Neutral Citation Number: [2025] UKUT 241 (LC)

Case No: LC-2023-628

IN THE UPPER TRIBUNAL (LANDS CHAMBER)
IN THE MATTER OF A NOTICE OF REFERENCE

Royal Courts of Justice,
Strand, London, WC2A 2LL

28 July 2025

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

COMPENSATION - COMPULSORY PURCHASE – 0.33 acre site, of which 0.12 acres acquired – cancelled scheme world – appropriate alternative development - 'before and after' valuation approach accepted – compensation based on overall loss of value awarded at £1.51 million

BETWEEN:

NOFAX STATION ROAD LIMITED

Claimant

-and-

THE LONDON BOROUGH OF BARNET

Acquiring Authority

Address: Land at 1-11 Station Road,
West Hendon
Barnet

Peter McCrea OBE FRICS FCIArb

Hearing dates: 24, 25 and 28 April 2025

Guy Williams KC, instructed by Asserson, for the claimant
Rebecca Clutten, instructed by Pinsent Masons LLP, for the Acquiring Authority

The following cases are referred to in this decision:

Secretary of State for Transport v Curzon Park Ltd and others [2023] UKSC 30

Transport for London v Spirerose Ltd [2009] RVR 225

Castlefield Property Limited v National Highways [2023] UKUT 217 (LC)

Lady Fox's Executors v Commissioners of Inland Revenue [1994] 2 EGLR 185

Railtrack v Guinness Limited [2003] EWCA Civ 188

Ryde International plc v London Regional Transport [2004] EWCA Civ 232

Ramac Holdings Limited v Kent County Council [2014] UKUT 109

Penny v Penny (1868) LR 5 Eq 227

Fraser v Fraserville [1917] AC 187

Urban Edge Group Ltd v London Underground Ltd [2009] UKUT 103 (LC)

Pro Investments v Hounslow LBC [2019] UKUT 319 (LC)

Pro Investments v Hounslow LBC [2021] UKUT 0201 (LC)

Bashir v LB Newham [2024] UKUT 146 (LC)

Introduction

1. This is a claim for compensation by Nofax Station Road Limited ('the claimant') following the compulsory purchase of part of its land at 1-11 Station Road, West Hendon, Barnet under the London Borough of Barnet (West Hendon Major Works) Compulsory Purchase Order (No.2A) 2016.

2. The London Borough of Barnet ('the acquiring authority') acquired the Reference Land pursuant to a general vesting declaration to facilitate part of the highways element of the redevelopment of the West Hendon estate. The date of vesting, and therefore the valuation date, was 1 November 2019.

3. At the hearing of the reference, the claimant was represented by Mr Guy Williams KC, and the acquiring authority by Ms Rebecca Clutten (assisted by her pupil, Mr Jeffrey Chu). Expert evidence on planning matters was given by Mr Dominic Dear MRTPI for the claimant and Mr Nicholas Alston MRTPI for the acquiring authority, and on valuation issues by Dr Anthony Lee MRTPI MRICS for the claimant and by Mr Charles Trustram-Eve MRICS for the acquiring authority. I am grateful to them all.

Facts in brief

4. The Reference Land formed the front part of the 0.34-acre site ('the Site') of the former Deerfield and West Hendon Social Club, located on Station Road in Hendon, north-west London, close to its junction with the A5 West Hendon Broadway. The southernmost section of the M1 is a short distance to the east, and Hendon station is further along Station Road to the north.

5. Only the 0.12-acre 'banana-shaped' strip of landscaped space at the front of the site (the 'Reference Land') was acquired. Some two years before the acquisition, but while the majority of the Reference Land was safeguarded in planning terms, the claimant had redeveloped the remainder of the site (the 'Retained Land'), constructing a three/four storey mixed-use building. At the valuation date, this comprised 125 square metres of office/retail accommodation in part of the ground floor, with the remainder of the space comprising 19 one-bed and 3 two-bed flats. 16 car parking spaces were in the basement. There was no affordable housing within the development. Since the valuation date, the commercial units have been converted, with planning permission, to residential units.

6. A plan showing the Reference Land hatched, and the Retained Land edged, is reproduced below.

Statutory Provisions

7. This is the first reference in which the Tribunal is required to assess compensation under the 'no scheme principle' in section 6A of the Land Compensation Act 1961, introduced by the Neighbourhood Planning Act 2017.

8. In so far as relevant to this reference, the rules under which compensation for the loss of land compulsorily purchased is assessed are contained within section 5 of the 1961 Act (at the valuation date, the subsequent amendments introduced by the Levelling Up and Regeneration Act 2023 were not in force):

> "5. Rules for assessing compensation.
>
> Compensation in respect of any compulsory acquisition shall be assessed in accordance with the following rules:
>
> (1) No allowance shall be made on account of the acquisition being compulsory.
>
> (2) The value of land shall, subject as hereinafter provided, be taken to be the amount which the land if sold in the open market by a willing seller might be expected to realise.
>
> (2A) The value of land referred to in rule (2) is to be assessed in the light of the no-scheme principle set out in section 6A.
>
> …
>
> (6) The provisions of rule (2) shall not affect the assessment of compensation for disturbance or any other matter not directly based on the value of land
>
> …
>
> and the following provisions of this Act shall have effect with respect to this assessment".

9. The new section 6A, referred to in Rule 2A, provides (with my emphasis):

> "6A No-scheme principle
>
> (1) The no-scheme principle is to be applied when assessing the value of land in order to work out how much compensation should be paid by the acquiring authority for the compulsory acquisition of the land (see rule 2A in section 5).
>
> (2) The no-scheme principle is the principle that—
>
> (a) any increase in the value of land caused by the scheme for which the authority acquires the land, or by the prospect of that scheme, is to be disregarded, and
>
> (b) any decrease in the value of land caused by that scheme or the prospect of that scheme is to be disregarded.
>
> (3) In applying the no-scheme principle the following rules in particular (the "no-scheme rules") are to be observed.
>
> (4) Rule 1: it is to be assumed that the scheme was cancelled on the relevant valuation date.
>
> (5) Rule 2: it is to be assumed that no action has been taken (including acquisition of any land, and any development or works) by the acquiring authority wholly or mainly for the purposes of the scheme.
>
> (6) Rule 3: it is to be assumed that there is no prospect of the same scheme, or any other project to meet the same or substantially the same need, being carried out in the exercise of a statutory function or by the exercise of compulsory purchase powers.
>
> (7) Rule 4: it is to be assumed that no other projects would have been carried out in the exercise of a statutory function or by the exercise of compulsory purchase powers if the scheme had been cancelled on the relevant valuation date.
>
> (8) Rule 5: if there was a reduction in the value of land as a result of—
>
> (a) the prospect of the scheme (including before the scheme or the compulsory acquisition in question was authorised), or
>
> (b) the fact that the land was blighted land as a result of the scheme,
>
> that reduction is to be disregarded.
>
> (9) In this section-
>
> …
>
> "relevant valuation date" has the meaning given by section 5A [the vesting date, as above]

(10) See also section 14 for assumptions to be made in respect of planning permission."

