement pursuant to section 106 of the Town and Country Planning Act 1990 before planning permission was granted. This would have required the same contribution of £250,000 towards community facilities in the parish of Clapham. Otherwise, the cost of the obligations to be undertaken by the landowner to BBC would have been 90/170 of their cost in the scheme world, to reflect the smaller number of dwellings proposed.

97. As a result of national and regional policies in favour of increasing residential densities, the number of houses eventually permitted on the Folly site increased to 263 from the 170 originally envisaged a density of approximately 21 dwellings per hectare. The approval of reserved matters was dated 2 March 2001. We consider that, if a similar application had been submitted in respect of the 6.95 ha which we have identified as being suitable for residential development in the no-scheme world, BBC would have responded favourably and the initial

figure of 90 houses would have been increased. Applying this higher density to the gross area of the reference land gives a total of 51 dwellings. Mr Fulcher said in his evidence that:

> "5.8.1 With the Reference Land included, the application of PPG 3 densities, as published in 2000, would have been for 323 dwellings. That is the 263 that were permitted in 2001 together with an additional 60 dwellings on the Reference Land."

There was no direct evidence from the claimants to suggest that planning permission would have been granted for more than 60 dwellings on the reference land. We note from Mr Horton's written evidence that he assumed a much higher net developable area for the reference land (95% of the gross area) than for the retained land (56.75% of the gross area). But Mr Horton did not say how many dwellings would have been granted planning permission on the reference land in the no-scheme world and at no time during the hearing did the claimants suggest that Mr Fulcher's figure of 60 dwellings was too low. Nor did the acquiring authority challenge it. We have therefore adopted this figure and in our opinion in the no-scheme world planning permission would have been granted for 60 dwellings on the reference land and 94 dwellings on that part of the retained land that we have determined would be developed (4.5 ha. gross at 21 dwellings per hectare), making a total of 154 dwellings.

98. We should refer to Mr Alsbury's suggestion that, in the no-scheme world, SDBF would not have provided CPC with any documentation suggesting the development of the Folly site, along the lines of the layout plan and planning brief which were submitted in the scheme world by Mr James. Mr Alsbury pointed out that SDBF did not raise the issue of loss of development land with the inspector appointed to conduct the roads inquiry in 1991, which dealt with the Clapham Bypass CPO. He said that ORS, who orchestrated the promotion of the site in the scheme world, waited until the detail of the scheme had been approved and then exploited its physical impact and the expectations that people had about the benefits it would bring. With this in mind he considered it likely that the claimants would not even have contemplated proposing a major development on the edge of Clapham in the no-scheme world. We do not agree with Mr Alsbury on this point. The embargo on development in Clapham was still in place in 1991 and there was no certainty as to when it would be lifted. This uncertainty also explains the failure of SDBF to make representations in support of the residential allocation of the Folly site at the inquiry into the Borough Local plan which sat from November 1991 until May 1992. Parties were not entitled to be heard at that inquiry unless they had submitted an objection by the end of 1990, at which time there was no public indication when the embargo would be lifted. ORS first offered to buy the Folly site in 1992. Their business was to identify sites with development potential. They were based in the area. By the time they approached SDBF in 1992 they would have been aware that the embargo would shortly be lifted. We are satisfied that, in the no-scheme world, ORS would have approached SDBF and that Mr James would have received the same instructions as he did in the real world.

99. We should also mention that Mr Fulcher gave evidence to the effect that, if the bypass had not been constructed in its actual position to the west of Clapham, it is likely that one would have been built to the east of the village on a similar time scale. Mr Purchas submitted that section 14(6) of the Land Compensation Act 1961 did not apply to the main compulsory purchase order, and so the valuation should reflect the presence of a bypass in an eastern alignment. We do not need to decide whether that submission is well founded. Nothing in the evidence suggests to us that the presence of such a bypass would have persuaded BBC to grant

consent for more development on the Folly site than it would have done if no bypass had been proposed.

100. Our conclusions on this issue have been based on the assumption that there would have been no objection from the Highways Agency to residential development of the southern half of the Folly site. That question was not considered by the highways experts, whose evidence was restricted to the possible development of the Folly site as a whole. It is possible that different highway considerations might apply to the two development sites.

