UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

COMPENSATION – compulsory purchase – preliminary issues – planning permission – whether permission to be assumed on basis that land "allocated" in development plan – whether planning permission to be assumed under no-scheme rule – cancellation assumption – chances of planning permission for different development options* – Spirerose –** ***Land Compensation Act 1961 s16(2)

IN THE MATTER OF A NOTICE OF REFERENCE

BETWEEN **URBAN EDGE GROUP LIMITED** **Claimant**

and

LONDON UNDERGROUND LIMITED **Acquiring Authority**

Re: Vacant Land and Buildings
59-63 Holywell Lane
Shoreditch
London EC2A 3PQ

Before: The President

Sitting at Procession House, 110 New Bridge Street, London EC4V 6JL
On 17, 18 & 19 February 2009

Guy Roots QC and *Alexander Booth* instructed by Swinnerton Moore LLP for the claimant
Michael Barnes QC and *Eian Caws* instructed by Eversheds LLP for the acquiring authority

The following cases are referred to in this decision:

Spirerose Ltd v Transport for London [2008] RVR 12; on appeal sub nom *Transport for London v Spirerose Ltd (In Administration)* [2009] RVR 18
Purfleet Farms Ltd v Secretary of State for the Environment, Transport and the Regions [2002] RVR 203
West Midlands Baptist (Trust) Associated Inc v Birmingham Corpn [1970] AC 874
Myers v Milton Keynes Development Corpn [1974] 1 WLR
Fletcher Estates (Harlescott) Ltd v Secretary of State for Transport [2000] 2 AC 307
Waters v Welsh Development Agency [2004] 1 WLR 1304
Pentrehobyn Trustees v National Assembly for Wales [2003] RVR 140
Jelson v Blaby District Council [1977] 1 WLR 1020
Essex County Showground Group Ltd v Essex County Council [2006] RVR 336
Stayley Developments Ltd v Secretary of State for the Environment, Transport and the Regions [2001] RVR 251

The following further cases were cited in argument:

Newes et Uxor v Lark (1571) Plowd 408
Miller v Minister of Pensions [1947] 2 All ER 372
Harmsworth Pension Funds Trustees Ltd v Charringtons Industrial Holdings Ltd [1985] 1 EGLR 97
Director of Lands v Yin Shuen Enterprises Ltd [2003] 2 HKLRD 399
Street v Mountford [1985] AC 809
AG Securities v Vaughan [1990] 1 AC417
In Re B [2008] UKHL 35
Bwllfa and Merthyr Steam Collieries (1891) v Pontypridd Waterworks Co [1903] AC 426
Cornwall Coast Country Club v Cardgrange Ltd [1987] 1 EGLR 146
Curr's Group Plc v Martin [1993] 3 EGLR 165
Director of Buildings and Lands v Shun Fung Ironworks Ltd [1995] 2 AC 111
Duvan Estates Ltd v Rossette Sunshine Savouries Ltd (1982) 261 EG 364
Electricity Supply Nominees v London Clubs Ltd [1988] EGLR 152
Gaze v Holden (1983) 266 EG 998
Hoare (VO) v National Trust [1998] RA 391
Horn v Sunderland Corpn [1941] 2 KB 26
Industrial Properties (Barton Hill) Ltd v Associated Electrical Industries Ltd (1976) (unreported)
Jelson v Minister of Housing and Local Government [1970] 1 QB 243
Leschke v Jeffs and Faulkner [1955] Queensland Weekly Notes 67
London County Council v Tobin [1959] 1 WLR 354
Lynall v Inland Revenue Commissioners [1972] AC 680
Melwood Units Pty Ltd v Commissioner of Main Roads [1979] AC 426
R v Davidson [1909] WN 52
R v Ettridge [1909] 2 QB 24
R v Horseferry Road Metropolitan Stipendiary Magistrate, ex p Siadatam [1991] 1 QB 260
Porter v Secretary of State for Transport [1996] 3 All ER 693
Ponsford v HMS Aerosols Ltd (1978) (unreported)
Segama NV v Penny Le Roy Ltd [1984] 1 EGLR 109
Trocette Property Co Ltd v Greater London Council (1974) 28 P&CR 408
Camrose v Basingstoke Corpn [1966] 1 WLR 1100

DECISION

Introduction

1. This reference relates to land adjoining the land that was the subject of the decision of the Tribunal (George Bartlett QC, President, and P R Francis FRICS) in *Spirerose Ltd v Transport for London* [2008] RVR 12, upheld by the Court of Appeal on 13 November 2008 sub nom *Transport for London v Spirerose Ltd (In Administration)* [2009] RVR 18. The acquiring authority was given leave to appeal by the House of Lords, and I understand that the appeal is shortly to be heard. The Court of Appeal determined that on a claim for compensation for the compulsory acquisition of land such compensation may be assessed on the assumption that planning permission would have been granted if in the no-scheme world it was probable that that permission would have been granted; and that such an assumption falls to be made even though it is not required to be made under sections 15 and 16 of the Land Compensation Act 1961. The same issue arises in the present case, and the Tribunal is bound by the decision of the Court of Appeal. Other issues associated with it also arise, however, and these form part of the present decision.

2. The claim is for compensation for the compulsory acquisition of the claimant's land, Wich House, under the London Underground (East London Line Extension) Order 1997, made on 10 February 1997 under the Transport and Works Act 1992. The Order authorised the acquiring authority to construct a railway known as the East London Line Extension (ELLX). Notice to treat and notice of entry were served on 30 August 2001, and possession was taken on 3 December 2001, which accordingly is the valuation date.

3. In its re-amended statement of case the claimant based its claim on five alternative development options, which it claimed would have received planning permission in the no-scheme world. The parties agreed five issues in relation to the question of planning assumptions and, following an interlocutory hearing, on 27 February 2008 I ordered that these should be determined as preliminary issues. At the hearing it was agreed that the fourth issue need not be determined. The other issues, as expressed in the order, are these:

> "(i) Whether planning permission should be assumed to have been granted in respect of any of the Development Options 1-5, set out in the Claimant's Amended Statement of Case, by virtue of section 16(2) of the Land Compensation Act 1961.
>
> (ii) Whether at 3 December 2001 there was a reasonable expectation that in the no-scheme world a planning permission would have been granted for any of the Development Options 1-5, and, if so, whether the land acquired is to be valued (a) on the assumption that such a permission was granted on the date or (b) in the light of that expectation but without any assumption as to permission being granted.

(iii) What was the level of the expectation that permission would be granted for each of the Development Options 1-5 stated in percentage terms or in such other terms as the Tribunal shall think appropriate...