10. As indicated immediately above, section 14 of the 1961 Act provides that in assessing compensation, account may also be taken of any actual or deemed planning permission. The version in force at the valuation date provided as follows:

"14 Taking account of actual or prospective planning permission

(1) This section is about assessing the value of land in accordance with rule (2) in section 5 for the purpose of assessing compensation in respect of a compulsory acquisition of an interest in land.

(2) In consequence of that rule, account may be taken—

(a) of planning permission, whether for development on the relevant land or other land, if it is in force at the relevant valuation date, and

(b) of the prospect, on the assumptions set out in subsection (5) but otherwise in the circumstances known to the market at the relevant valuation date, of planning permission being granted on or after that date for development, on the relevant land or other land, other than—

(i) development for which planning permission is in force at the relevant valuation date, and

(ii) appropriate alternative development.

(3) In addition, it may be assumed—

(a) that planning permission is in force at the relevant valuation date for any development that is appropriate alternative development to which subsection (4)(b)(i) applies, and

(b) that, in the case of any development that is appropriate alternative development to which subsection (4)(b)(ii) applies and subsection (4)(b)(i) does not apply, it is certain at the relevant valuation date that planning permission for that development will be granted at the later time at which at that date it could reasonably have been expected to be granted.

(4) For the purposes of this section, development is "appropriate alternative development" if—

(a) it is development, on the relevant land alone or on the relevant land together with other land, other than development for which planning permission is in force at the relevant valuation date, and

(b) on the assumptions set out in subsection (5) but otherwise in the circumstances known to the market at the relevant valuation date, planning permission for the development could at that date reasonably have been expected to be granted on an application decided—

(i) on that date, or

(ii) at a time after that date.

(5) The assumptions referred to in subsections (2)(b) and (4)(b) are—

(a) that the scheme of development underlying the acquisition had been cancelled on the launch date,

(b) that no action has been taken (including acquisition of any land, and any development or works) by the acquiring authority wholly or mainly for the purposes of the scheme,

(c) that there is no prospect of the same scheme, or any other project to meet the same or substantially the same need, being carried out in the exercise of a statutory function or by the exercise of compulsory purchase powers, and

(d) if the scheme was for use of the relevant land for or in connection with the construction of a highway ("the scheme highway"), that no highway will be constructed to meet the same or substantially the same need as the scheme highway would have been constructed to meet.

…"

11. Two potentially confusing aspects are of note. First, section 6A introduced five new Rules governing the no-scheme assumption. The familiar valuation Rules 1 to 6 of section 5 (now supplemented by Rule 2A) remain, but section 6A now has Rules 1 to 5 of its own. Secondly, as amended, the 1961 Act gave two differing dates at which cancellation of the scheme should be assumed to have occurred. For the purposes of assessing compensation, Rule 1 of section 6A assumes a cancellation on the valuation date (in this reference, 1 November 2019), while for the purposes of appropriate alternative development ('AAD'), the scheme is assumed to have been cancelled on the launch date (which is agreed to have been 14 June 2014, some five and a half years previously).

12. As the Supreme Court confirmed in *Secretary of State for Transport v Curzon Park Ltd and others* [2023] UKSC 30 (at [74]), when constructing the cancelled scheme world, what matters is the circumstances known to the market <u>on the valuation date</u>, either by way of actual planning permissions (section 14(2)(a)), or the prospect of planning permission being granted on or after the valuation date (14(2)(b)), or in assessing whether the test for AAD is satisfied (14(4)(b)). In these latter two exercises the local planning authority is assumed to have applied ordinary planning principles to the existing circumstances.

13. Leaving aside the prospect of planning permission being granted *after* the valuation date, the combination of ss6A and 14 means that we must assume two things happening on the valuation date. The first is that the scheme is cancelled, the second is a sale of the subject land. Arguably, s.14(2)(b) ("of the prospect …of planning permission being granted <u>on or after</u> that date…") raises the possibility of a third event on the same date – of planning permission being granted. In the real world this would be an implausible combination of events, but I do not need to explore that for the purposes of this reference. First because it is agreed that there are schemes which are capable of constituting AAD, the extent of that

AAD is in issue. Secondly, as Lord Neuberger commented in *Transport for London v Spirerose Ltd* [2009] RVR 225 at [50]:

> "…if a statute directs that property is to be valued on an open market basis as at a certain date, one would not expect any counterfactual assumptions to be made other than those which are inherent in the valuation exercise (such as the assumption that the property has been on the market and is the subject of a sale agreement on the valuation date) or those which are directed by the statute".

14. Finally, of particular relevance in this reference, section 7 of the Compulsory Purchase Act 1965 gives claimants an entitlement to claim compensation for severance and injurious affection:

> "In assessing the compensation to be paid by the acquiring authority under this Act regard shall be had not only to the value of the land to be purchased by the acquiring authority, but also to the damage, if any, to be sustained by the owner of the land by reason of the severing of the land purchased from the other land of the owner, or otherwise injuriously affecting that other land by the exercise of the powers conferred by this or the special Act."

Issues

15. There are three main issues in dispute. First, the extent of appropriate alternative development that is likely to have been permitted, absent the scheme. Secondly, the valuation of the site based on that development, which the valuation experts had very helpfully agreed on various bases. Thirdly, how that valuation should be applied to arrive at a compensation sum, and whether a 'before and after' valuation approach is appropriate.

16. As for quantum, by the end of the hearing the competing positions were as follows:

Head of Claim	Claimant's Assessment	AA's Assessment
Loss of Reference Land	£2,350,000 (together)	£15,000
Severance and Injurious affection		£0
Professional Fees	Agreed at £62,845.20	

17. The claimant's assessment is based on taking the residual land value of the whole site, assuming AAD comprising a 53 unit scheme, and deducting from it the residual land value of the scheme which was built in the scheme world. The authority's assessment is based solely on the (agreed) value of the Reference Land as amenity space.