Issue 3: What was the hope value at the valuation date of residential planning permission being granted on some or all of the Folly site, including the reference land?

101. It was agreed at the hearing that if the Tribunal decided that planning permission would not have been granted in the no-scheme world for development of the Folly site, it would indicate whether it was to be valued on the basis that it had hope value, and, if so, to what degree. In the event we have found that only part of the Folly site (6.95 ha. out of a total of 15.01 ha.) would have received planning permission in the no-scheme world. This issue is therefore restricted to the remaining 8.1 ha. (rounded) that we say would not have received such planning permission.

102. We agree with Mr Alsbury's comments about hope value (see paragraph 78 above) when applied to the remaining land that we consider would not have received planning permission. We find that there was a modest degree of hope of planning consent being granted in respect of this land some time after 2006.

Issue 4: Should there be any set-off for betterment in respect of contiguous lands belonging to the claimants?

103. Mr Purchas submitted that the bypass was constructed for the purpose of removing through trunk traffic from Clapham and that it was not the purpose of acquisition to provide a means of enclosure or containment to Clapham Village. The relevant question was what, if any, benefit accrued to the value of the retained (contiguous) land from the construction of the bypass for that purpose, which Mr Purchas said made no difference to the acceptability of access onto the A6. Consequently the retained land did not benefit by the purpose of the acquisition of the land for a highway.

104. Even if any enclosure created by the bypass was relevant to betterment under section 261 of the Highways Act 1980 Mr Purchas argued that, apart from the reference land, such enclosure only reinforced the natural containment provided by the existing tree and hedge belt and that consequently no set-off for betterment was justified. In any event it was the claimants' position that in the no-scheme world residential planning permission would have been granted on the retained land and therefore the question of betterment did not arise.

105. Mr Morshead argued that the value of the claimants' retained land for profitable use had come about precisely because of the bypass. He relied, inter alia, upon the Tribunal's decision in *Esso Petroleum Company Limited v Secretary of State for Transport* [2008] RVR 351 where the President said at paragraph 21:

> "Viewed against this background it is clear, I believe, that the meaning that Mr Barnes seeks to give section 261(1)(a) is far too narrow. The purpose of the provision is, in my judgment, clear. It is to bring into account the increase in value of the claimant's retained contiguous land arising from the scheme so that this can be set off against the value of the land taken. Such increase in value falls to be determined as at the valuation date in the light of all the factors that bear on it at that time ..."

Further explanation of the President's reasoning is given at paragraph 16:

> "The wording of section 261(1)(a) is, on one view certainly, not perfect. It refers to the claimant's remaining contiguous land being benefited "by the purpose for which the land is authorised to be acquired". It can obviously be said that it is not the purpose of the acquisition that may benefit the retained land but the implementation of that purpose (or the prospect of its implementation). But the meaning seems to me to be sufficiently clear. Quite simply "purpose" is here used to mean the scheme or the project (to use the term favoured by the Law Commission in its report Towards a Compulsory Purchase Code: (1) Compensation (2003)), and it is the benefit derived by the retained land from the scheme or project that is to be brought into the reckoning."

Mr Morshead said that the President had rejected a narrow view of the relevant provisions, the consequence of which in this reference was that a set-off for betterment should be made.

106. However, in *Portsmouth Roman Catholic Diocesan Trustees Registered v Hampshire County Council* [1980] 1 EGLR 150 the President, V G Wellings QC, said of section 222(6)(a) of the Highways Act 1959 (an identical provision to section 261(1)(a) of the 1980 Act) at 155M:

> "The kind of benefit to which the tribunal is required to have regard is, in my opinion, one which is directly referable to the purpose for which the land is authorised to be acquired, such as where the coming of the road will provide access to the retained land of a new or improved kind (including the creation of a frontage to a widened highway), which benefit increases the value of that land. It appears to me that the grant of planning permission by the local planning authority in respect of the green [retained] land was an indirect effect of the purpose for which the land taken was acquired. *A fortiori* is this so where, as in the present case, the planning permission was granted in pursuance of a policy which was itself referable to the purpose for which the land taken was acquired."

