UPPER TRIBUNAL (LANDS CHAMBER)

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ACQ/422/2008

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

COMPENSATION – compulsory purchase – preliminary issues – planning permission – whether planning permission to be assumed on the basis that land allocated in development plan – whether any other expectation of planning permission as hope value – whether reserved matters approval pursuant to existing outline planning permission to be assumed – Land Compensation Act 1961 ss.14(2) & (3) and 16(1) & (2)

IN THE MATTER OF A NOTICE OF REFERENCE

BETWEEN

THOMAS NEWALL LIMITED

Claimant

and

LANCASTER CITY COUNCIL

Respondent

Re: St George's Works
St George's Quay
Lancaster LA1 5QJ

Before: Her Honour Judge Alice Robinson
and N J Rose FRICS

Sitting at: Manchester Crown Court, Crown Square, Manchester M3 3FL and Manchester Civil Justice Centre, 1 Bridge Street West, Manchester M60 1WJ on 2-5 June 2009 and on 16-18 September 2009 at 43-45 Bedford Square, London WC1B 3AS

Barry Denyer-Green instructed by Holdens Solicitors for the claimant
Guy Roots QC and *Alex Booth* instructed by Eversheds for the acquiring authority

The following cases are referred to in this decision:

Birmingham Corporation v West Midland Baptist Association [1970] AC 874
Urban Edge Group Ltd v London Underground Ltd ACQ/186/2005
Fletcher Estates (Harlescott) Ltd v Secretary of State for the Environment [2002] 2 AC 307
Pentrehobyn Trustees v National Assembly for Wales [2003] RVR 140
Pointe Gourde Quarrying and Transport Co Ltd v Sub-Intendent of Crown Lands [1947] AC 565
Melwood Units Pty Ltd v Comr of Main Roads [1979] AC 426
Transport for London v Spirerose Ltd [2009] 1 WLR 1797
Rugby Joint Water Board v Shaw-Fox [1973] AC 202
Myers v Milton Keynes Development Corp [1974] 1 WLR 696.
Margate Corporation v Devotwill Investments [1970] 3 AllER 864

The following further cases were cited in argument:

Jelson Ltd v Blaby District Council [1977] 1 WLR 1020
Purfleet Farms Ltd v Secretary of State for the Environment, Transport and the Regions [2002] RVR 203
RMC (UK) Ltd and Another v Greenwich London Borough Council [2005] RVR 140
Spirerose Ltd v Transport for London [2008] RVR 12
Waters v Welsh Development Agency [2004] 1 WLR 1304
Collis Radio Ltd v Secretary of State (1975) 29 P&CR 390
Chesterfield Properties v Secretary of State (1997) 76 P&CR 117

DECISION

Introduction

1. This reference is a claim for compensation for the compulsory acquisition of the claimant's land known as St George's Works, St George's Quay, Lancaster under the Lancaster City Council (Luneside East Lancaster) Compulsory Purchase Order 2005 (hereafter "the CPO"). The CPO authorised the acquisition of all interests in the area known as Luneside East of which the claimant's land comprising plots 26, 27, 28 and 29 formed part.

2. The claimant objected to the CPO and an inquiry was held. During the course of the inquiry the claimant withdrew its objection and entered into a building agreement with the respondent acquiring authority and Luneside East Limited (hereafter "the Developer"). The CPO was confirmed by the Secretary of State on 20 June 2006.

3. On 4 September 2006 the acquiring authority made a General Vesting Declaration and the claimant's land vested in the acquiring authority on 10 November 2006. On 12 January 2007 the claimant gave notice to terminate the building agreement. The claimant has made two references to the Lands Tribunal, one for compensation pursuant to the General Vesting Declaration and the other pursuant to the building agreement. If the first reference is the correct one the valuation date is 10 November 2006. If the second reference is the correct one the valuation date is 1 August 2006. On 7 November 2008 it was ordered that the two references be heard together. The parties are agreed that for the purpose of determining the preliminary issues it does not matter which valuation date applies and therefore it is not necessary at this stage to determine which is the correct reference.

4. The Tribunal ordered the determination of preliminary issues which are now agreed to be as follows:

> "(a) whether for the purposes of section 16 of the Land Compensation Act 1961 it should be assumed that planning permission would be granted for development of the claimant's land comprising retention, conversion, extension and change of use of the mill building to provide approximately 150 flats and if so,
>
> (i) what conditions might reasonably have been expected to be imposed, and
>
> (ii) what planning obligations secured by means of agreement might reasonably have been expected.
>
> (b) If the answer to (a) is no, whether for the purposes of section 14(3) of the Land Compensation Act 1961 there was at the valuation date a prospect that planning permission might be granted in the future for development of the claimant's land comprising retention, conversion, extension and change of use of the mill building to provide approximately 150 flats and if so,
>
> (i) what was the degree of certainty that such permission would be granted
>
> (ii) the likely timing of any such planning permission

(iii) what conditions might reasonably have been expected to be imposed, and

(iv) what planning obligations secured by means of agreement might reasonably have been expected.