18. In addition, the claimant claims a basic loss payment under s.33A, Land Compensation Act 1973, and any statutory interest.

Issue 1 - Appropriate Alternative Development

19. In *Curzon Park*, the Supreme Court described (at para. 86) the exercise of assessing AAD as requiring:

> "…the local planning authority (or, as the case may be, the Upper Tribunal) to assess whether and what planning permission could reasonably have been expected to be granted as at the valuation date … on the basis of the cancellation assumption "but otherwise in the circumstances known to the market" at that date. This test requires the local planning authority to conduct an exercise similar to that which it would have had to conduct in the real world if an application had been made for planning permission for equivalent development for the land in issue, but requires that exercise to be conducted with a more limited set of information than would likely have been available in such a real world scenario.
>
> 87…. Section 17(5) supports the view that the local planning authority is required to perform what is essentially the same assessment exercise for the grant of planning permission in relation to the land in issue as would have been required in the real world, including by specifying relevant conditions, but painting with a broad brush on the basis of the general information known to the market at the valuation date.
>
> …
>
> 89… The point of the broad brush assessment required by section 14 is that the local planning authority should be taken to behave so far as possible, working in a broad brush way by reference only to objective circumstances known to the market, as it could reasonably have been expected to do if an application for planning permission for the land in issue had been made in the real world….".

20. This 'broad brush' test had been applied by the Tribunal in *Pro Investments v Hounslow LBC* [2019] UKUT 319 (LC) which concerned a CPO to enable the redevelopment of Brentford FC's new stadium. The Tribunal was required to decide between two competing positions in the context of harm to heritage assets in the vicinity. The claimant's scheme, for 303 residential units, was compared with the respondent's CAAD of 80 units, or an alternative position before the Tribunal of 98 units. The permitted scheme underlying the CPO featured 253 units at a much higher ratio of one and two-bedroomed units – 93% - than policy permitted, requiring 30% three-bedroomed units. The claimant's scheme fell short of the local planning authority's design standards on amenity space, circulation cores, car parking, sunlight and outlook, but the claimant relied on the ways in which the stadium scheme equally infringed policy in justifying its design.

21. The Tribunal (Martin Rodger QC, Deputy Chamber President, and myself) said this:

> "112. The importance of good design and high quality architecture in mitigating adverse impacts on townscape is apparent from the officer's report on the [stadium scheme underlying the CPO – including 253 apartments]. That application was for outline planning permission only, so far as it related to the residential buildings, but the absence of detailed design solutions was not an impediment to the success of the application. In the same way, for the purpose of a CAAD application, a detailed design is not a prerequisite… [T]he

> respondent's architecture expert who drew up its alternative scheme, described a CAAD scheme as an application in "a skeleton form", with details comparable to the information the respondent would expect to see at the pre-application stage. We agree.
>
> …
>
> 117 …it is for the claimant to establish that the scheme which it proposes would be likely to receive permission. If the proposed scheme contravenes normal design standards it is for the claimant to demonstrate that it would nevertheless be likely to obtain permission. It may readily be assumed that certain design issues would be capable of satisfactory resolution including, for example, issues concerning materials and aesthetic features. But where design standards impose real constraints on the scale of development which is likely to be permissible, the Tribunal has to be satisfied on the balance of probability that the claimant's proposal would not be rejected because it fell short of those standards.
>
> 118. We also appreciate that design standards must be seen in the context of other strategic planning objectives and that they are applied by local planning authorities with some flexibility, as is apparent from the planning permission granted for the stadium enabling development. No doubt such flexibility as is available will depend in part on an assessment of the proposal as a whole, including public benefits it is likely to produce and which may be sufficient to justify a departure from some aspects of policy. But an authority's ability to depart from standards reflected in the statutory development plan …is not unrestricted – the determination of a planning application is required to be made in accordance with the statutory development plan unless material considerations indicate otherwise. A core principle of planning policy is to seek to secure high quality design and a good standard of amenity for residents of new homes."

22. The Tribunal did not consider that the claimant's infringement of design standards could be justified by reliance on the stadium scheme, which the officer's report stressed was far from a typical development. The authority had balanced the unprecedented building heights and unit density against the community value and economic development of the new stadium being built. There was no new football stadium in the claimant's scheme, which had to be assessed on its own merits against policy.

23. Whilst being mindful [126] that the claimant had advanced no evidence in support of any alternative to its own scheme, and that it should be wary of redesigning it, the Tribunal was satisfied that there was sufficient evidence to draw conclusions as to the number and mix of units that would likely be acceptable, and subsequently ordered a variation of the respondent's CAAD, specifying 205 units, the mix of one, two and three-bedroomed units, and the required provision of affordable housing. That notional scheme formed the basis of the Tribunal's subsequent determination of compensation in *Pro Investments v Hounslow LBC* [2021] UKUT 0201 (LC). In this reference, I must consider AAD and its effect on compensation together.

24. Mr Williams referred to the Tribunal's decision in *Bashir v LB Newham* [2024] UKUT 146 (LC). While in that appeal the Tribunal again applied its broad brush, the case was more

concerned with height, scale and massing in the context of harm to heritage assets, and is of limited assistance here.

25. In summary, in assessing AAD, the reasonable planning authority would not require or expect the same level of detail as would be submitted for a full planning application – they would be faced with a 'more limited set of information' (*Curzon* para 86*)*. Whether that level of detail would be comparable to a pre-application stage, or to that required for an outline application, doesn't really matter. It needs to be of sufficient detail to demonstrate that it complies with the development plan, and if it does not, it is for the claimant to establish that any contravention would not be a barrier to planning permission being granted. Some details can be left to one side, typically say surface finishes and landscaping. The planning authority might be prepared to accept some shortfalls from standards to secure its objective of providing housing. But it seems to me that does not invite disregard of a range of fundamental planning standards – the broad brush is not applying a whitewash over the development plan.

26. Aside from planning theory, it should be remembered what the exercise is seeking to achieve. AAD is not the real world, it is a tool to aid the assessment of compensation, and the level of detail needs to be sufficient to provide a notional development that is capable of being valued by a reasonable valuer. Ms Clutten stressed that the claimant's pleaded case was based on a number of residential units, but both experts applied capital rates per sq ft to an aggregate floor space, and not on a per unit basis.