(v) Is the effect of the Pointe Gourde principle (whether the statutory principle or the supplemental principle as recently applied by the Tribunal) or any other principle of the law of compensation (whether contained in the statutory provisions or derived from some other source) such that it can be assumed that in the absence of the scheme underlying the acquisition, in this case the ELLX project, development in the locality of Wich House would or might have been permitted and completed prior to the valuation date of a height similar to or greater than Wich House, with any effect that such an assumption would or might have had on the hope or expectation at the valuation date of obtaining a grant of planning permission for any form and height of new developments of the site of Wich House."

At the hearing each party called planning evidence, and after the hearing I received extensive closing submissions in writing, the last submissions being received on 1 May 2009. The decision of the Court of Appeal in *Spirerose* had determined the second question in (ii) (in favour of (a)), and additional questions, not set out in the issues as stated, were addressed in argument. In the circumstances it is best if I deal with the issues as they require to be considered, without reference to this formulation and numbering, but identifying them by heading only.

The subject land and its surroundings

4. The site, 59-63 Holywell Lane, was occupied by a brick built building known as Wich House. It had four storeys on the Holywell Lane frontage, the fourth floor being set back, and three storeys at the rear. Following the grant of planning permission in April 1984 for the use of the building for warehousing and industrial purposes with ancillary offices and showrooms it was occupied by Frederick Wich & Co Ltd as the company's head office, showroom and warehouse/storage and distribution centre for the small leather goods that it manufactured in Walsall. Very occasionally fittings would be attached to the goods at the premises. At the valuation date the building was in use for storage purposes on the ground floor with five residential units on the upper three floors. The residential uses did not have the benefit of planning permission, and it is accepted that these were unlawful and gave no value to the land.

5. Holywell Lane is a minor road about 130 metres in length running westwards from Shoreditch High Street to Great Eastern Street. The subject land lies about in the middle on the south side of the road, and a short distance to the west of it are the arches of the former Broad Street railway line. ELLX is now under construction utilising the old railway line and curving eastwards from it across the subject land. At the date of valuation the site had to the east of it the Spirerose building on ground floor and basement at 64-70 Holywell Lane and a 4-storey building to the west, 55 Holywell Lane, with, beyond this, a 2½ storey building occupied together with the adjacent railway arches. Opposite all these buildings was a large cleared site, the Lirastar site, used for car parking.

The development options

6. The claimant advanced five development options showing how the subject land could have been developed, and its contention was that in the no-scheme world planning permission could reasonably have been expected to be granted for each of these options. The expert planning witnesses, Mr Charles Moran MRTPI for the claimant and Mr Philip Rowell MRTPI for the acquiring authority, directed their evidence to a consideration of these options. They were:

> Option 1: Change of use of the existing building to Class B1 (Business) use.
>
> Option 2: Change of use of the existing building to Class B1 (Business) use, a fill-in extension to the existing fourth storey and the erection of a two-storey roof extension, all for Class B1 use.
>
> Option 3: Change of use of the existing building to Class B1 (Business) use, a fill-in extension to the existing fourth storey for Class B1 use and the erection of a two-storey roof extension for residential use.
>
> Option 4: Change of use of the existing building, with a fill-in extension to the existing fourth storey and the erection of a two-storey extension, for Class B1 (Business) use at ground and first floor and live/work use accommodation at second to fifth floor level.
>
> Option 5: Change of use of the existing building, with a fill-in extension to the existing fourth storey and the erection of a two-storey extension, for Class B1 (Business) use at ground floor and Live/work use accommodation at first to fifth floor level.

The development plan and other sources of policy

7. The statutory development plan at the valuation date was the London Borough of Hackney Unitary Development Plan 1995, which was adopted on 5 June 1995. I will refer to its material provisions later. It is to be noted that a review of the UDP began during late 1998 or early 1999. A First Deposit Draft Review was agreed for consultation but was not actually placed on deposit, and at the valuation date the review had been abandoned. There was non-statutory supplementary planning guidance and interim policy guidance on live/work uses, which were used for development control purposes from July 1999. National and regional planning policy, notably PPG1 – General Policies and Principles (1997) in relation to mixed use development, also requires consideration.

Section 16(2): does it apply to a UDP?

8. Section 14(1) of the 1961 Act provides that the assumptions mentioned in section 16 are to be applied in the assessment of compensation. The claimant places reliance on the assumption contained in section 16(2), which is in these terms:

> "16(2) If the relevant land or any part thereof (not being land subject to comprehensive development) consists or forms part of an area shown in the current development plan as an area allocated primarily for a use specified in the plan in relation to that area, it shall be assumed that planning permission would be granted, in respect of the relevant land or that part thereof, as the case may be, for any development which –
>
> (a) is development for the purposes of that use of the relevant land or that part thereof, and
>
> (b) is development for which planning permission might reasonably have been expected to be granted in respect of the relevant land or that part thereof, as the case may be."

9. The acquiring authority say that section 16(2) had application only where the "current development plan" was one prepared under the Town and Country Planning Acts 1947 and 1962 and has no application where, as here, the development plan is a unitary development plan prepared under the Town and Country Planning Act 1990. Mr Barnes's submission is this: that the reference to "an area shown in the current development plan as an area allocated primarily for a use specified in the plan" is one couched in the language of section 5 of the 1947 Act, which provided expressly for such allocations, whereas the 1990 Act employs different language and does not provide for areas to be allocated for particular uses. This contention is in my judgment clearly wrong, but in order to explain fully why it is wrong it is necessary to consider it in relation to the relevant sequence of statutory provisions.

10. Starting with the Town and Country Planning Act 1947 there have been three generations of development plan. Under section 5(1) of the 1947 Act every local planning authority was required to submit to the Minister a development plan "indicating the manner in which they propose that land in [their] area should be used (whether by the carrying out thereon of development or otherwise) and the stages by which any such development should be carried out." Under subsection (2) it was provided that

> "... any such plan may in particular –
>
> (a) define the sites of proposed roads, public and other buildings and works, airfields, parks, pleasure grounds, nature reserves and other open spaces, or allocate areas of land for use for agricultural, residential, industrial or other purposes of any class specified in the plan..."

11. Under paragraphs (b) and (c) the plan could designate land as subject to compulsory acquisition, including any land comprised in an area defined in the plan as an area of comprehensive development, and subsection (3) provided:

> "(3) For the purposes of this section, a development plan may define as an area of comprehensive development any area which in the opinion of the local planning authority should be developed or re-developed as a whole, for any one or more of the following purposes, that is to say for the purposes of dealing satisfactorily with extensive war damage or conditions of bad lay-out or obsolete development, and other specified purposes."