107. This suggests that the type of planning benefit accruing in the present reference is not one to which we should have regard. The only way in which the contiguous lands of the claimants can be said to have benefitted by the construction of the bypass is, as we have discussed above, by enabling the grant of residential planning permission on a larger area (by 8.1 ha.) than

would have been the case, in our opinion, in the absence of the scheme. The bypass was of no direct physical benefit to the contiguous lands by, for instance, providing a means of access that would not otherwise have been available.

108. While the words used by the President at paragraph 16 of *Esso* would support the wider effect of section 261(1)(a) contended for by Mr Morshead, such a result would be contrary to the Tribunal's decision in *Portsmouth*. Since *Esso* was itself a case that concerned the physical effect of the works (stopping up an access and opening another) it can be said that the decision does not support the wider construction.

109. *Portsmouth* was distinguished, on the facts, in *Leicester City Council v Leicestershire County Council* [1995] 2 EGLR 169. In that case the member, Dr T Hoyes FRICS, found that the only material factor preventing the full implementation of residential planning permission on the retained land was the non-availability to traffic of the link road that was the purpose for which the land was authorised to be acquired. The relevant planning policies for new housing were at all material times dependent upon the construction of the link road. Until that road was completed the planning permissions were subject to a condition limiting the development of the retained land to 100 out of a total of 270 dwellings. The member said at 174J:

> "On the facts I find that the removal of the embargo upon the construction and occupation of the further 170 dwellings is clearly and directly dependent upon the construction and opening to traffic of the balance of the link road to secure an adequate capacity connection between the A46 and the A47… I further conclude that the value of the retained green land is benefitted by the purpose, the provision of the link road, for which the red land is being acquired from the claimant. It therefore follows that by virtue of section 261(1)(a) I am enjoined to have regard to the extent of that benefit in terms of value when making a determination as to the compensation payable for the land taken, the red land."

110. We do not consider that there is such a clear and direct dependency between the value of the retained land and the purpose of the acquisition in the current reference. The relevant planning policies did not depend upon the provision of the bypass (although we think that they were influenced by the prospect of it) and the planning permission that was granted in September 1998 was capable of implementation in respect of the retained land whether or not the bypass proceeded. The grant of planning permission on the retained land was not attributable to the additional capacity provided by the bypass.

111. We therefore conclude that, despite the strong argument that can be advanced for setting off development value produced by the scheme, the contiguous lands are not benefitted by the purpose for which the land was authorised to be acquired and there should be no deduction for betterment. If we are wrong in our interpretation of section 261(1)(a) of the 1980 Act then what falls to be determined is the extent of the benefit to the claimants' retained land of the 169 dwellings (263 minus 94) that were permitted in the scheme world, but which we have found would not have received planning permission in the no-scheme world. Since we have also found that only 60 dwellings would have been permitted on the reference land, our view is that the betterment to the retained land will exceed the market value of the reference land by a

substantial margin, even taking account of the modest degree of hope value that existed in the no-scheme world for the development of the balance of 5.65 Ha. Accordingly no compensation would be payable.

Spirerose

112. Such was our position prior to the decision of the House of Lords in *Spirerose*. As we have said above, the parties had been agreed that the principal issue was whether or not planning permission would have been granted for residential development on the reference land in the no-scheme world. This approach now requires reconsideration in the light of the House of Lords decision. Four reasoned opinions were given. Lord Walker of Gestingthorpe at paragraph 10 said that he was in full agreement with the reasoning of Lord Collins of Mapesbury and, at paragraph 45 he said that he believed that his reasons were consonant with those of Lord Collins. Neither expressed agreement with Lord Scott of Foscote or Lord Neuberger of Abbotsbury, who gave the other reasoned opinions. Both Lord Scott and Lord Neuberger expressed agreement with Lord Walker and Lord Collins as to the outcome of the appeal, and Lord Scott at paragraph 9 and Lord Neuberger at paragraph 56 expressed agreement with them that the principle in *Pointe Gourde Quarrying and Transport Company Limited v Sub-Intendent of Crown Lands* [1947] AC 565 (PC) was a rule of statutory interpretation, but apart from that neither expressed agreement with the reasoning of Lord Walker and Lord Collins. Lord Mance, who did not give a reasoned opinion, expressed agreement with the reasoning of Lord Collins, as illustrated by that of Lord Walker. It is worth noting the extent of the expressed agreements, but little seems to turn on it (although Lord Neuberger seems to go further in paragraph 55 than Lord Walker and Lord Collins in limiting the scope of *Pointe Gourde*).