(c) whether it could reasonably have been expected at the valuation date that approval of reserved matters pursuant to the outline planning permission dated 6 November 2002 would be granted for development of the claimant's land comprising retention, conversion, extension and change of use of the mill building to provide approximately 150 flats."

This is the decision on the preliminary issues.

The reference land and its surroundings

5. It is common ground that for the purpose of determining the preliminary issues the physical condition of the reference land and its surroundings is to taken as at the valuation date, see *Birmingham Corporation v West Midland Baptist Association* [1970] AC 874 at p. 899. In the period August to November 2006 the reference land comprised a large 4/5 storey mill/warehouse building fronting St George's Quay and a derelict red brick building to the rear. The mill building was managed by the claimant and occupied by a number of businesses mainly for offices but also including workshops, artists studios and storage. To the rear of the mill building were areas of hardstanding used for parking, access to which is gained from St George's Quay through an arch in the mill building.

6. St George's Quay is a local distributor road running westwards from the city centre under Carlisle Bridge which carries the main railway line, past the reference land towards the Lune Industrial Estate further to the west. To the north of St George's Quay lay a number of relatively modern factory and storage buildings which included a vehicle training and repair centre. To the west of the reference land there was a large operational gas holder and associated buildings. To the south lay a range of single storey buildings in various states of repair formerly used for manufacturing oilcloth. The southern most part of this area was formerly used as a scrap dealers yard and is the subject of a waste management licence. After the manufacturing and scrap uses ceased some of the buildings were occupied for various purposes including by a builder, for storage, vehicle hire and repairs. Land to the south and east of the reference land has the benefit of rights of way through the reference land to St George's Quay. All these areas lie within Luneside East, the subject of the CPO. Large parts of Luneside East were vacant or under used.

7. To the north of Luneside East lies the River Lune, to the east lie the railway line and beyond open space, the castle and city centre and to the west lie residential areas and the Lune Industrial Estate.

The development plan and other policies

8. In 2006 the development plan comprised

- RPG13 Regional Planning Guidance for the North West (2003)
- Joint Lancashire Structure Plan (2005)
- Lancashire District Local Plan (2004)
- Lancashire Minerals and Waste Local Plan (2001)

It is agreed the latter plan contains no material policies.

9. The acquiring authority prepared supplementary planning guidance known as The Luneside East Development Brief (hereafter "SPG4"). This was first adopted in January 2000 with a revised version being adopted in September 2004.

The first preliminary issue: should planning permission be assumed under section 16 of the Land Compensation Act 1961?

10. Before addressing the planning merits a number of legal issues raised by the parties as to the correct approach need to be resolved. These are as follows:

(1) Which provision(s) of section 16 of the Land Compensation Act 1961 (hereafter "the 1961 Act") apply, subsections (1), (2) or (3)?

(2) What assumptions should be made as to the factual background? In particular

(a) should it be assumed that the acquiring authority's proposals underlying the CPO have been cancelled or should one review the planning history as it would have been absent those proposals?

(b) if cancellation is the correct approach, what is the cancellation date?

(c) how much of the acquiring authority's proposals should be ignored, the whole scheme for Luneside East or only so much of it as affects the reference land?

It should be noted that the purpose of determining these legal issues is to identify what planning permission, if any, is to be assumed under section 16. Different considerations may arise at the later stage of determining the value of the reference land.

Which provisions of section 16 apply?

11. Sections 16(1), (2) and (3) provide:

"(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.

(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.

(3) 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 range of two or more uses specified in the plan in relation to the whole of 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 a use of the relevant land or that part thereof, being a use falling within that range of uses, 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."

12. Whereas section 16(1) refers to land <u>defined</u> in a development plan, section 16(2) and (3) refer to land <u>allocated</u> in a development plan. The distinction dates back to the Town and Country Planning Act 1947. 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..."

13. Section 39(1) of the 1961 Act defined "development plan" as having the meaning assigned to it by section 5 of the 1947 Act and "the current development plan" as the plan in force at the date of notice to treat. Section 38(3) and (7) of the Planning and Compensation Act 2004 provide that in the 1961 Act a reference to the development plan is a reference, for the purpose of land outside Greater London, to the RSS and the development plan documents.

Previous planning Acts contained similar provision, see e.g. section 54 of the Town and Country Planning Act 1990 and section 20 of the Town and Country Planning Act 1971. Thus, section 16 of the 1961 Act applies to current development plans, see *Urban Edge Group Ltd v London Underground Ltd* ACQ/186/2005 paragraph 20.