The planning history of the site

27. The site has been subject to numerous planning applications, of which some were granted, some refused, and some withdrawn. To set the context for my later comments, I outline below those most relevant (when referring to the acquiring authority in its capacity as the local planning authority, I shall call it 'the council').

28. First, the planning experts agreed that the existing building on the Retained Land (only) was built out in accordance with the following planning permissions. Under H/01827/11 ('the original permission') permission was granted in February 2012 for the demolition of the former social club, and the construction of a part-three, part-four storey building of 18 residential units and two office units with off street parking at lower ground level for 16 vehicles, 14 x one bed homes and 4 x two bed homes.

29. In August 2017, under 17/4493/FUL, permission was granted for the creation of a two bedroomed flat at third floor level. Consent 17/5483/FUL dated October 2017 was a retrospective consent for the retention of a further third floor unit. In July 2019, under 18/4233/FUL, retrospective consent was granted for the conversion of two 2-bedroomed duplex flats into four 1-bed flats. The parties have called these the 'extension 1 – 3' permissions, respectively.

30. As a result, at the valuation date the existing building on the Retained Land comprised 22 units, none of which were affordable housing, with 19 one-bedroomed units and three with two bedrooms. There were two commercial ground floor units of 125 sqm (which, subsequent to the valuation date, were converted to residential - application 20/3704/FUL granted in 2021). The valuation experts agree that the aggregate net sales area was in the order of 1,412 sqm, or 15,199 sq ft. That aggregation does not amount to a total gross internal area, as it does not include corridors, circulation space, plant rooms, and the like.

31. Two applications were refused. The first, W/03099F/07, for 40 units, was refused in January 2008; the second, H/046545/12 for 25 units, was refused in May 2013.

32. Two other planning applications are of relevance, one permitted, and one refused. Planning application 18/5408/FUL ('the extension 4 permission') was granted by the council in July 2019. It is relevant because it was a planning consent in force at the valuation date, lying on both the Retained Land and part of the Reference Land. The planning experts summarised the permission as follows:

> "Extension to 2no existing commercial units at ground floor level and existing residential units at upper levels (1st and second floor only), including a three storey front extension to an existing part three, part four storey building with extension to existing lower ground floor level. Note: Existing units at 3rd floor level retained (1 x one bed and 1 x two bed). No increase in units, however an increase in the number of habitable rooms and floorspace (+7,916sqft)".

33. The officer's report to the planning committee confirmed that, after an amendment, the line of the proposed building would not 'prejudice the delivery of the CP02A highway works'. It seems therefore that the highway works are only on part of the Reference Land acquired, since the extension 4 permission involved building partly on the remainder.

34. Again, the valuation experts helpfully agree that this extension 4 permission provided an aggregate net sales area of 2,147 sqm, or 23,115 sq ft, excluding corridors etc as above.

35. Planning application 16/3088/FUL ('the refused application') was refused by the council in August 2017, and the claimant's subsequent appeal was dismissed in April 2018. It is relevant because it also sets a reference point against which AAD can be considered. The planning inspector's reasons for dismissing the appeal included the effect of the proposed development on the character and appearance of the area, and its effect on the living conditions of existing neighbouring occupiers. The Inspector considered that in comparison with the existing building:

> "…by virtue of the significantly further forward projection of the proposed building, its height at its tallest and thus resulting scale so close to the back edge of the pavement it would dominate this part of the street scene. The increased prominence would not only jar visually with the much smaller scale of the opposite more traditional terraced housing but also make the street overall appear unbalanced. The resulting building would have a looming and over-bearing impression on a human scale and as a result reduce the quality of the public realm at this point."

36. The Inspector concluded that harm would be caused to the character and appearance of the area particularly by virtue of the forward projection, such that the proposal would not be policy compliant. He also found that the increased proximity of the proposed building to those dwellings on the opposite side of Station Road, coupled with the large windows to the front elevation would exacerbate the sense of overlooking, and would detrimentally affect the living conditions of the occupiers opposite, in conflict with policy.

The rival schemes of AAD

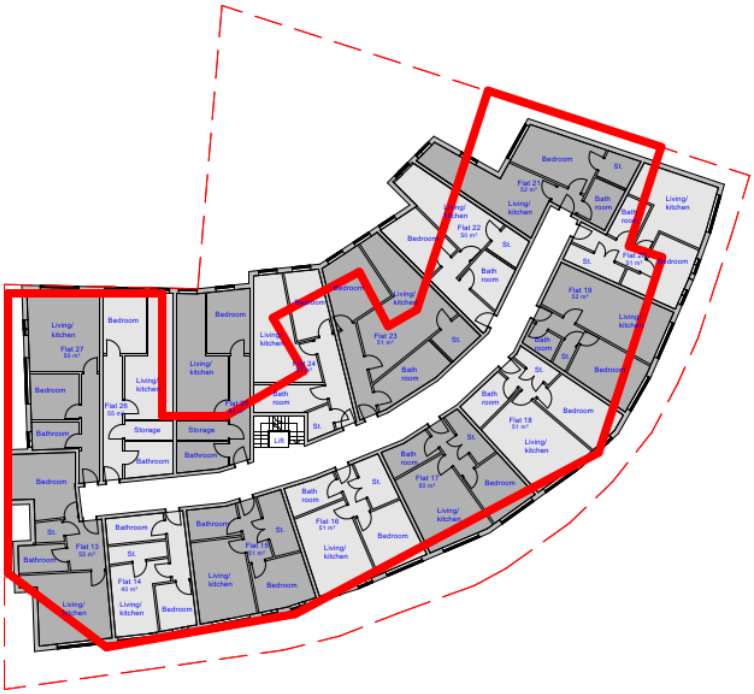
37. It is common ground that the Retained Land and at least part of the Reference Land were capable of accommodating AAD at the valuation date. The dispute centres on the scale, form, and content of that notional development. It is agreed that a four storey development would be acceptable, and that the building line could be advanced beyond the permitted extensions. Quite how far, and what setbacks would be required, is in issue.

38. The claimant originally proposed a scheme of 53 units, which Mr Dear said was policy compliant. As I explain below that position changed as the hearing progressed.

39. The authority drew up its own scheme of AAD; they called it the 'concept scheme'. This comprised 125 sqm of commercial floorspace, plus 20 homes (4 x three bed, 11 x two-bed, and 14 x one-bed units). The total net residential sales area was 1,950 sqm.