113. For the purposes of our decision these opinions need to be scrutinised in order to determine whether planning permission for the reference land is to be assumed under

(a) section 6 and the First Schedule of the 1961 Act,

(b) section 9, or

(c) some other application of the *Pointe Gourde* principle,

or whether compensation can only reflect hope value.

114. We have set out in paragraph 14 above the relevant parts of section 6 and the First Schedule. Section 9 is set out in paragraph 15.

115. Spirerose's case in the Lands Tribunal was advanced principally on the basis of (c) above and additionally on the basis of (b). Its case under (b) was not acknowledged in the House of Lords, and it may not have been argued. It did not advance a case under (a). The opinions are thus addressed principally to (c) to which we turn first.

116. The issue in *Spirerose* was one that is easily stated: whether, if on the facts there was a probability that in the absence of the scheme planning permission would have been granted but that none of the statutory assumptions in sections 14 to 16 applied, it should be assumed that planning permission would have been granted; or whether in such circumstances compensation could only reflect the hope of the grant of permission. The decision was simply that, since what has to be determined is the value of the land, if there was no certainty of the grant of planning permission such value could only reflect the prospect that such permission might be granted: Lord Scott at paragraphs 7 to 9, Lord Walker at paragraph 38, Lord Neuberger at paragraphs 50 to 57 and Lord Collins at paragraphs 99, 108, 109, 118 and 128 to 133). Two points in particular need to be noted in these conclusions in relation to (c).

117. The first point is that the basis for the assessment of hope value was a no-scheme basis. Of course, it had to be. In the scheme world there would be no hope of planning permission. The decision is nowhere explicitly put on this basis, but the implication is unavoidable and clear (most notably in paragraphs 96 to 99 of Lord Collins's opinion). The *Pointe Gourde* principle was thus applied, apparently to the construction of "value" in rule (2) and to the effect given to section 14(3), so that the value of the land was held properly to reflect the hope of planning permission being granted in the no-scheme world.

118. The second point, following on from the first one, is that *Jelson Ltd v Blaby DC* [1977] 1 WLR 1020 and *Melwood Units Pty Ltd v Main Roads Commissioner* [1979] AC 426, on which the Lands Tribunal had relied for its decision that planning permission was properly to be assumed, were distinguished on the basis that in each case the first instance tribunal had, or was to be treated as having, regarded as a certainty that planning permission would have been granted (Lord Collins at paragraphs 105 to 114, Lord Walker at paragraph 39). The applicability of the *Pointe Gourde* principle in such circumstances was not questioned.

119. Lord Collins said this in relation to the Tribunal's application of *Jelson*:

> "108. In the present case the Tribunal considered that since none of the statutory assumptions as to planning permission could have applied on the facts of *Jelson Ltd v Blaby District Council* so as to give rise to an assumption of permission for residential development, it is necessarily implicit in the conclusion of the Court of Appeal that, applying *Pointe Gourde*, it was appropriate to assume the grant of such planning permission.
>
> 109. I do not agree. The point was not discussed or considered, and the parties proceeded on the basis that planning permission would have been granted at the relevant date had there been no road scheme. The existing houses were built facing the proposed ring road. Jelson made the application in accordance with a layout previously agreed with the county planning officer and an official of the acquiring authority, but the application was refused because of objections of the residents in the housing estates who said that their houses were built with the advantage of facing on to the ring road. The evidence was that, but for the road scheme and the building of the housing estates, permission would actually have been obtained for the building of housing estates including the strip. This decision did not justify the conclusion by the

Tribunal that it was authority for the proposition that the grant of planning permission is to be assumed once it is shown that it would probably have been granted."