12. These were the development plan provisions that applied when the 1961 Act, re-enacting provisions of the Town and Country Planning Act 1959, with its provisions for planning assumptions, was enacted. I have quoted section 16(2). Section 16(3) covered land consisting or forming part of land shown as an area allocated primarily for a range of two or more uses. The following subsections are also relevant:

> "16 (1) If the relevant land or any part thereof (not being land subject to comprehensive development) consists or forms part of a site defined in the current development plan as the site of proposed development of a description specified in relation thereto in the plan, it shall be assumed that planning permission would be granted for that development...
>
> (4) If the relevant land or any part thereof is land subject to comprehensive development, it shall be assumed that planning permission would be granted, in respect of the relevant land or that part thereof, as the case may be, for any development for the purposes of a use of the relevant land or that part thereof falling within the planned range of uses [which were defined in subsection (5) as the uses indicated in the plan as proposed uses of land in the area]...
>
> (7) Any reference in this section to development for which planning permission might reasonably have been expected to be granted is a reference to development for which planning permission might have been expected to be granted if no part of the relevant land were proposed to be acquired by any authority possessing compulsory purchase powers.
>
> (8) In this section 'land subject to comprehensive development' means land which consists or forms part of an area defined in the current development plan as an area of comprehensive development."

13. It is clear that section 16, for obvious reasons, was using the language of section 5 of the 1947 Act: "define sites", "allocate areas" and "define as an area of comprehensive development" are all terms derived directly from section 5.

14. The second generation of development plans, provided for initially by the Town and Country Planning Act 1968 and then by the 1971 and 1990 Act consisted of a system of county-wide structure plans and district-wide local plans. In the Local Government Act 1985

this two-tier system was replaced in Greater London (to which particular provisions had previously applied) and other metropolitan areas by a system of unitary development plans, consisting of two parts that were comparable respectively to structure and local plans. The 1990 Act continued these provisions. Section 12 provided:

> "Preparation of unitary development plan
>
> 12. (3) Part I of a unitary development plan shall consist of a written statement formulating the authority's general policies in respect of the development and other use of land in their area (including measures for the improvement of the physical environment and the management of traffic).
>
> (4) Part II of a unitary development plan shall consist of –
>
> (a) a written statement formulating in such detail as the authority think appropriate (and so as to be readily distinguishable from the other contents of the plan) their proposals for the development and other use of land in their area or for any description of development or other use of such land;
>
> (b) a map showing those proposals on a geographical basis;
>
> (c) a reasoned justification of the general policies in Part I of the plan and of the proposals in Part II of it; and
>
> (d) such diagrams, illustrations or other descriptive or explanatory matter in respect of the general policies in Part I of the plan or the proposals in Part II of it as the authority think appropriate or as may be prescribed."

15. One of the matters for which the 1968 Act provided was the inclusion in structure plans of provision for "action areas". Section 2, the section dealing with the preparation of structure plans, included this:

> "(5) A local planning authority's general proposals under this section with respect to land in their area shall indicate any part of their area (in this Act referred to as an 'action area') which they have selected for the commencement during a prescribed period of comprehensive treatment, in accordance with a local plan prepared for the selected area as a whole, by development, redevelopment or improvement of the whole or part of the area selected, or partly by one and partly by another method, and the nature of the treatment selected."

The 1971 and 1990 Acts similarly provided for the indication of action areas. It is to be noted that the 1971 Act provided for the consequential amendment of the Land Compensation Act 1961. Schedule 23 contained these provisions:

> "In the Land Compensation Act 1961 any reference to an area defined in the current development plan as an area of comprehensive development shall be construed as a reference to an action area for which a local plan is in force."

16. The third generation of development plans is the creature of the Planning and Compensation Act 2004. Provision is made for Regional Spatial Strategies (RSS), each of

which sets out the Secretary of State's policies in relation to the development and use of land within the region (in London there is a Spatial Development Strategy) and for the preparation of local development schemes by local planning authorities. A local development scheme must specify the documents that are to be local development documents (section 15(2)(a)); and the local development documents must (taken as a whole) set out the authority's policies relating to the development and use of the land in their area (section 17(3)). The local development scheme must also specify which documents are to be development plan documents (section 15(2)(c)).

17. Section 39(1) of the 1961 Act defined "development plan" (a term principally of significance in section 16 of the Act) as having the meaning assigned to it by section 5 of the 1947 Act. (It also defined "the current development plan" as the plan in force at the date of notice to treat.) Section 27 of the 1990 Act provided that for the purpose of the 1961 Act the development plan for any district in Greater London was the UDP, and section 54 made similar provision for structure and local plans. Section 38(2), (3) and (7) of the 2004 Act provides that in the 1961 Act a reference to the development plan is a reference, for the purpose of land in Greater London, to the spatial development strategy and the development plan documents, and elsewhere, to the RSS and the development plan documents.

18. It is to be noted that for the second and third generations of development plan the statutory provisions are less detailed than section 5 of the 1947 Act in stating what plans may contain. They are required to set out the policies (and, in the second generation plans, the proposals) of the local planning authority, but there is no reference to the defining of sites or the allocation of land for particular uses. Guidance as to what plans should contain is, however, given in PPG12. The last edition of PPG12 that was issued in respect of the 1990 Act was that of February 1992, and paragraph 3.8 of this stated:

> "3.8 In providing the detailed framework for the control of development and use of land, local plans need, in general conformity with the structure plan:
>
> – to set out the authority's policies for the control of development; and
>
> – to make proposals for the development and use of land and to allocate land for specific purposes.
>
> By contrast to structure plans these policies and proposals are to be shown on an Ordnance Survey base map."

19. In relation to the third generation of development plans the Town and Country Planning (Local Development)(England) Regulations 2004 provide that any document that includes a site allocation policy must be a development plan document (reg 7(c)), and PPG12 (June 2008) states:

> "8.1 The adopted proposals map should:
>
> - identify areas of protection, such as nationally protected landscape and internationally, nationally and locally-designated areas and sites, and Green Belt land;

- show areas at risk from flooding; and
- allocate sites for particular land use and development proposals included in any adopted development plan document and set out the areas to which specific policies apply."

20. In the light of these provisions it seems clear that there are a number of reasons for rejecting Mr Barnes's contention that section 16(2) only has application to development plans prepared under the 1947 and 1962 Acts. The first is that the definition of "development plan" in the 1961 Act has been modified to take account of the second and third generation of development plans (see sections 27 and 54 of the 1990 Act and section 38 of the 2004 Act referred to above). So for the purposes of the present claim the reference in section 16(2) to the current development plan is a reference to the 1995 UDP. If it had been intended that section 16(2) (or subsections (1) and (3)) should not apply to a UDP or a structure or local plan but should cease to have effect under the second generation of plans, this would presumably have been stated.

21. Secondly, the fact that section 16(5), which applied to areas of comprehensive development, was made to apply to action areas when these came in after the 1968 Act, while no equivalent modifications were made to subsections (1), (2) and (3), reinforces the impression that it was not thought necessary to alter the references to defined sites (in subsection (1)) or to allocated areas (in subsections (2) and (3)).