40. In the light of the planning inspector's concerns, one of the main points in issue is the position of the frontage of any development relevant to the pavement. The parties produced a helpful plan to help comparison of the various versions, and which I reproduce below. The substantive element of the plan shows the claimant's scheme (at first floor level). The back of the pavement is shown by a long-dashed red line. Working inwards from the pavement, the boundary of the building proposed under the refused application, which the Inspector found overbearing, is shown by a blue dashed line. The extension 4 permission is shown by a green line. The existing building, constructed and amended in line with the permissions outlined at above, is shown by a pink line.

41. It will be noted that the frontage of the claimant's scheme projects further out than the extension 4 permission, but, in the main, is further from the pavement than that of the refused application. In comparison, the authority's concept scheme is overlaid on the plan below:



Planning evidence

42. Mr Dominic Dear MRTPI gave evidence for the claimant. He was previously a senior planning officer employed by the acquiring authority, but now owns his own firm – Adara – which also employs architects, some of whom had been involved in the design of the claimant's scheme. Mr Nicholas Alston MRTPI gave evidence for the acquiring authority. He is a Principal at Avison Young, heading up the London planning consultancy team.

43. The experts' helpful Statement of Agreed Facts records their agreement that if the council was unable to demonstrate a five year housing land supply at the valuation date, then the 'tilted balance' provisions of NPPF paragraph 11(d) - the presumption in favour of sustainable development - would be engaged. While I heard evidence on this topic, I need say little about it, for reasons that will become clear. It was common ground, as Mr Dear confirmed in evidence, that policies on housing quality, unit size, mix, density, design (including with respect to layout and massing), car parking and loss of existing use, would not be treated as being out of date should the tilted balance be engaged.

44. The claimant's scheme comprised a four-storey building of similar height and width to that built, but extending some 3m forward of it. In his first report, Mr Dear said that the scheme would meet all relevant planning policies and guidance. It took account of the Planning Inspector's reasons for refusing the refused application, and set the building some 2.5m back from that which the Inspector rejected. In other respects, Mr Dear said that the claimant's scheme would comply with the development plan, and there were no material considerations indicating that planning would not be granted.

45. That position changed as the hearing progressed. During cross examination by Ms Clutten, Mr Dear was forced to accept that the claimant's scheme, as drawn, failed to comply with many planning policies, or guidance, including those relating to room dimensions, lift car sizing, accessible dwellings, amenity space, single-aspect units, and parking. As drawn,

some of the flats (for example flats 41 and 42, which can be seen by comparing the two plans above) had windows which would face the brick wall of 5 Mapesbury Mews.

46. In Mr Dear's view, no scheme is capable of complying with *all* policy requirements, and some flexibility was required; all of the criticisms outlined above could be remedied by 'tweaking'. In his experience as a planning officer, schemes evolved over a series of meetings, with the plans being adjusted as the process went along, before a satisfactory scheme was arrived at. That may well be the position; what matters is that an application complies with the development plan as a whole, which may involve a departure from some policies within it. But the Tribunal is tasked with deciding whether a particular scheme of AAD has a reasonable expectation of being granted. In that respect the analogy with an outline consent is perhaps more accurate than that of pre-application discussions. The decision-maker, either the planning authority or the Tribunal, must decide whether it is reasonable to expect that a planning permission would be forthcoming for the proposal in front of it, accepting that some details might have to be agreed at a later point.

47. It seemed to me that Mr Dear didn't really understand the task facing the Tribunal, nor his duties as an expert witness. I agree with him that some aspects might be capable of being 'tweaked', as he put it, to ensure compliance with the relevant policy. But at a hearing of a reference based on AAD, the Tribunal can only decide on the material before it – any fundamental tweaks need to have already been made. I accept that some elements could be left out of account, and am mindful that some of the deficiencies of the claimant's scheme are in respect of guidance rather than policy. But the claimant's scheme was unsatisfactory in so many ways that I have no confidence that it was capable of being remedied to the extent required to comply with the development plan as a whole. Additionally, there is insufficient evidence of the claimant's redistribution of unit mix within the 53-unit envelope for me to place any weight on this – they featured in one paragraph of Mr Dear's second report; no plans or further details were forthcoming, and in cross-examination he couldn't recall how he had arrived at his calculations.

48. As his scheme was systematically dismantled by Ms Clutten in cross-examination, Mr Dear resorted to answering questions with either grudgingly monosyllabic responses, or with combative questions of his own. I have placed very little weight on his evidence, and am unpersuaded that there is a reasonable expectation of planning consent being granted for the claimant's scheme. It is not AAD.

49. I found Mr Alston an experienced, albeit loquacious, witness whose evidence was of assistance. In addition to the concept scheme, he accepted that the extension 4 permission would be a reasonable indicator of what the likely maximum floorspace capacity of the Site is likely to be in an extension/alteration scenario.

50. The evidence on the extension 4 permission was fairly limited. The valuers, for instance, did not present a bare residual land value for it in the way the other alternatives were presented. The 'residual' land value assumed that the scheme as built was present, with its built out capital value, but the costs of the extension only were included – hence the surprisingly high figure of £5.45m, which the claimant understandably did not contend for.

51. A comparison of the plans above demonstrates that there is little between the parties as to the line of the frontage that would likely be permitted. They really only diverge at the northern end of the building. In my judgment the line of the concept scheme, leading to the natural line of the terrace of houses on Station Road (and very similar to that of the existing

building), is appropriate. Mr Williams quite correctly pointed out that the frontage of the extension 4 permission was set back to avoid the element of the Site which had been safeguarded for the road widening, which would not be the case in the no scheme world. That is a fair observation, but isn't the end of the matter.

52. Having visited the Site and viewed the existing building in its setting on Station Road, comparing what has been built with the various options put forward by the parties, I can sympathise with the Inspector's concerns about the overbearing nature of the refused application, and in my judgment the building line of the claimant's scheme line would probably have the same effect, especially on the fourth floor. As for the rear building line, the claimant's scheme replicated that existing, while the authority's scheme brought the line in, to the extent that it produced a smaller total floor area than that included in the extension 4 permission. However, there are no plans or calculated floor areas before me to represent a building that would have the frontage of the authority's scheme, but the rear of that existing/the claimant's scheme, and I am unpersuaded that, unlike in *Pro Investments*, I have sufficient material to carry out that exercise myself.

53. On the basis of the evidence before me, I am satisfied that the authority's concept scheme, in terms of bulk and massing, would have a reasonable prospect of receiving planning permission as AAD, and should form the basis of the valuation for compensation.