14. The claimant submits that the reference land is defined in the Lancashire District Local Plan (hereafter "the Local Plan") for the purposes of section 16(1) as it is identified and delineated on the proposals map and in policy H3 as part of a site for housing. The acquiring authority submits that the H3 sites are only sites where there is an opportunity to provide housing and that this does not preclude other uses which are in some cases specifically envisaged such that the reference land is not a 'site defined in the current development plan as the site of proposed development of a description specified' as required by section 16(1).

15. Policy H3 provides

> "The following sites identified on the local plan proposals map are allocated as housing opportunity sites"

These include a site comprising most of Luneside East south of St George's Quay but excluding the gas holder. Paragraph 2.3.1 of the Local Plan seeks to encourage the development of Housing Opportunity Sites but paragraph 2.3.3 states

> "Some of these sites require the relocation of existing uses, site clearance and preparation. Some could also provide student accommodation should the need arise. They are, therefore, not formally allocated as housing sites under Policy H4. The allocation of land as a Housing Opportunity Site under Policy H3 is intended to identify that housing is seen by the Council as the best and most efficient use of the site. It is intended that this policy should not preclude neither other appropriate uses nor the continuation of existing lawful uses."

16. The description of some sites includes reference to other uses in any redevelopment although only housing and student housing is mentioned in the description of the Luneside East Housing Opportunity Site.

17. The reference to a 'site of proposed development' in section 16(1) is to be contrasted with an 'area allocated primarily for a use' in section 16(2) and (3). The former must mean a more definite proposal for development than simply the identification of land as suitable for a particular use, especially where continuation of existing uses or redevelopment for other uses as well is not precluded. In our view the effect of policy H3 is to encourage housing development not prescribe a particular development. A Housing Opportunity Site is therefore not a 'site of proposed development of a description specified in relation thereto' for the purposes of section 16(1).

18. Although paragraph 2.3.3 of the Local Plan envisages other uses may continue or be developed on the Housing Opportunity Sites, we consider that Policy H3 allocates land as a

housing opportunity site rather than for a mix of uses. Such sites are therefore allocated primarily for a single use not a range of two or more uses and the relevant provision for the purposes of the first preliminary issue is accordingly section 16(2).

Cancellation of the scheme or a revised planning history?

19. Following the decision of the Tribunal in *Urban Edge Group Ltd v London Underground Ltd* ACQ/186/2005 issued between the June and September hearings in this case, both parties submitted that the cancellation assumption was the correct one.

20. Section 16(7) of the 1961 Act provides

> "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 reasonably 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."

The same phrase was considered by the House of Lords in *Fletcher Estates (Harlescott) Ltd v Secretary of State for the Environment* [2002] 2 AC 307 as it appears in section 17(4) of the 1961 Act namely "if [the relevant land] were not proposed to be acquired by an authority possessing compulsory purchase powers." There it was held that the scheme must be assumed to have been cancelled on the relevant date, which for the purposes of section 17 is the date of publication of notice of the compulsory purchase order, see section 22(2). In our view there is no material difference between sections 16 and 17 for this purpose. Both require consideration as to what planning permission either might reasonably have been expected to be granted (section 16) or would have been granted (section 17). Both stipulate that for the purpose of this assessment it must be assumed that no part of the relevant land were proposed to be acquired by any authority possessing compulsory purchase powers. Leaving on one side for a moment which is the correct date, the ordinary meaning of the words of the statute is simply that, at whatever date the assumption is being made, there is no proposal to acquire the relevant land. As Lord Hope said in *Fletcher Estates* at p.105

> "No assumption has to be made as to what may or may not have happened in the past."

21. This approach is also consistent with the decision of the Tribunal in *Pentrehobyn Trustees v National Assembly for Wales* [2003] RVR 140 paragraph 65 in which it was said, obiter, that

> "Moreover subss (2) and (3) of s 16, which create assumptions of planning permission for an allocated use where planning permission could reasonably have been expected, are evidently to be applied on the basis of the cancellation assumption, since subs (7) uses the same present conditional language as s 17(4)."

We therefore agree with the parties that the cancellation assumption is the correct one.

At what date is cancellation assumed?

22. In its initial Skeleton Argument the acquiring authority argued that section 16(7) should be interpreted in the same way as section 17(4) notwithstanding that section 22(2) does not apply to section 16. On this analysis the correct date is publication of the notice of the CPO which is 4 February 2005. In its final submissions the claimant adopted this approach but the acquiring authority changed its position, arguing that the valuation date is the correct date, following the decision of the Tribunal in *Urban Edge* at paragraph 45. In the event neither party considered that it would make any difference to a decision on the preliminary issues. There would be no change in the planning policy approach whether cancellation was assumed to have occurred on 4 February 2005 or in August/November 2006.