22. Thirdly, defining sites and allocating areas were not terms defined by the 1947 Act or the 1961 Act so as to confine their meaning to definitions and allocations made by first generation development plans. They do not cease to have meaning outside the context of the first generation plans, and indeed that there may be what is referred to as allocation under the 1990 and 2004 Acts is clear from PPG12 and the 2004 Regulations.

23. I would add that, if Mr Barnes is right and section 16(2) and (3) have no application to second and third generation development plans, so that this particular category of planning assumptions no longer exists, this would in my view by itself constitute a very strong argument for applying the no-scheme rule to be applied by analogy with these provisions in order to fill the void. As it is, apart from more general considerations, the appropriateness of applying the no-scheme rule is in my view reinforced by the more limited application that these subsections appear to have under the later development plans and the difficulties that can now arise in deciding whether land is "allocated" for the purposes of applying them. This is the next matter that arises.

Section 16(2): was the subject land allocated for a use specified by the plan?

24. Whether "the relevant land consists of or forms part of an area shown in the current development plan as an area allocated primarily for a use specified in the plan in relation to that area" falls, self-evidently, to be determined by examining how the relevant land is shown on the proposals map and relating this to the policies and other provisions of the plan. This is,

as will be seen, a much harder task than it would usually have been in relation to first generation development plans, which, in accordance with the provisions of section 5 in the 1947 Act, used to show areas allocated for housing or other uses and to define the sites of new roads etc, leaving the rest as white (unallocated) land or Green Belt. As the Tribunal (George Bartlett QC, President, and P H Clarke FRICS) stated in *Purfleet Farms Ltd v Secretary of State for the Environment. Transport and the Regions* [2002] RVR 203 at paragraph 38, second generation plans did not define sites or allocate areas of land in this way.

25. The relevant part of the proposals map is that showing the South Shoreditch Inset Area. Within the SSIA are three Defined Employment Areas, the largest of which is the South Shoreditch DEA, within which the subject land lies. It is within the part of the SSDEA that lies between Worship Street in the south and Old Street in the north. The map shows in dark purple areas of land identified in the key under "Employment" as "New development". Each of these is numbered and there is a proposals schedule that refers to them. Secondary roads are shown in yellow, and the line of ELLX is shown in yellow hatched black. Apart from this and some other smaller notations that do not need to be considered, the rest of the area is shown in pale purple (with some lesser areas left uncoloured). The key identifies the pale purple land under "Employment" as "Defined Employment Areas". A plan on page 168 of the UDP shows the DEA as extending across both the land coloured light purple and the other land as well. One particular feature that does need to be noted is the Lirastar site on the opposite side of Holywell Lane from the subject land. This is shown dark purple except where it is crossed by the line of ELLX, where it is shown striped dark purple and yellow hatched black.

26. Particular polices of relevance to the notations in the SSIA and SSDEA are these. In Chapter 5 of the UDP, which deals with South Shoreditch, the following policies appear:

> "ST27. The Council will seek to protect and enhance the mixed employment and special land-use character of the South Shoreditch Inset Area…
>
> SSH2. Industrial Development in the South Shoreditch Defined Employment Area. In that part of the South Shoreditch Defined Employment Area lying north of Worship Street and south of Old Street there will be a general presumption of approval in principle to proposals for industrial (Class B2) development.
>
> SSH3. Office and Business Development in the South Shoreditch Defined Employment Area. The Council will in principle support office and business (Class B1) Development in the South Shoreditch Defined Employment Area. Where site characteristics permit, however, the Council will seek to ensure that an appropriate element of floorspace suitable for industrial (Class B2) purposes is retained or provided as a result of the development."

27. In the chapter of the UDP dealing with employment there are two policies under the heading "New Development":

> "E1 Development Sites.

> The Council will safeguard the sites shown on the proposals map for employment generating developments (Classes B1, B2 and B8), as defined in the proposals schedule.
>
> E2 Development within Defined Employment Areas.
> The Council will give favourable consideration to employment-generating development within the Defined Employment Areas where:
> (A) It does not cause conflict with the policies applying only to the South Shoreditch Inset Area;
> (B) The use will not cause serious nuisance by way of visual intrusion, noise, vibration, air pollution or traffic generation to adjoining uses or to the surrounding area.
> Residential development will not normally be permitted within Defined Employment Areas."

28. The chapter on transport contains the following policy that applies to the ELLX notation:

> "TR4 Safeguarding of land
> The Council will safeguard land shown on the proposals map for public transport use."

The justification for this policy contains the following:

> "The Council ... will seek to protect the integrity of the land required for the northern extension of the East London line from Shoreditch (Bishopgate) to Dalston Strategic centre. The Council will not permit developments which will jeopardise their route corridors. The safeguarded and protected route corridors are shown on the proposals map."

29. The claimant's submission is that, leaving aside the ELLX notation, there could be no doubt that the land was "allocated" for employment use since it fell within the SSDEA; and that the ELLX notation was not intended to affect this allocation but simply to enable planning permission to be refused for development that would prejudice the route corridor. Accordingly, it is said, the land was within an area allocated within the terms of section 16(2) (or within subsection (3) if B1, B2 and B8 are considered to be separate uses for the purposes of section 16).

30. I have difficulty in accepting the contention that the whole of the SSDEA is allocated for employment purposes within the meaning of section 16. The SSDEA is a very large expanse of densely developed urban land (it is over 100 acres in extent) containing roads and buildings of many sorts in a great range of uses – industrial, residential, commercial, retail, leisure etc – and a principal policy is that its mixed employment and special land use character should be maintained (see ST27) rather than that it should be put to a particular use or particular uses. Moreover, to the extent that the UDP does provide for industrial development of land in the SSDEA, the policies dealing with this are qualified: "favourable consideration" will be given to employment-generating development (policy E2) but subject to particular provisos. There is expressed to be a presumption in favour of B2 development (policy SSH2) and in-principle

support for B1 development (policy SSH3). There is a contrast between these qualified policies that apply to the SSDEA in general and policy E1 which provides for the safeguarding for B1, B2 and B8 development of particular sites defined on the proposals map. It may be that each such safeguarded site would qualify as "an area allocated primarily for a use specified in the plan" (or for a range of uses), although there is no need for me to reach a conclusion on this matter, which in any event is likely to be the subject of dispute in the reference relating to the Lirastar site. But I do not think that the whole of the SSDEA, although an area within which employment uses will be favoured, can be said to be an area allocated primarily for such uses.

31. Had I concluded that the subject land fell within an "area allocated" within the meaning of section 16(2) or (3) it would have been necessary to go on to consider whether permission might reasonably have been expected to be granted for development for the specified use (so that the assumption would fall to be made that such permission would be granted). On the basis of the Court of Appeal decision in *Spirerose* the same question (with the same consequential assumption) arises now that the matter must be determined under the no-scheme rule rather than under section 16.