54. The authority's scheme as drawn has 125 sqm of commercial floorspace, 4 three-bed, 11 two-bed and 14 one-bed units; the latter representing 48% of the total by unit. The total net sales area is 1,950 sqm. Mr Alston referred to Mr Trustram Eve's evidence that a mix which represented 60% two-bed and 40% one-bed units, within the same floor area, would produce the highest value; and he accepted that that mix in that scheme would have a reasonable prospect of achieving planning permission.

Loss of office space

55. As indicated above, at the valuation date, two commercial units were present in the existing building. Planning consent was subsequently granted for their conversion to residential use.

56. It is common ground that the applicable policy was DM14 of Barnet's September 2012 Local Plan, which states at a:ii –

> "…loss of a B Class use will only be permitted where it can be demonstrated to the council's satisfaction that a site is no longer suitable and viable for its existing or alternative business use in the short, medium and long term and a suitable period of effective marketing has been undertaken. Where this can be demonstrated the priority for re-use will be a mixture of small business units with residential use."

57. The supporting text at 15.2.4 explains that 'effective marketing' means

> "where a site has been continuously actively marketed both for sale and rent for a period of 12 months at an appropriate price which can be agreed in advance with the council [at pre- application if appropriate] for re- use or redevelopment for employment use and no interest has been expressed. Once this can be satisfied then partial loss for residential and employment use may be permitted. The impact on local employment will be considered and re- provision,

preferably of small business units will be favoured which can secure an equivalent amount of floor space and level of employment."

58. As I indicated when outlining the planning history above, consent was granted in 2021 to change the use of the two commercial units to residential, under 20/3704/FUL. The officer's report to the planning committee indicated that the applicants had provided evidence that the units had been marketed 'since July 2017', and the officer was satisfied that DM14 had been complied with, subject to a payment of £25,000 towards the loss of employment floorspace.

59. Mr Dear confirmed that the required marketing was undertaken. I accept that. While the planning inspector in the refused application was doubtful, on balance I accept that it is likely that the applicant would have been able to demonstrate compliance with policy DM14, subject to the payment of £25,000.

Affordable Housing

60. As I indicated above, the existing building features no affordable housing, and was constructed under the original permission H/01827/11. On that application, the officer's report to the planning committee said this:

> "The application was submitted with a viability report dated 20 April 2011. This was assessed for the council by an independent consultant*.
>
> The applicant's report concluded that the proposed scheme with eighteen residential and two commercial units would not be viable with the provision of any affordable housing.
>
> The independent viability consultant retained by the council has confirmed that had the whole of the existing site been available for development it is likely that some affordable housing could be achieved. However by safeguarding one third of the application site for future highway works scheme viability is significantly [affected] and has confirmed that no affordable housing can viably be provided.
>
> The London Plan allows for the level of affordable housing to be set subject to a viability assessment. Recent appeal findings have also supported the provision of no affordable housing in instances where it can be demonstrated that its provision would curtail the development of the site.
>
> It is therefore accepted that the scheme can not make provision for affordable housing."
>
> (*Mr Trustram Eve)

61. At the valuation date, some eight years on, whilst its Development Management Local Plan document set a requirement of 40% affordable housing, the council was applying a local target of 35%, reflecting the Mayor of London's threshold approach in his Affordable Housing and Viability SPG.

62. Dr Lee said that the 27 schemes consented by the council in 2018 and 2019 showed an average affordable housing provision of 23% with only two schemes meeting the policy requirement, these schemes being brought forward by a registered provider. Of the ten

schemes providing between 20 and 55 units, excluding two local authority schemes of 100% affordable, nine were granted consent with zero affordable housing. The sole development which had any – 35% - was a local authority led scheme, which Dr Lee, not unreasonably, surmised might have been on the basis that the local authority was prepared to accept a lower land value to boost housing numbers.

63. Dr Lee said that given the scheme world development could not accommodate any affordable housing, and considering the other schemes which were unencumbered by loss of space for highway works, the broad level of affordable housing was between 0-20%. He understood Mr Trustram Eve's position to be that no affordable housing should be included in the valuation exercise, but that was on the basis that Mr Trustram Eve's valuation had included the existing value of the building on site, such that the valuation exercise was negative in any event.

64. The experts agreed that at the valuation date, the method of assessing affordable housing viability would be based on assessing a baseline land value - the higher of 1) the existing use value plus 10% or 2) the development value of the Site, using a toolkit. The council's independent viability consultant mentioned in the planning report above was Mr Trustram Eve. He said that the agreed baseline figure at that time was £750,000, and that it was likely that values would have increased since then, possibly to £1-£1.1 million. Dr Lee considered it more likely than not that at the time the consent was granted there might have been some affordable housing had the whole site been available, but said the question was speculative. While there were questions to both experts as to what that might be, and how it might have grown from £750,000 in 2011, neither of them had carried out the toolkit exercise to ascertain what the likely level would be.

65. In the absence of any reliable evidence as to baseline land values, I am left with what the council was demanding in the period around the valuation date, which I am satisfied would be a proxy for what a reasonable planning authority would require. Dr Lee's table of 27 developments showed that generally smaller schemes, of a scale comparable to all of the options before me, attracted 0% affordable housing, whereas generally, larger schemes were able to support affordable housing at rates of 13-38%. Doing the best I can on the limited evidence before me, I am satisfied that the valuation exercise should be on the basis of no affordable housing.

66. Drawing the threads together at this point, in my judgment a scheme which encompasses the authority's concept scheme building envelope, but without affordable housing or commercial space, would be AAD. The configuration, in terms of mix, which would generate the highest value would, as Mr Alston accepted, be a 37 unit scheme of 1 and 2-bedroomed units.

Issue 2 - Valuation

A brief history of the reference

67. The acquiring authority, through Mr Trustram Eve's firm Avison Young, made the reference to the Tribunal in September 2023. Its original statement of case adopted two valuation approaches. The first was to value the Reference Land in isolation – which as above was assessed at £15,000. The second was a 'before and after' approach. The 'before' figure reflected the value of the Retained Land and the Reference Land together, assuming planning consent for development of the whole Site. The 'after' figure was said to be the

value of the Retained Land with assumed planning permission for a scheme based on the existing building. The difference between the two values was £150,000.