120. In relation to *Melwood*, Lord Collins said:

> "112. It is plain from the decision that the evidence was that permission would have been granted. The Privy Council accepted 'as findings of fact … that but for the expressway project and its impact on the 37 acres an application to develop the whole area for a drive-in shopping centre with ancillary parking area would have been granted by the registration board, including the resumed land and south land' (at 433) and said that "it is established that, without the expressway project, ..planning permission would have been given for the whole 37 acres" (at 434).
>
> 113. The questions in the case stated included a question whether the Land Appeal Court should have assessed compensation on the basis that, but for the compulsory acquisition, planning permission 'would or would probably have been granted' for the whole of the 37 acres, and the Privy Council answered 'yes' to that question: [1979] AC at 438. But the Privy Council said (ibid.) that the answers by themselves 'may not serve any very useful purpose' and adopted the developer's formulation of the questions. The developer's formulation was that the assessment should proceed on the basis that there was no expressway proposal and that 'planning permission would have been obtainable' for the whole site. The Privy Council concluded that the developer's formulation was not substantially different from its own answers, and was prepared to adopt it: at 439."

121. Lord Collins's view was shared by Lord Walker, who said at 39:

> "39. In reaching this conclusion the Lands Tribunal relied mainly on the decision of the Privy Council in *Melwood Units Pty Ltd v Commissioner of Main Roads* [1979] AC 426 and *Jelson Ltd v Blaby District Council* [1977] 1 WLR 1020. But it seems reasonably clear that each of those cases started from a finding by the fact-finding tribunal that in the absence of the proposed scheme involving compulsory purchase, planning permission *would* have been granted (not might have been, or would have been expected on the balance of probability to be, granted). They do not therefore assist in the process of elevating a good chance into an assumed certainty."

122. The claimant's case is that section 6 and case 1 of the First Schedule apply because in the absence of a proposal to acquire the other land within the CPO it would not have been likely that the road would have been built, and as a consequence the subject land would have received planning permission and would have been worth more. In its skeleton argument the acquiring authority accepted that section 6 and case 1 applied, but it was said that this did not add anything to *Pointe Gourde* (applied, therefore, as it was believed to apply pre *Spirerose*).

123. The claimant in *Spirerose* did not contend that section 6 and case 1 applied, although on the facts it would appear that it could have done so. (It was probably thought sufficient to rely on *Pointe Gourde* and section 9 and to pray in aid *Jelson*.) It was no doubt because of this that Lord Scott said (at paragraph 3) that none of the section 6 disregards "fortunately, is relevant in

the present case", Lord Collins simply summarised (at paragraph 78) the effect of section 6 and Schedule 1 and said no more about it, and Lord Neuberger did not mention it at all. Lord Walker, having said at paragraph 34 that *Davy v Leeds Corpn* [1965] 1 WLR 445, determined under the 1959 predecessor provision of section 6 and Schedule 1, represented a correct application of the part of the statutory code that embodied the *Pointe Gourde* principle, said this at paragraph 37:

> "The scheme, in this case, is the extension of the London Underground from Dalston to Whitechapel. It is not suggested that the carrying out of that scheme increases or depresses the value of the respondent's land in any particular way, except so far as it has taken away the respondent's prospect of obtaining planning permission for mixed-use redevelopment, since no planning authority was going to authorise redevelopment on a site marked for compulsory purchase, as the respondent's land has been since 1993. The respondent is therefore entitled to compensation for the loss of a chance, assessed as at the valuation date (3 December 2001), of obtaining planning permission in a "non-scheme world" sometime between 1993 and 2001. Unless it falls within one of the statutory assumptions in section 6 of and the First Schedule to the 1961 Act, that chance is to be assessed as "hope value", a concept with which valuers, and the Lands Tribunal, are very familiar."

124. The implication of the last sentence is that, where section 6 and the First Schedule do apply, the claimant is not confined to hope value where the scheme has meant that he has lost the prospect of obtaining planning permission. This could be an extremely important conclusion, but it is unexplained and it is *obiter* since Spirerose did not rely upon section 6 and the First Schedule. It also appears to be inconsistent with what Lord Collins said about section 9 to which we now turn.