23. In the case of section 17, the decision as to what planning permission would have been granted has to be taken at the time the right to apply for a certificate arises (section 22(2)) and the certificate must state what classes of development would be appropriate 'either immediately or at a future time' (section 17(3)(a)). In the case of section 16, there is no provision equivalent to section 22 (2) and section 16 does not specify the date at which the decision as to what planning permission might reasonably have been expected to be granted is to be made. However, section 14(1) of the 1961 Act states that the assumptions in section 16 are to be made in ascertaining the value of the relevant interest for the purpose of assessing compensation. In our judgment, the section 16 assumptions are therefore to be made at the valuation date. It follows that, when making an assumption as to what planning permission might reasonably have been expected to be granted if no part of the relevant land is proposed to be compulsorily acquired, the cancellation assumption is made at the same time as the decision as to the planning merits of development.

How much of the scheme is assumed to have been cancelled?

24. The claimant submitted relying on *Fletcher Estates* at p.105 and *Urban Edge* paragraphs 45 and 46 that the assumption to be made is that the whole scheme has been cancelled. The acquiring authority submitted relying on *Transport for London v Spirerose Ltd* [2009] 1 WLR 1797 that the only assumption to be made is that arising out of section 16(7) namely that only the acquiring authority's proposals to acquire the reference land have been cancelled.

25. More generally, the claimant argues the effect of the *Pointe Gourde* principle is that the assumption to be made is that no land is proposed to be acquired pursuant to the acquiring authority's scheme. The classic formulation of this principle is that "It is well settled that compensation for the compulsory acquisition of land cannot include an increase in value which is entirely due to the scheme underlying the acquisition": *Pointe Gourde Quarrying and Transport Co Ltd v Sub-Intendent of Crown Lands* [1947] AC 565, 572 per Lord MacDermott. In *Melwood Units Pty Ltd v Comr of Main Roads* [1979] AC 426 it was established that just as any increase in the value of the land due to the scheme must be left out of account, so also must any decrease. The claimant submits that when applying the provisions of the 1961 Act it would be appropriate to apply the *Pointe Gourde* principle or a purposive statutory construction of like effect where the result would otherwise fall short of fair compensation. It

is submitted that this is supported by the decision of the House of Lords in *Spirerose*, in particular paragraphs 36 and 56. This permits a no-scheme consideration of the planning merits.

26. Both *Fletcher Estates* and *Urban Edge* are concerned with linear transport proposals, a road bypass and railway respectively. Usually if land along the line of the proposed route becomes unavailable the whole scheme would founder. That is not the case here. Subject to the manner in which the reference land may be developed, its exclusion from the CPO would not physically prevent the realisation of the balance of the acquiring authority's proposals for Luneside East. In *Fletcher Estates* it was common ground between the parties that any assumption, whether cancellation or a re-writing of the planning history, involved ignoring the whole of the scheme not just the proposals to acquire the land in question. Accordingly the issue which arises here was not argued before or addressed by the House of Lords. *Urban Edge*, a decision under section 14(3) rather than section 17, followed the same approach without the issue ever being raised. In *Fletcher Estates* Lord Hope said this at p.102:

> "It is plain that the assumption which the local planning authority is directed to make by [section 17(4)] requires it to ignore the fact that an interest in the land is proposed to be acquired by an authority possessing compulsory purchase powers as described in section 22(2). This involves disregarding the publication of the notice of the proposed compulsory purchase order… The question is: how much else must the local planning authority disregard when making its assumption?"

27. It appears from this that the decision to disregard the whole scheme was closely related to the relationship between sections 17(4) and 22(2). Section 22(2) states that an interest in land is only an interest proposed to be acquired for the purpose of section 17 where notice of the CPO has been published. The fact that the cancellation assumption has to be made on the date of publication of the CPO by definition informed the statement made above that the cancellation is of the CPO, not just the inclusion of the land in question within it.

28. By contrast, in the case of section 16 the cancellation assumption is to be made at the valuation date. That is well after the compulsory purchase order is made and in many cases other land may already have been acquired and some works undertaken pursuant to the order. For example, in this case the acquiring authority had already taken steps to secure removal of the gas holder and it is common ground that the physical condition of the reference land and its surroundings is to be taken as at the valuation date. In those circumstances one must ask on what basis it is to be assumed that the whole extant scheme has been cancelled when section 16(7) states only "if no part of <u>the relevant land</u> were proposed to be acquired"? (emphasis added)