Mutiple applications

32. Mr Barnes submitted that to prove its case that planning permission would have been granted at the valuation date, the claimant must show that in the absence of the scheme it would have applied for such permission. The claimant was relying on the five options, and its case was that planning permission would have been granted for each of these. But, said Mr Barnes, there was no evidence that in the no-scheme world the claimant would have made application for any of these, and there was certainly nothing to suggest that it would have made multiple applications. In *Spirerose* the Tribunal said that, if the conclusion was that planning permission would have been granted at the valuation date, it was to be assumed, in the absence of evidence to the contrary, that the hypothetical willing seller would have applied for such permission in time for it to be granted by that date (see [2008] RVR 12 at paragraph 70 (b)). The need for a planning application to be assumed did not, however, form part of the Court of Appeal's approach, and, in the light of this, I do not accept that for a permission to be assumed under the no-scheme rule, as explained in *Spirerose*, it is necessary to establish that an application for planning permission would have been made or would have been made at any particular time. I do not see that any such requirement can be read into section 16, and it can be said, therefore, that there is no justification for importing such requirement to support an assumption arising where the no-scheme rule is applied by analogy with the statutory provisions. The cancellation assumption, on which a conclusion on the reasonable expectation of planning permission is to be based (see below), rules out speculation about what might have been done before the valuation date in the no-scheme world. The Tribunal simply has to consider whether as at the valuation date planning permission would on the balance of probabilities have been granted without speculating whether, when or by whom an application for such permission might have been made in the no-scheme world.

33. It follows that there is no reason why a claimant should not advance a claim on the basis of more than one development for which it contends that planning permission would have been

granted. Case management and the award of costs constitute sufficient instruments for dealing with a claim that puts forward an unreasonable number of schemes.

When would the assumed planning permission have been granted?

34. Mr Barnes raised the question, if an assumption of planning permission is to be made under section 16(2), whether the correct assumption is (a) that the planning permission existed on the valuation date or (b) that the permission did not exist on the valuation date but would be granted after that date following an application made for it. His submission was that (b) was the correct assumption because the words in section 16(2) "planning permission would be granted" must relate to the valuation date and must mean that the assumption is that planning permission would be granted after that date. He contrasted those words with those in section 17(4): "planning permission would have been granted". The consequence of assuming a future grant of permission, Mr Barnes said, was that there would be periods of delay, first before an application was made and then before it was determined, and allowance would have to be made for these in assessing compensation.

35. I do not think that this contention is correct. The reason for the words "would be" rather than "would have been" is, I think, that compensation does not necessarily fall to be assessed as at a past date. A person served with notice to treat may refer the question of compensation to the Lands Tribunal even though possession of his land has not been taken (and the acquiring authority are able to withdraw the notice to treat following the Tribunal's decision). If possession has not been taken, compensation falls to be determined as at the date on which it is agreed or assessed: *West Midlands Baptist (Trust) Associated Inc v Birmingham Corpn* [1970] AC 874. The use of the words "would have been granted" would obviously be inappropriate in such circumstances. In my judgment the wording "would be granted" was adopted simply in order to establish that, in assessing compensation, planning permission is to be taken as a certainty.

36. This is the conclusion that the Tribunal came to in *Purfleet Farms* [2002] RVR 203 at paragraph 60, and I see no reason to depart from it. In my judgment, where planning permission is to be assumed under section 16(2) (except as provided for under subsection (6), which applies where the development plan indicates that planning permission would be granted only at a future time), the assumption to be made is of planning permission in force at the date of valuation. The same would go for a planning permission assumed under the no-scheme rule.

Physical state of adjacent land and planning permission in the no-scheme world

37. It is likely that whether planning permission might reasonably have been expected for the addition of two storeys to Wich House or for its use in part for residential or live/work purposes would have depended to some extent on the potential effect on such development of the physical state and use of adjacent land and any planning permissions granted for its development. The likely effect of the development of Wich House on the use of adjacent land would similarly be a material consideration. The case for the claimant, as advanced in the

evidence of Mr Moran, was that it should not be assumed that adjoining sites within the ELLX scheme would, in the absence of the scheme, have been in the state that they were actually in at the valuation date. By contrast it was a fundamental part of the acquiring authority's case in relation to both use and building height considerations arising on Options 2 to 5 that the prospect of planning permission must be approached on the basis that immediately adjacent to the subject land was the Spirerose building, a single storey building in B2 use. That would have been part of the physical context in which a proposal for a two-storey extension of Wich House would have been evaluated; but, more importantly, it would, they said, have constituted a strong argument against permitting any residential use in the adjoining premises. As a matter of law, Mr Barnes submitted, the physical state of the land surrounding the subject land, both land within the scheme and land outside it, must be taken to be as it was at the valuation date.

38. The basis for Mr Barnes's argument was that, although support for the proposition that there could be an investigation of an "adjusted" no-scheme world to be assumed at the valuation date was to be found in *Myers v Milton Keynes Development Corpn* [1974] 1 WLR 696, such a proposition was inconsistent with the House of Lords decisions in *Fletcher Estates (Harlescott) Ltd v Secretary of State for Transport* [2000] 2 AC 307 and *Waters v Welsh Development Agency* [2004] 1 WLR 1304.

39. As far as the statutory provisions are concerned, section 6 of the 1961 Act would not provide a basis for making the assumption, if the evidence showed this to be justified, that in the no-scheme world development of other land within the scheme would have taken place by the valuation date, giving an enhanced value to the subject land. Section 6 simply has the effect of requiring that scheme development is left out of account if it increases or decreases the value of the subject land.

40. The question, therefore, is whether under the no-scheme rule it is permissible to assume the planning history as it would have been and the development of other land in the vicinity as it would have been carried out in the no-scheme world: or whether the cancellation assumption of *Fletcher Estates* is the right one, so that no such development is to be assumed. In *Pentrehobyn Trustees v National Assembly for Wales* [2003] RVR 140 I expressed the view, in the light of authority and the statutory provisions and the successive changes that had been made to them, that, attractive as the second alternative was, it was not open to the Tribunal to adopt it. Since then, however, the House of Lords has decided *Waters*, and the Court of Appeal has decided *Spirerose*.

41. In *Waters* Lord Nicholls of Birkenhead said this at [2004] 1 WLR 1304 at paragraph 55 with reference to the relationship between section 6 and *Pointe Gourde*:

> "...Undoubtedly the present state of the law gives rise to serious valuation difficulties. It is unreal to require land to be valued on the basis of what would have been the position if a major development which took place years ago had not been carried out. Lord Denning MR, in his accustomed style, referred to a valuer having to 'conjure up a land of make-believe' and 'let his imagination take flight to the clouds': see *Myers v Milton Keynes Development Corp* [1974] 1 WLR 696 at 704. In a recent case in the Lands Tribunal the President had to rewrite the history of Mold in North Wales over

> 17 years. He described this as a 'virtually impossible task': see *Pentrehobyn Trustees v National Assembly for Wales* [2003] RVR 140 at 154 (para 98)."