125. Before the Lands Tribunal the case for the Claimant in *Spirerose* was that section 9 applied. It does not appear from the reports that the claimant pursued that basis of its claim in the House of Lords. Certainly none of the opinions treat the claimant's case as including that contention. Lord Scott summarised the effect of section 9 but said no more about it, and none of the other law lords except Lord Collins mentioned it at all. Lord Collins (at paragraph 79) set out the provision, and in paragraphs 106 and 107 he quoted from a passage in the decision of the Lands Tribunal in the decision of the Lands Tribunal and the judgment of Lord Denning MR in the Court of Appeal in *Jelson* at 1025 and 1027, in which section 9 had been held to apply. He did not suggest that *Jelson* was wrongly decided.

126. At paragraph 96 of the decision, under the heading "The present case", Lord Collins said that he repeated "what I consider to be the crucial provisions in the 1961 Act"; which he identified in paragraph 97 as rule (2), section 9 and section 14(3). It was in the light of these provisions that Lord Collins concluded at paragraph 99 that the clear answer to the question in the appeal was that the valuation on the hope value basis was the correct one. It is conceivable that Lord Walker saw a distinction between the operation of section 6 and section 9 (and expressed himself as he did in paragraph 37 in consequence of this), but we cannot see any basis for a difference. There does not appear to be any basis for distinguishing the operation of section 6 and section 9 for this purpose. It seems that Lord Collins's analysis in paragraphs 96 to 99 embraces section 9 and therefore the correct approach under (a) and (b) will necessarily

be the same as for (c); in each case, unless the conclusion is that it is certain that planning permission would have been granted, compensation must be assessed on the basis of hope value.

127. It is to be noted that, although *Jelson* and *Melwood* were distinguished on the basis that in each case planning permission was found to be certain, Lord Walker recognised that the grant of planning permission is never a certainty. At paragraph 44 he said:

> "The decision of a local planning authority is comparable to that of a judge trying an action for damages; the decision is not arbitrary, but neither is it predictable with certainty."

This lack of certainty necessarily applies when a determination is being made as to what would have happened in the past. In view of this there may be an argument that in order to give effect to the decision in the House of Lords it is appropriate to treat the references to the certainty of planning permission as being to a high probability of planning permission being granted. This would reconcile the basis on which they distinguished *Jelson* and *Melwood* with the reality that there never is certainty that planning permission will be granted. This might be a workable solution, and an assumption that planning permission would have been sought might be implied (see paragraph 66 of *Spirerose* in the Lands Tribunal). However, the references to certainty in the opinions are so clear and unqualified that we do not consider that it is open to us to treat them in this way.

128. It is then necessary to consider the circumstances and the timeframe by reference to which the hope value of planning permission is to be determined. Lord Walker, at paragraph 37, says that what falls to be determined is compensation for the loss of a chance, assessed at the valuation date (3 December 2001), of obtaining planning permission in a no-scheme world between the date notice was served under the Transport and Works Act in 1993 and 2001. We find it difficult to operate this approach in practice, because the prospects of obtaining planning permission and the nature of any permission that might be granted are not static over time. For instance, in the present reference there were planning policy changes in respect of the density of residential development introduced under PPG3 in 2000 and changes in highways policy introduced in July 1998 when the Government published "A New Deal for Trunk Roads in England" and excluded the A6 through Clapham from the core trunk road network. These would necessarily have changed the hope value of the subject land.

129. As Lord Hope of Craighead put it in *Fletcher Estates (Harlescott) Ltd v Secretary of State for the Environment* [2000] 2 AC 307 at 323A-D:

> "...The system of planning control which requires planning permission to be obtained for the development of land brings into account a variety of facts and circumstances. Factors such as predictions of population growth and the availability of suitable land for development affect the need for more land to be released for housing in the area. These factors need to be reassessed at regular intervals. A need which was identified 10 or five years ago may have disappeared. The predicted growth on which it was

based may have been reduced. The need may have been fully met by the building of the required number of houses in the given area. Or other factors may have changed, leading to the conclusion that the need must be met elsewhere. It is one thing to examine these factors, on the assumption that the proposal has been cancelled on the relevant date, in the light of existing circumstances. It is quite another to look back into the past and to try to reconstruct the planning history of the area on the assumption that the proposal had never come into existence at all. The further back in time one goes, the more likely it is that one assumption as to what would have happened must follow on another and the more difficult it is likely to be to reach a conclusion in which anybody can have confidence."