29. We do not consider that reliance on the *Pointe Gourde* principle entitles an assumption to be made that the whole scheme is to be disregarded. In *Spirerose* the House of Lords limited the application of the principle, deciding that it did not give rise to an assumption, in the absence of any statutory assumption, that planning permission would be granted. The principle was described as a judge made principle of statutory construction that is one aspect of the rule that 'value' means 'value to the owner', see Lord Walker at paragraphs 12, 20 and 22, Lord

Neuberger at paragraphs 55 and 56 and Lord Collins paragraphs 127 and 128. Lord Walker referred to the subsequent introduction of the provisions now contained in the 1961 Act and stated "it must be recognised, in my opinion, that the principle's vigour is now channeled and restrained by a much more complex statutory scheme" see paragraph 24. Lord Walker went on in paragraph 41 to state that the statutory code in the 1961 Act did not demonstrate that all cases were to be treated as materially similar and that "For the court to try to correct the code in accordance with its perception of what is fair would amount to judicial legislation." Lord Collins referred to the decision in *Rugby Joint Water Board v Shaw-Fox* [1973] AC 202 which refused to extend the *Pointe Gourde* principle so as to apply it not only to the ascertainment of the value of an interest in land but also to ascertainment of the nature and extent of the interest to be valued, paragraph 124. He continued in paragraph 128

> "In my opinion [Pointe Gourde] is a principle of statutory interpretation, mainly designed and used to amplify the expression 'value.'"

30. In our judgment the *Pointe Gourde* principle does not permit a further statutory assumption to be made, namely that in addition to the assumption that 'no part of the relevant land were proposed to be acquired' there are no proposals to acquire any land pursuant to the relevant scheme. To do so would introduce a new assumption which is not warranted by the language of section 16(7) nor by any recognised purposive principle of statutory construction as envisaged by Lord Walker in paragraph 36 of *Spirerose*. It would also result in applying the *Pointe Gourde* principle to the ascertainment of the interest to be valued rather than the value of the interest contrary to *Rugby Joint Water Board* case and see also *Myers v Milton Keynes Development Corp* [1974] 1 WLR 696 at p.702. It will be at the subsequent valuation stage that *Pointe Gourde* is potentially applicable not at this preliminary stage of determining whether the reference land is assumed to have planning permission.

31. Further, to ignore any proposals to acquire land for the purposes of the scheme as a whole would be inconsistent with the House of Lords decision in *Margate Corporation v Devotwill Investments* [1970] 3 AllER 864. There land was affected by a road bypass scheme and the Lands Tribunal had to decide whether planning permission might reasonably have been expected to be granted under section 16(2) for housing. The House of Lords held that although the bypass could not proceed on its existing line without the relevant land, it was a question of fact whether it was appropriate to assume that a bypass on another line would be likely to be built. This decision could not have been reached if the assumption had to be made that the acquiring authority's underlying proposal had to be disregarded. The effect of the *Margate* case has been reversed by section 14(5)-(7) so far as road schemes are concerned but that does not affect the application of the principle in other cases.

Factual background

32. It is now necessary to outline the factual background which flows from determination of these legal issues and against which the preliminary issue must be determined. The acquiring authority's proposals for Luneside East which underpinned the CPO are set out in a report of the Corporate Director (Regeneration) to Cabinet on 25 November 2003 (CD30). The aim was to reclaim and redevelop the derelict and contaminated site to provide new employment and

housing opportunities and be a catalyst for regeneration of the wider Luneside area, paragraph 2.1. The acquiring authority's role was to assemble the land, if necessary by compulsory purchase and carry out accommodation works. Thereafter the site would be transferred to a developer who would carry out enabling works and then develop the site, either themselves or by selling on to other developers, paragraphs 2.10 and 3.1.

33. The accommodation works to be carried out by the acquiring authority comprised, in summary, arranging for removal of the gas holder, flood protection works, re-alignment of St George's Quay and demolitions. The enabling works to be carried out by the developer included all remediation of contamination, paragraph 3.3.

34. An important aspect of the proposals was the involvement of the North West Development Agency (hereafter "NWDA") and English Partnerships. The scheme was to be funded not by the acquiring authority but through public monies from the NWDA, English Partnerships and EDRF grant and from the private sector master developer. The total public funding available was £8,148,000 (NWDA and English Partnerships) and £2,314,941 (ERDF) (Massie Report para 3.1.5). In his evidence the acquiring authority's Forward Planning Manager Mr Lawson made it clear that the site had seen no significant investment for 30 years, that it was unrealistic to expect the private sector to overcome all of the site constraints (which included contamination and complex land ownerships) because there was 'too much risk in making the investment for the financial return potentially available' and that public intervention was 'essential' to unlock the development potential of the site, paragraphs 6.2 and 6.3.