Lord Nicholls reflected this conclusion in setting out his "pointers" at paragraph 63.

42. Lord Brown of Eaton-under-Heywood, referring to the Law Commission's report "Towards a Compulsory Purchase Code: (1) Compensation" (2003) (Law Com No 286) (Cm 6071), said this at paragraph 148:

> "In so far as the 'wide version' of the rule described in para 7.16(2) of the report involves the disregard of 'the planning history over a much wider area [than the order land], and dating back many years' I too would deprecate it. If, indeed, that is thought to be the approach required following *Point Gourde*'s reference to the 'underlying scheme' as subsequently interpreted, then in my opinion the rule has developed impermissibly far and should now be narrowed down. Clearly, for example, it cannot be right that the valuer must let his imagination 'take flight to the clouds' as Lord Denning MR suggested in *Myers v Milton Keynes Development Corporation*..."

43. In addition to emphasising the need to limit the application of the *Pointe Gourde* (or no-scheme) rule, *Waters* also makes two further things clear. The first is that the rule is to be applied by analogy to the statutory provisions (see Lord Nicholls's pointer (4) at paragraph 63). Secondly, the purpose of the rule (or principle, as Lord Nicholls referred to it) is to ensure that a dispossessed owner receives fair compensation (see paragraphs 61 and 63). How the rule is to be applied must necessarily have regard to these matters. Thus in *Spirerose* Carnwath LJ, giving the judgment of the court said (at paragraph 65):

> "...the 1961 Act is intended to provide a statutory code, in which as we have noted earlier (in discussing s 14: para 20 above) there is apparent a legislative intention to assimilate the various versions of the [no-scheme] rule. It is accepted that, where the statutory assumptions apply, probability of a permission is converted into full value for valuation purposes. As has been seen, the claimant was unable to take advantage of the statutory assumptions because of an anomaly in the provisions fixing the date of consideration. As far as possible, we would interpret the no scheme rule so as to remedy the anomaly rather than extend it. Further, reflecting the same point, it is plainly desirable that there should be consistency in the assessment of compensation for compulsory purchase of land in materially similar cases, whether or not the statutory assumptions apply."

44. In *Fletcher Estates* Lord Hope of Craighead (with whom the other law lords agreed) based his conclusion on the cancellation assumption on the wording of subsection 17(4). At [2000] 2 AC 307 at 322-323 he said:

> "The critical words in the subsection to which attention must be directed are to be found in the phrase 'if it were not proposed to be acquired'...The assumption which has to be made is that the land is not 'proposed to be acquired' at the relevant date...

> The position appears therefore to be quite straightforward upon a consideration of the ordinary meaning of the words used in the statute. The assumption which the local planning authority must make relates to the situation as at the relevant date. The scheme for which the land is proposed to be acquired, together with the underlying proposal which may appear in any of the planning documents, must be assumed on that date to have been cancelled. No assumption has to be made as to what may or may not have happened in the past."

45. In this passage Lord Hope was of course addressing himself to the section 17 procedure and to what was the relevant date for that purpose. But what he referred to as "the critical words" appear also in section 16. It is clear that the questions of whether the land is allocated (subsection (2)) and, if so, whether planning permission might reasonably have been expected to be granted (subsection (7)) have to be considered as at the valuation date. The words "if it were not proposed to be acquired" imply cancellation, as Lord Hope said, and the assumption in subsection (7) must therefore be of cancellation as at the valuation date, with no assumption being made as to what may or may not have happened in the past.

46. When the statutory assumptions as to planning permission do not apply and compensation is being assessed under the no-scheme rule, the need for "consistency in the assessment of compensation for compulsory purchase of land in materially similar cases, whether or not the statutory assumptions apply" (see above) must, it seems to me, require the application of the cancellation assumption in such circumstances also. The position, I believe, has thus been reached, as the result of the *Waters* and *Spirerose* decisions, that the law in relation to planning assumptions is seen to be essentially that recommended by the Law Commission for inclusion in a statutory code (see Rule 14 on page 94 of the report), and the observation to the contrary in paragraph 67 of the Tribunal's decision in *Spirerose* is not correct. It is a result that in my view is to be welcomed.

47. There is a qualification that needs to be added to what I have said. In *Jelson v Blaby District Council* [1977] 1 WLR 1020 the assumption was made, not of cancellation of the scheme as at the valuation date, but as to what would have happened if there had never been a scheme for the relief road. The assumption of cancellation would have been of no help to the claimant because by then the development on either side of the land reserved for the road had been carried out. Fair compensation could only be achieved by taking account of what value the claimant could have realised for its land if there had never been a scheme. Because the application of *Pointe Gourde* is in essence discretionary, the need for consistency with the statutory provisions does not mean, it seems to me, that it cannot be applied in a particular way that achieves fair compensation in the circumstances of the particular case, so that the approach in *Jelson v Blaby*, to the extent that it was based on *Pointe Gourde*, is not incompatible with the application of the cancellation assumption in the generality of cases.

48. I accept, therefore, the acquiring authority's submission that the physical state and the use of the land in the vicinity of the subject land should be taken to be as they in fact were at the valuation date. This is the effect of applying the cancellation assumption. Thus the Spirerose building is to be assumed as it then was, a single storey building in B2 use as a

printing works. But the cancellation assumption would also open the way to a consideration of the planning permission that might then be granted for its redevelopment. The claimants submitted that it was relevant to take into account a planning permission that had been granted on 24 August 1990 on the Lirastar site. That permission was for the erection of 7051 square metres of B1 floorspace in four and five storey units and 2618 square metres of B1 and B2 floorspace in five storey units. I can see no reason why it should not be taken into account. The claimants also submitted that I should take account of the fact that in *Spirerose* the Tribunal determined that in the no-scheme world planning permission would have been granted as at 3 December 2001 (the same valuation date as in the present case) for a scheme consisting of basement, ground and first floor offices and two floors of flats above. Mr Barnes did not dissent from this, although he said that I might wish to review the finding in *Spirerose* that there was no class B2 use close to the Spirerose land. The prospect of permission for the development for which the Tribunal in its *Spirerose* decision concluded would have been permitted can in my view properly be taken into account – but only as a permission that the market would have considered to be probable – and, of course, there could be no certainty that if such a permission were granted it would be implemented. I see no justification for reviewing correctness of the *Spirerose* decision on the facts, as Mr Barnes asks me to do.