68. This approach was explained further in correspondence between the parties, and in a letter to the claimant's solicitors from Avison Young dated 27 November 2023, residual appraisal reports were presented. These assumed that the existing building could be demolished and that a 25 unit scheme built on the Reference Land and the Retained Land would generate a residual land value of £1.79 million. It then went on to consider the residual value of the Retained Land, which it calculated at £1.645 million based on a 22 unit scheme. The difference was put at £145,000, say £150,000; "therefore the compensation payable for the Rule 2 value of the Reference Land is assessed at £150,000".

69. By June 2024 the authority had instructed solicitors. Expert valuation evidence was exchanged, which alerted the claimant to the authority's altered position as outlined in Mr Trustram Eve's first expert report, and led to its amended Statement of Case.

Valuation evidence

70. In his first report, Dr Lee adopted a 'before and after' approach. He valued Mr Dear's 53 unit scheme at between £2.7m (assuming 20% affordable housing) and £3.3m (assuming none). He then deducted from this his residual land value for the Existing Building of £1.617m (comparing this with the £1.645 stated to be Avison Young's view [para 68 above]). The resulting difference, of this 'before and after approach' put compensation at between £1.091m and £1.753m depending on the level of affordable housing. In his second report, the residual land value of the Reference Land was recalculated to be £1.16m. and Dr Lee also provided alternative valuations based on the various competing schemes of AAD. This formed the basis of the valuers' very helpful agreed matrix, which I refer to below.

71. In his first report, Mr Trustram Eve adopted two approaches. His first, and principal, approach departed from the views of his colleagues at Avison Young. He explained 'my understanding that the assessment of the Scheme world value cannot disregard the existence (and therefore the value) of the Existing Building and any marriage value will only arise if the development value exceeds the market value of the Existing Building'. Since the value of the existing building was put at £7.13 million (since agreed at £7.11 million), no marriage value arose, and the value of the reference land was said to be £10,000 (since agreed at £15,000).

72. If he were incorrect, his second approach assumed the Existing Building was demolished and the Reference Land and Retained Land conjoined to facilitate a redevelopment of the combined Site. While he carried out a residual appraisal, it was evident from land sales that a land value equating to £122,000 per private unit could be achievable. He therefore valued the Retained Land, assuming the existing building of 19 units, at £2.32 million, and the combined Site, assuming the authority's concept scheme of 29 units at £3.53 million. By combining the sites a marriage value of £1.21 million was generated. He then equalised this value pro-rata between the two parcels based on their site areas (Retained Land 0.21 acres, Reference Land 0.12 acres) to arrive at a value of £434,000 for the Reference Land.

73. At that point, therefore, the essence of the differing approaches was that Dr Lee's 'before and after' mirrored the method originally used by Avison Young – deducting from the residual land value of the Site the residual land value of the Reference Land. Mr Trustram Eve's first approach valued the Reference Land only as a grass strip of nominal value,

because he said that once the value of the Existing Building had been accounted for, there was no marriage value that could be added to this nominal value. Mr Trustram Eve's second approach was not a 'before and after' valuation as such; instead, it assumed the Existing Building were demolished, and apportioned the residual value of the Site, between the Retained Land and the Reference land, pro-rata on site area. There was no 'after' as such.

74. Dr Lee and Mr Trustram Eve then began to compare notes, and are to be commended for the degree to which they co-operated in the run up to the hearing, making sensible concessions and compromises, resulting in an exemplary Statement of Agreed Facts.

75. The results of that industry were that the value of the Reference Land, in its existing state at the valuation date simply as a grass verge was agreed at £15,000. The capital value of the Existing Building, as built, was agreed at £7.11 m. The residual value of the Retained Land was agreed at £590,000 (significantly below the previous figures owing to build cost being corrected). They also very helpfully agreed valuations on each of the permutations before the Tribunal, which has considerably simplified the task before me.

76. The valuation experts have very helpfully agreed a valuation on my preferred basis outlined at paragraph [66] above – which they called 'scheme 3a', at £2,114,246 before rounding. My only adjustment to that is to include within the s.106 costs a payment of £25,000 for the loss of commercial floor space, as indicated above, to bring the total s.106 costs to £91,600. There might be a slight adjustment required in the Argus model to the finance figure, but I will use £2,089,246, say £2.1 million.

77. This would represent the residual market value of the whole Site (the Retained Land and the Reference Land) at the valuation date. There was some discussion about whether the value of the Site should be discounted to reflect the lack of actual planning permission. I do not accept that, partly because of the planning history of the Site, with a number of residential permissions. It was put to Mr Trustram Eve in examination in chief, but did not feature in his written evidence. It also seems to me to fly in the face of what AAD is premised upon – that it could reasonably be assumed to be granted.

Issue 3 – Valuation Principle

The basis of compensation – legal principles

78. The authority does not say that a before and after approach is impermissible *per se* but argues that it is appropriate to use this approach only if by doing so would lead to a result similar to an independent assessment of the Reference Land under Rule 2 (of s.5, 1961 Act), and of the Retained Land under s.7, 1965 Act.

79. Ms Clutten submitted that the Reference Land must be valued under Rule 2 - the value of the land shall… be taken to be the amount which the land if sold in the open market by a willing seller might be expected to realise; and under Rule 2A, that value is to be assessed in the light of the no scheme principle set out in Section 6A. She submitted that there is no comparable provision requiring the application of the no scheme principle to s.7 of the 1965 Act.

80. This open market hypothesis, Ms Clutten said, has been repeatedly endorsed in the Court of Appeal (*Lady Fox's Executors v Commissioners of Inland Revenue* [1994] 2 EGLR 185,

Railtrack v Guinness Limited [2003] EWCA Civ 188, and *Ryde International plc v London Regional Transport* [2004] EWCA Civ 232).

81. Ms Clutten also referred to a decision of the Tribunal (HH Judge Alice Robinson and myself) in *Ramac Holdings Limited v Kent County Council* [2014] UKUT 109, where at [62] the Tribunal said this:

> "…the effect of rule (2) is clear. The Reference Land must be valued as if it alone was being sold on the open market by a willing seller. This is a hypothetical basis because the seller – the claimant – may be anything but willing, particularly if the Reference Land forms an important part of other land retained by it. Insofar as the claimant suffers a loss because of a diminution in the value of Retained Land then this will form a claim for compensation for severance and/or injurious affection. It does not justify adopting an artificial approach to valuing the Reference Land as if is still formed part of a larger whole."