35. Pursuant to the proposals the NWDA applied for and was granted outline planning permission on 6 November 2002 (hereafter "the OPP") for 'comprehensive mixed use development as an "urban village" comprising up to 350 residential units and up to 8,000 square metres of business floor space and ancillary leisure uses and other "support uses"', Krassowski Appendix 4. The plan to which this permission relates shows only zones of development and indicative highway and off road routes, CD28 p.20.

36. On 9 November 2004 the acquiring authority entered into an agreement requiring National Grid Transco to decommission and remove the gas holder and then to transfer the freehold of the gas holder site to the acquiring authority. Works to facilitate decommissioning were underway in August 2006 but not completed until September 2006 when the gas holder ceased to be operational. It was demolished between September and December 2006. In December 2004 planning permission was granted for the Lower Lancaster Flood Alleviation Scheme which included works in the vicinity of Luneside East. These included a new reinforced concrete wall along the riverfront and a wall with floodgates and moveable barriers across St George's Quay and running south to the immediate east of the Carlisle Railway Bridge. Works began in 2005 and were scheduled for completion by the end of 2006. Works were suspended in October 2006 when they reached the edge of Luneside East and were largely completed in 2007.

37. In the light of these facts we consider that at the valuation date any decision as to whether planning permission might reasonably have been expected to be granted would have

taken into account the imminent removal of the gasholder and expected completion of the flood prevention works.

38. By August 2006 the acquiring authority had acquired all the freehold land to the south of the reference land and had become the holder of the waste management licence affecting the land to the very south of Luneside East. Mr Lawson's evidence suggests that the acquiring authority had also purchased land north of St George's Quay, see para 3.27.4. At the valuation date the acquiring authority therefore owned or had contracted to purchase the majority of the Luneside East site.

Planning issues

39. The acquiring authority's case is that notwithstanding the allocation of a Housing Opportunity Site in policy H3 of the Local Plan which includes the reference land, planning permission would not reasonably have been expected to be granted for retention, conversion, extension and change of use of the mill building to provide approximately 150 flats (hereafter "the claimant's proposal"). The grounds on which it is said planning permission would have been refused are that the claimant's proposal would

- be contrary to policies nationally, in the development plan and SPG4 by virtue of its failure to provide an appropriate mix of uses, an eastern gateway and inadequate open space/landscaping;
- prejudice the development of the remainder of Luneside East;
- provide inadequate access.

40. The claimant's proposal is in accord with policy H3 of the Local Plan. The acquiring authority argued that the Local Plan was out of date and more weight should be given to other policies. It is common ground that the Local Plan was prepared between 1994 and 1997, the public inquiry took place in 1998/1999 and the Inspector's Report was published in 2000. Because of the lack of objections to policy H3 the boundary of the Luneside East housing site could not be altered and remained as drawn in 1997.

41. Regional Planning Guidance for the North West (hereafter "RPG13") was adopted in 2003 and the Joint Lancashire Structure Plan (hereafter "the Structure Plan") in 2005. Policy DP1 of RPG13 states that new development should be located so as to make the most effective use of land and promote appropriate mixes of uses within sites and neighbourhoods. It seeks a sequential approach to meeting development needs starting with the effective use of existing buildings in urban areas including the re-use or conversion of empty buildings if sound and worthy of re-use. Policy UR1 promotes urban renaissance and policy UR5 states that authorities should review all development plan allocations especially for housing and the scope for encouraging mixed use developments should be considered. Policy 1 of the Structure Plan states that development will contribute to achieving the efficient use of land and buildings, high accessibility for all, a balance of uses that help achieve sustainable patterns of development and urban regeneration.

42. A number of important national policies post date preparation of the Local Plan including PPG3 Housing (2000), PPG13 Transport (2001) and PPS1 Creating Sustainable Communities (2005). Mr Krassowski accepted in cross examination that the effect of these policies as well as RPG13 and the Structure Plan was to place increasing emphasis on development of previously developed urban land, the encouragement of housing, employment and a mix of uses in urban areas, urban renaissance and reducing the need to travel by bringing housing and jobs into closer proximity with one another. With the exception of policy H1 which prioritises use of previously developed land in sustainable locations these important objectives are not reflected in Local Plan policies. We therefore accept that in this respect the Local Plan is out of date. Further, these policies provide strong support for (1) bringing forward development of the reference land and Luneside East as a whole being previously developed land in a sustainable urban location, (2) for development which is well integrated with the town centre to the east and (3) for development of a mix of uses.

43. By definition the claimant's proposal would bring forward development of the reference land. However, the acquiring authority's case is that development of the reference land in accordance with the claimant's proposal would prejudice bringing forward development of the remainder of Luneside East because the latter would no longer be viable.