The reasonable planning authority

49. In *Essex County Showground Group Ltd v Essex County Council* [2006] RVR 336 the Tribunal (George Bartlett QC, President, P R Francis FRICS and A J Trott FRICS) expressed agreement with the submission of the acquiring authority that in determining whether there was a reasonable expectation of planning permission, the proper approach was to determine what a reasonable planning authority, correctly addressing both law and policy, could have been expected to decide at the valuation date. Mr Barnes submitted that this was wrong as a matter of law and that the correct approach was to determine what the actual planning authority could reasonably have been expected to decide. It is not suggested that anything in the present case turns on this, and I am reluctant to embark upon a consideration of what, for present purposes, is an academic question. I will simply say this.

50. Although there is apparent force in the contention that, since planning powers are exercised by actual planning authorities, it is the decision that the particular authority might reasonably have been expected to make that is of relevance, I think that what was said in *Essex Showground* was probably correct. It is important to bear in mind that, while there is no appeal from the grant of planning permission, either party – claimant or acquiring authority – may appeal against the grant or refusal of a section 17 certificate, and it is then for the Secretary of State, through the exercise by an inspector of what is essentially a judicial function, to determine whether planning permission could reasonably have been expected to be granted. The determination to be made in such circumstances, clearly, is not as to whether the planning authority could reasonably have been expected to grant permission but whether it would have been reasonable for planning permission to be granted. When the question is being considered under the no-scheme rule by analogy with section 17 the approach ought, applying *Waters* and *Spirerose*, to be the same; and I can see no reason why a different approach should be applied under section 16. Of course, in making the determination, evidence of actual decisions made by the planning authority will be relevant and no doubt persuasive.

51. Where hope value is being considered, on the other hand, the enquiry is a different one. What matters then is the prospect that the market would have attached to the grant of permission (see *Stayley Developments Ltd v Secretary of State for the Environment, Transport and the Regions* [2001] RVR 251 at paragraph 29) and it would necessarily be the prospect of the actual planning authority granting permission on which the market would base its assessment.

The prospect of planning permission: Option 1

52. The permitted use of the building at the valuation date was for warehousing and industrial purposes with ancillary offices and showrooms. The evidence suggests that the only industrial use that had been made of it was for some minor purposes which would have fallen within Class B1. At the valuation date the major part of the building was in use, in breach of planning control, for residential purposes.

53. The planning witnesses referred to a number of UDP employment policies, but there was agreement that the policy requiring particular attention was Policy SSH3 "Office and business development in the South Shoreditch Defined Employment Area", which was in these terms:

> "The Council will in principle support office and business (Class B1) development in the South Shoreditch Employment Area. Where site characteristics permit, however, the Council will seek to ensure that an appropriate element of floorspace suitable for industrial (Class B2) purposes is retained or provided as a result of the development."

54. Mr Rowell saw the second sentence as creating the possibility that the council might refuse permission for a scheme that did not provide an element – he suggested on the ground floor – of B2 use. He nevertheless put the chances of planning permission for purely B1 use at between 70% and 80%. Mr Moran advanced a number of reasons why Policy SSH3 would not have carried weight. My conclusion is that planning permission for Option 1 could reasonably have been expected. The arguments for permitting a B1 use throughout the building would clearly have been very strong. Nothing in the existing planning permission restricted the use of any part of the building to B2 purposes. It had not been in use for B2 purposes, so that there was nothing to suggest that it would have been attractive for such a use. There is nothing, it seems to me, that would have justified the refusal of planning permission for a full B1 use, and I assess the level of expectation that it would be granted as very high.

The prospect of planning permission: Option 2

55. Option 2 (like options 3 to 5) included the construction of two additional floors to Wich House, making it a 6-storey building. Mr Rowell in his evidence for the acquiring authority did not disagree with the claimants' contention that planning permission for such an extension for B1 use could have been expected on the balance of probabilities, although he expressed the degree of probability as between 50% and 60%.

56. The relevant planning policy to which regard would have been had in determining whether a 6-storey building should be permitted was Policy EQ1 of the UDP. The criteria that this laid down in relation to new development included the requirements that such development must "respect the visual integrity and established scale, massing and rhythm of the building or group of buildings or street scene of which they form a part" (requirement (a)); and must "be of a height which accords with and is compatible with neighbouring buildings, and have regard to the special circumstances of the site..." (requirement (d)).

57. Mr Moran said that, although at the valuation date the sites immediately adjacent to Wich House comprised either low-rise buildings or vacant sites used for open storage or car parking, this was due to the blighting effect of ELLX. Looking at the general character of South Shoreditch, it was to be noted that in the 1991 publication "South Shoreditch Conservation Areas – Urban Design Guidance", which provided a useful guide to the character of the area, it was said that the area was characterised by buildings 3 to 5 storeys in height. It said that height was negotiable within that band and that an additional storey might be permissible provided that it was set back. Mr Moran also placed reliance on the existence of buildings in Great Eastern Street and Shoreditch High Street, which were between 6 and 9 storeys.

58. Mr Rowell said at the valuation date Wich House was already the tallest building within the immediate area. He considered that the extension would not respect the scale, massing and rhythm of the buildings or street scene, and that the building when extended would not be of a height that was compatible with neighbouring buildings. There was therefore considerable doubt as to whether the requirements of EQ1 would be met. He thought, however, that there was a fair chance of permission being obtained for Option 2, and he placed the chances at between 50% and 60%.

59. A photograph of Wich House shows it in the context of the buildings on either side of it. The Spirerose building to the east was a single storey building. The building immediately to the west had a three-storey frontage to Holywell Lane, and it appears that the design of Wich House had been closely related to it, with the fourth floor being set back so as to reduce its impact when viewed from the street. The permission on the Lirastar site was for a 4-5-storey development. The conclusion of the Tribunal in *Spirerose* was that on that site permission would have been granted at the valuation date for a 4-storey building. Following the hearing the parties produced an agreed schedule of some 68 buildings and sites, comprising virtually all those in the vicinity of the subject land. It shows a predominance of 4-storey buildings, with a few of 1, 2, 3 and 5 storeys. The arches of the old railway line to the west are said to be the equivalent of 2 storeys. The only buildings of 6 storeys or more were 21-33 Great Eastern street (5-6 storeys), 12-34 Great Eastern Street (7 storeys), 56 Shoreditch High Street (8-9 storeys) and 1-6 Bateman Row (6 storeys). All these were large buildings on large sites lying beyond the immediate surroundings of the subject land.

60. Had it not been for the view expressed by Mr Rowell I should not have concluded in the light of this material that permission would have been granted for a 6-storey building on the relatively small site occupied by Wich House – certainly not in advance of any other permissions for buildings of a similar height in the area (and there was no evidence of the

likelihood of this). However, since Mr Rowell's assessment of between 50% and 60% was maintained throughout as the probability that the acquiring authority said that I should adopt for Option 2, I am not disposed to reject it. On this basis alone I conclude that there was a reasonable expectation of planning permission being granted and that the level of expectation was that advanced by the acquiring authority.