82. I note, however, the Tribunal went on, at [99] (with my emphasis):

> "We accept that, in order to value land compulsorily acquired under rule (2), it is usual to analyse comparable transactions to identify a value per square foot for the land which is then applied to the area of land acquired. However, in our judgment it is not necessarily appropriate to carry out the same exercise on a before and after basis in order to demonstrate a diminution in the value of Retained Land by reason of part of it having been compulsorily acquired. Whether that is the correct approach will depend on the evidence. But the issue at the end of the day under s.7 of the 1965 Act is whether the claimant can demonstrate that the Retained Land is in fact worth less as a result of the loss of the land acquired."

83. In *Ramac*, the claimant was unable to demonstrate that the loss of the reference land had made any difference to the value of the retained land, either by way of a loss of rental income, 'nor [was] there any evidence that loss of the reference land will result in the loss of developable area' [98]. It should be noted in that case the reference land amounted to 0.77 hectares of roadside verge, covered with trees and scrub, outside the fenced area of the claimant's retained land comprising 24.12 hectares of landscaped industrial park. That is a somewhat different proposition to that on this reference.

84. Ms Clutten also submitted that in addition to assuming an open market sale, it is necessary to value the Reference Land in its existing condition at the valuation date, relying on *Penny v Penny* (1868) LR 5 Eq 227 (in which it was held that the land acquired is assessed to be on what is now called the reality principle), and *Fraser v Fraserville* [1917] AC 187 (in which the Privy Council described the principles from earlier cases as requiring

> "…that the value to be ascertained is the value to the seller of the property in its actual condition at the time of expropriation with all its existing advantages and with all its possibilities, excluding any advantage due to the carrying out of the scheme for which the property is compulsorily acquired…"

85. In her skeleton argument, Ms Clutten submitted that the same was true of the condition of the land in the vicinity of the Reference Land, relying on the decision of the Tribunal (George Bartlett QC, President) in *Urban Edge Group Ltd v London Underground Ltd* [2009] UKUT 103 (LC), but as Mr Williams pointed out, this case was about planning

assumptions and what could be considered on the land and surrounding land at the valuation date, and Ms Clutten, sensibly, did not return to it in closing.

86. Ms Clutten noted that the absence of any reference to the open market hypothesis in the claimant's skeleton or valuation evidence must mean that the claimant's approach to the valuation exercise is wrong.

87. I should add briefly here that Ms Clutten relied on various concessions made by Dr Lee in cross examination. But, as she also pointed out, Dr Lee is a valuation expert who did not claim to be an expert in the law of compulsory purchase. The Tribunal must decide this claim in accordance with a proper application of the law, and I am not persuaded that Dr Lee's concessions are fatal to the claimant's case.

88. For the claimant, Mr Williams KC relied on the principle of equivalence, or 'fair compensation', as the Supreme Court preferred in *Curzon Park* [at 57]. He submitted that a claimant is entitled to be fully and fairly compensated for its loss. No allowance is to be made for the acquisition being compulsory. In practice, this means the Tribunal must consider the situation in which the claimant would have been but for the scheme, and seek to provide financial compensation that places it back into that position – insofar as money can do so.

89. It was clear, Mr Williams submitted, that in the absence of the scheme the Claimant would have been in the position of having a development opportunity for a larger building with a higher value on the whole Site. As a result of the scheme it has been unable to develop the whole Site, and was able to develop only the Retained Land which could accommodate a significantly smaller building. The Scheme acquired 37% of a site that was suitable for residential-led redevelopment.

90. As the Tribunal (Martin Rodger KC, Deputy Chamber President, and Mr Mark Higgin FRICS) said recently in *Castlefield Property Limited v National Highways)* [2023] UKUT 217 (LC) at [22]:

> "The guiding principle in the assessment of compensation is the principle of equivalence. The landowner whose land is taken in the public interest should receive compensation which fully and fairly reflects the loss which the owner has actually suffered, no more and no less."

91. I accept Mr Williams' submissions. The authority's approach fails to reflect the principle of equivalence. Each case is fact-specific, but the circumstances of this reference are far from those in *Ramac*, for instance.

The valuation exercise

92. Standing back is invariably useful. In this reference the claimant owned the whole Site of 0.33 acres, of which 0.12 acres was acquired. Absent the scheme, the claimant's uncontroverted evidence is that it would have developed the whole. I have determined above that planning permission could reasonably have been assumed to be granted for a development with a residual land value of the Site at £2.1 million. The valuers agree that the residual value of the retained land is £590,000, in the scheme world. That is based on the Existing Building, the development of the Site being limited to that because the front part of the Site was safeguarded for the scheme.

93. I am mindful of the slight artificial nature of the valuation exercise, in that the Existing Building was physically present at the valuation date. However assessing compensation for compulsory purchase is by definition an artificiality. The basic flaw of the authority's approach is that doesn't compare apples with apples, in that the costs of construction, finance, marketing, etc of the AAD is allowed for, but the capital value of the Existing Building is included without also deducting on a similar basis the costs etc of constructing it.

94. In this case a proper application of the statutory no-scheme principle produces the result the claimant contends for. The value of the land taken, the Reference Land, was decreased by the prospect of the scheme. Section 6A(2)(b) requires that decrease to be disregarded. The fact that the decrease predates the valuation date is not critical. The construction of a smaller building on the Retained Land before the valuation date, which crystallised the claimant's loss, cannot be left out of account. Any reduction in the value of the land is to be disregarded if it was a result of the prospect of the scheme as section 6A(8) directs. It therefore seems to me to be consistent with the no scheme principle for the compensation to which the claimant is entitled for the taking of the Reference Land to reflect the loss it sustained as owner of the whole of the Site by its inability to develop the Site as fully as it would otherwise have done.

95. I have determined above that the residual value of the Site was £2.1 million. The agreed value of the Retained Land is £590,000. As a result of the scheme, the claimant's land has reduced in value by £1,510,000, which I award.

Pre-reference costs

96. These are agreed at £62,845.20 including VAT.

Basic Loss payment

97. There are amendments to section 33A of the Land Compensation Act 1973 on the horizon, but for the purposes of this reference, the Act provides that basic loss falls to be assessed as 7.5% of the claimant's qualifying interest in the land, subject to a maximum of £75,000. Given my determination above, I award the claimant this maximum amount.

Determination

98. I determine compensation of £1,510,000, together with professional fees at £62,845.20, and a basic loss payment of £75,000.

99. This decision is final on all matters except costs, and the parties are invited to make submissions on costs, if they cannot be agreed, as outlined in the letter which is issued to the parties.

Peter McCrea OBE FRICS FCIArb

28 July 2025

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.