Viability of development of Luneside East

44. Mr Asher on behalf of the claimant gave evidence that if the reference land were converted and redeveloped for 150 residential units, development of the remainder of Luneside East would be viable. Mr Massie's evidence for the acquiring authority was that it would not be viable. Even on Mr Asher's figures, development of the remaining land would not be particularly profitable. His calculation of the residual land value of the reference land was just under £8m whereas his calculation of the residual value of the 3 remaining phases was £95,000, £1,072,000 and £100,000. He assumed that the gas holder would have to be removed but that this cost would be met by public funding. In the no scheme world the gas holder would already have been removed and can effectively be ignored.

45. Mr Asher accepted his phases did not relate to any land ownership boundaries. Mr Massie's evidence was that there was no obvious re-arrangement of the boundaries in the phases which would coincide with land ownership boundaries. It would therefore be necessary to assemble the land or for there to be a significant degree of co-operation between owners. However, as the acquiring authority had already purchased (or contracted to purchase) most of Luneside East by the valuation date(s) and the proposals to acquire the rest of Luneside East remained extant we do not consider that this would prejudice Mr Asher's phasing scheme. Mr Asher assumed that in each of his 3 remaining phases the land could be separately remediated. Some of the land is seriously contaminated, though not uniformly so and there was no evidence that this would be possible. All the evidence of the contamination experts was directed towards the remediation of the remainder of Luneside East (excluding the reference land) as a whole. Mr Asher agreed that his costs only included for some internal site and road works whereas to a greater or lesser extent all of the list of infrastructure relied on by Mr Massie would be required, subject to negotiation with the local planning authority and what the

development could afford. This includes work on and around Carlisle Bridge to provide an attractive 'gateway,' public open space along the river and on site including a children's play area, re-alignment of St George's Quay and provision of an electricity substation. Mr Asher questioned the £5.7m allowed for infrastructure by Mr Massie but did not suggest an alternative figure. Further, Mr Asher has not taken any account of existing use values and he did not dispute Mr Massie's evidence that these exceeded Mr Asher's residual land values. As Mr Asher accepted, if existing use values exceed the development value then a developer is unlikely to purchase the land. This would be the case whether the remainder of Luneside East was in its original separate ownerships or largely in the ownership of the acquiring authority. For these reasons we do not consider that Mr Asher's appraisal is realistic and it does not support the view that the remainder of Luneside East would be redeveloped.

46. Although Mr Massie's development appraisal could be described as simplistic it mirrored the real world valuation and showed a very substantial loss, over £6.4m. Mr Asher agreed that the appraisal adopted similar assumptions to his namely that none of the infrastructure costs referred to above would be borne by development of the reference land. Even if an average of the claimant's estimated remediation costs were substituted in the appraisal (£4m as suggested by the claimant as opposed to Mr Massie's £6.081m) and the price paid for the land was reduced to reflect the loss of the reference land from the development there would still be a substantial loss. Mr Asher's Rebuttal Report challenged the infrastructure costs on the grounds that the developer of the reference land would expect to bear some of them (para 2.2). However, at the hearing the claimant clarified that it would not make any such contribution. Mr Massie agreed in cross examination that there should be some reduction in infrastructure costs to reflect those which related directly to the reference land but that these would be minimal. Even if there were some scope for further reducing the infrastructure costs as suggested by Mr Asher, again, he provided no alternative figures. In cross examination Mr Asher accepted that his other criticisms of Mr Massie's approach were not valid.

47. Taking into account all of the evidence we conclude that development of the remainder of Luneside East in accordance with the acquiring authority's preferred approach in SPG4 would have been unlikely to be viable. It follows that development of the reference land would not be a catalyst for regeneration of the rest of Luneside East.

48. In the light of the fact that the difference in remediation costs put forward by the parties' respective experts does not affect the lack of viability of development in Mr Massie's appraisal it is not necessary to address these differences. Further, the acquiring authority no longer argues that planning permission would have been refused on the grounds of contamination/remediation issues. However, Mr Glavin's Rebuttal Proof asserted that remedial works would be carried out over the whole of Luneside East in any event, either by the landowners co-operating or the work being done or by the local authority pursuant to its powers in the Environmental Protection Act 1990 (hereafter "the EPA"). This could have a significant effect on the viability argument.

49. We do not consider that in the absence of proposals to compulsorily acquire the reference land the landowners of Luneside East would have co-operated to bring forward development

and remediation of the area as a whole, apportioning costs according to land holding and degree of contamination, or that the acquiring authority would have done so having acquired the remainder of Luneside East. We have concluded that if the reference land were developed for the claimant's proposal, development of the rest of Luneside East in accordance with SPG4 would be unlikely to be viable. No alternative more valuable form of development has been suggested. Thus there would have been no remediation through redevelopment.