The prospect of planning permission: Options 3, 4 and 5

61. Each of these options involves an extension to 6 storeys and the introduction of residential use. In the case of Option 3 the top two floors would be in residential use. Option 4 would have Live/work accommodation on the second floor and above. Option 5 would have Live/work accommodation on the first floor and above.

62. There was no significant disagreement as to the policy considerations that would have borne upon proposals to introduce an element of residential use in this location. They were the ones that were referred to in paragraphs 72 to 78 of the *Spirerose* decision. The principal UDP policies were these. Strategic Policy ST25 stated that the council would especially resist the loss of employment land and premises through changes of use and redevelopment. Policy E2 said that the council would give favourable consideration to employment generating development within DEAs, provided it did not conflict with policies for the SSIA, but that residential development would not normally be permitted within DEAs. Policy E5 said that any proposals resulting in a reduction of site area or floor space used for employment-generating land uses would be resisted.

63. Strategic Policy ST27, to which I have already referred, stated that the council would seek to protect and enhance the mixed employment and special land-use character of the area; and the text made clear that it was the council's policy to restrict residential development in the area because of the inappropriate environment and the desire not to restrict unduly the operations of local businesses. Housing policy HO3 stated that, outside sites specifically identified for housing on the proposal map, housing would normally be permitted provided that it did not conflict with the retention of land and floor space for employment uses and that the environment of the site was acceptable.

64. These policies, which taken overall would have been unfavourable for any proposal for residential use of the building whether existing or extended, were, however, no longer being strictly applied at the valuation date because the council recognised that the industrial character of the area had changed to a mixed-use character and it was neither realistic nor consistent with new government policy to seek to resist such change. In February 1997 the replacement PPG1: General Policy and Principles was issued. It contained, as it put it, "a fresh emphasis on mixed use development." Paragraph 8 is particularly to be noted:

> "Within town centres but also elsewhere, mixed use development can help create vitality and diversity and reduce the need to travel. It can be more sustainable than development consisting of a single use. Local planning authorities should include policies in their development plans to promote and retain mixed uses, particularly in

> town centres, in other areas highly accessible by means of transport other than the private car and in areas of major new development. What will be appropriate on a particular site will be determined by the characteristics of the area – schemes will need to fit in with and be complementary to their surroundings – and the likely impact on sustainability, overall travel patterns and car use. The character of existing residential areas should not be undermined by inappropriate new uses."

PPG3 at paragraphs 49-51 similarly urged authorities to promote developments containing a mix of uses, including housing.

65. In June 1996 the council published planning guidance on live/work development, and it updated this in July 1999. The guidance stated the benefits of such development but said that it would only be allowed in DEAs if certain criteria were met. In 1998 the council embarked on a review of its UDP, but it abandoned this in March 2000. As a policy document it would therefore have carried no weight at the valuation date. It is sufficient to note that it contained a policy, E6 (D1), which applied to the city fringe area including Holywell Lane, that set out criteria for permitting mixed-use development. These included requirements that there should be no lack of operational business floor space and that the uses within the development should be compatible. I have no doubt, as the Tribunal accepted in *Spirerose*, that this policy arose out of guidance in the PPGs and was consistent with them.

66. In *Spirerose* the Tribunal derived assistance from two appeal decisions, one on Westland Place, Nile Street, Britannia Walk, N1, and one relating to a site at 5 Garden Walk, London EC2, in reaching its conclusion that a mixed-use development would have been permitted on the Spirerose site. Mr Barnes said that the Tribunal had been wrong to do so because each of those appeals turned on its own facts, which were substantially different from those affecting sites in Holywell Lane. It seems to me, however, that the decisions are of assistance because they evince a favourable approach being taken to mixed-use development in the area and explain its acceptability in terms of government policy.

67. Option 3 would not have resulted in the loss of any employment floorspace. Mr Moran said that an appropriate attribution of the live and work elements of Option 4 would show that there would have been no net loss of employment floorspace, while in Option 5 the loss would have been only small. It seems to me, however, that the inhibition to the introduction of a residential element in the use of the building would have been the proximity of the B2 use of the Spirerose building. Although as at the valuation date the prospect of a mixed-use development of the Spirerose site would have been regarded as good, it appears to me likely that, until such a development had taken place or the replacement of the B2 use was guaranteed, planning permission for a mixed-use development of the subject land would have been refused. In this respect the position is to be contrasted with that affecting the prospect of permission for the Spirerose site itself, because at the valuation date there was no B2 use adjoining that site. It is, however, the case, in my view, that there would have been an expectation of a mixed-use development being permitted at some point in the relatively near future.

68. The other objection to Options 3 to 5 would have been that they each involved an extension of the building to 6 storeys. I have referred to this above. My conclusion is that planning permission would have been refused for each of these options on the grounds of the proximity of a B2 use and the inappropriate number of storeys in the extension. The expectation of planning permission being granted as at the valuation date would, I think, have been fairly low.

Determination

69. I accordingly determine the preliminary issues as follows:

(i) Planning permission should not be assumed to have been granted for any of the options by virtue of section 16(2) of the Land Compensation Act 1961.

(ii) As at 3 December 2001 there was a reasonable expectation that in the no-scheme world planning permission would have been granted for Options 1 and 2 (though not for Options 3, 4 and 5), and the land is to be valued on the assumption that such permissions were granted on that date.

(iii) The level of expectation that planning permission would be granted for each of the development options was as follows:

Option 1: a very high level;

Option 2: 50%-60%;

Options 3, 4 and 5: a fairly low level.

(v) Both under the statute and under the no-scheme rule the valuation is to be carried out on the cancellation assumption. It is not to be assumed that in the absence of ELLX any development in the vicinity of Wich House would have been carried out other than development which had in fact been carried out before the valuation date.

70. I would add, for the purposes of considering hope value, that I see no reason why the market at the valuation date would have taken a different view about the prospects of planning permission from the assessment at (iii) above.

71. The parties are now invited to make submissions on costs, and a letter about this accompanies this decision, which will become final when the question of costs has been determined.

Dated 4 June 2009

George Bartlett QC, President

Addendum on costs

72. I have received submissions on costs from both parties. The acquiring authority make detailed submissions on the extent of their success on each of the preliminary issues, and they submit that they have succeeded wholly or substantially on them and accordingly should have their costs. The claimant has responded to these detailed points, but its primary submission is that in view of the principles enunciated by the Court of Appeal in *Purfleet Farms Ltd v Secretary of State* [2003] EGLR 9 and the provisions of section 4 of the Lands Compensation Act 1961 it would be premature to make an award of costs at this stage. I agree with this submission. The extent of the acquiring authority's success on the preliminary issues will need to be set in the context of the final outcome of the reference, at which stage the question of costs can be considered overall in the light of *Purfleet Farms* and section 4. Costs of the preliminary issues are therefore reserved.

Dated 17 July 2009

George Bartlett QC, President