130. If the task were to determine whether, on the balance of probabilities, planning permission would have been granted at some point in the period under consideration (here 1991 to 2001), difficult as such a task might be for the reasons given by Lord Hope, it would at least produce a clear answer: planning permission would or would not have been granted. The value of the subject land could then be assessed as at the valuation date in the light of this conclusion. But the change through time in the prospects of obtaining planning permission seems to us to make Lord Walker's approach impossible of application unless in the particular case the prospects remained the same throughout the period under consideration.

131. We therefore do not think hope value can be assessed for the purposes of a valuation at the valuation date other than by reference to the hope that existed at that date, unless in a particular case the prospects of obtaining planning permission were constant throughout the period under consideration. That is not the case in this reference. None of the other law Lords suggested what the approach to the determination of the prospects of obtaining planning permission should be in *Spirerose*, and what Lord Walker said in paragraph 37 was not essential to the decision.

132. In *Urban Edge* (apparently with the agreement of counsel on both sides) the Tribunal held that the prospect that planning permission would be granted fell to be determined at the valuation date in the light of the physical circumstances then existing. It was, in other words, a cancellation assumption: the scheme itself was to be discounted but everything else was to be taken as it was at the valuation date. The decision in *Urban Edge* was issued very shortly before the hearing of *Spirerose* but it does not appear to have been referred to in the House of Lords. To the extent that it assumed the grant of planning permission rather than hope value, following *Spirerose* in the Court of Appeal, it is inconsistent with the House of Lords decision. But the application of the cancellation assumption when considering hope value is not inconsistent with the decision. In the circumstances we think that the correct approach to adopt is to determine the prospects as at the valuation date on a cancellation assumption, following in this respect *Urban Edge* in the way that it addressed the prospects of planning permission being granted.

Conclusions

133. In the light of the above analysis we have made findings on the following questions:

(i) What were the prospects as at the valuation date, on the assumption that the scheme was cancelled, of obtaining planning permission on the reference land? (Our preferred approach)

We consider that condition 22 of the September 1999 planning permission would not be sustainable and that there would be a near certainty (95%) of its removal, with the effect that residential development could take place on the reference land.

(ii) What were the prospects during the period 1 December 1991 (the date of the inspector's report on the route of the bypass) to 5 January 2001 (the valuation date), on the assumption that the scheme had never been proposed, of obtaining planning permission on the reference land? Did the prospects remain constant throughout the period?

We found above at paragraph 97 that planning permission would have been granted in the no-scheme world for development of the reference land by 60 dwellings. The prospects changed with time as both highways and planning policies developed (see paragraph 128 above). If there had never been a proposal for the bypass we estimate that the chances of obtaining planning permission at the valuation date would have been 85%.

(iii) If the scheme had never been proposed, what was the likelihood that planning permission would have been granted by the valuation date, and what were the prospects that it might be granted in future, on the retained land? Should there be a deduction for betterment?

If there had never been a proposal for a bypass, there was a very good chance (85%) that planning permission would have been granted for the construction of 94 houses on some 4.5 ha of the retained land on the southern half of the Folly site, adjoining the reference land. In addition, there was a modest degree of hope (25%) that planning permission would be granted for residential development on the remainder of the Folly site some time after 2006. Although planning permission was granted for residential development on a significantly larger area in the scheme world, there should be no deduction for betterment.

134. The conclusions under (ii) and (iii) above assume that there would have been no objection from the Highways Agency to the residential development of the southern half of the Folly site in isolation. That question was not considered by the highways experts, whose evidence was restricted to the possible development of the Folly site as a whole. It is possible that different highway considerations might apply to the two development sites and the parties may wish to address this question if so advised. It will also be necessary to consider the valuation implications of the hope values that we have quantified above. Finally, we have not been notified of any agreement on the Tobin costs, which therefore remain outstanding.

135. The parties are invited to submit agreed directions for the future conduct of the reference to the Tribunal within 28 days of the date of this decision. In the absence of agreement, a pre-trial review will be listed to consider the matter.

Dated 22 December 2009

N J Rose FRICS

AJ Trott FRICS