50. As to remediation under the EPA, there was no evidence that the acquiring authority had surveyed and identified any contaminated sites let alone had any funding to enable it to do so. Further, in the absence of any viable redevelopment of the remainder of Luneside East, there was no evidence that the acquiring authority as owner of the majority of Luneside East would have had funding to remedy contamination or as to what action the Environment Agency would have taken, if any. Even if remediation under the EPA were a realistic possibility the standard of remediation would have been less than that required to make the site suitable for development with the result that some remediation costs would have to be included in Mr Massie's appraisal. This would continue to result in a negative figure for development value.

51. For all these reasons we consider that development of the reference land in accordance with the claimant's proposal would prejudice bringing forward development of the remainder of Luneside East. This would be a strong objection, especially given the size of Luneside East and its proximity to the town centre.

Planning issues revisited

52. The other aspects of national and development plan policy support referred to in paragraph 42 above are integration and mixed uses. As to integration, the railway line and bridge are a significant barrier between the town centre and open space to the east and the reference land and Luneside East to the west. In order to promote links between the two and ensure successful regeneration any development of the reference land and Luneside East should be well designed, attractive and easily accessible, drawing people towards and into the site. These objectives are described as an 'Eastern Gateway' in SPG4 paragraph 7.23, although we consider that the precise requirements set out in paragraph 7.27 of the guidance are over prescriptive. Demolition of the St George's Works building is not required by SPG4 to achieve integration (nor by the OPP) and there are sound reasons for its retention. The building reflects the history of the city and it has significant potential for conversion/refurbishment which would be a sustainable approach towards development. Although the Developer's Masterplan (trial bundle B2 p.433) envisages partial demolition of the building that does not mean the development cannot be properly integrated with land to the east by other means.

53. However, we consider that the claimant's proposal has some shortcomings in this respect. Although it would not physically prevent the re-alignment of St George's Quay or development of open space and café/retail type uses between the building and the river, neither does it make any positive contribution towards integration in this respect. A residential use at ground floor level would not provide the visual interest or lively interaction between public

and private space which food and drink, retail and other public uses would provide. It would also prevent provision of such uses to the south of the building, which is south facing and lends itself better to sitting out than the area immediately north of the building. The claimant's proposal would not provide any non-vehicular link to land to the east. Mr Krassowski stated that this could be facilitated by loss of a couple of car parking spaces to create an area on the eastern boundary of the reference land for access to land to the south of the reference land. Whatever development might take place to the south of the reference land in the future, we do not consider that a small area or corridor through or to the side of 100 plus car parking spaces would provide a satisfactory pedestrian or cycle link to open land to the east, however attractively designed. On approaching the site from the east the immediate impression would be of the sheer flank wall of the mill building and car parking spaces with no incentive to venture further.

54. As to the issue of mixed uses, the claimant's proposal would not itself provide any use beyond housing and ancillary parking and open space. Physically this would not prevent the development of other uses on the rest of Luneside East. However, it is common ground that commercial uses need to be located on and near the road in order to maximise viability with the back of the Luneside East site being more suitable for residential uses. Mr Krassowski referred to the availability of land to north and west of the reference land for commercial uses. However, with the exception of the land immediately to the west of the railway bridge these areas would not be visible to anyone approaching the site from the east, lie beyond the reference land and at the furthest end of Luneside East from the town centre. In land use terms the most suitable location for non-residential uses is fronting St George's Quay immediately to the west of the railway bridge. The claimant's proposal's failure to provide such uses is an objection of some weight.

55. The acquiring authority relied on SPG4 in support of its case. We accept that on the cancellation assumption SPG4 would be extant policy at the valuation date(s). It would carry weight as an analysis of the constraints and general planning objectives which apply to Luneside East. But removal of the reference land from the scheme would inevitably affect the weight to be attached to the guidance given its emphasis on the need for comprehensive as opposed to piecemeal development. Provided development of the reference land did not prejudice other important planning objectives there could be no objection to its development separate from the rest of Luneside East. For the reasons already given we consider that the claimant's proposal would conflict with planning objectives reflected in SPG4, which would remain important notwithstanding the reference land remaining in separate ownership and the potential different timing of development: the requirement for mixed uses at ground floor level around the railway bridge and fronting St George's Quay (para 7.12), an appropriate non-vehicular link to land to the east (paras 7.9 & 7.26) and a well designed, attractive and inviting gateway or face to the east (para 7.23).

56. Although SPG4 is not part of the development plan for the purposes of s.38(6) of the Planning and Compulsory Purchase Act 2004 (hereafter "the 2004 Act") there is no dispute that it would be a material consideration, the issue between the parties being as to the weight which should be attached to it. Although not part of the development plan we accept the evidence of Mrs Ryan that it was prepared in accordance with the then guidance in PPG12

paragraphs 3.15-3.18: no minimum consultation period is specified and 6 weeks is reasonable, no independent public examination is required and the acquiring authority had regard to the claimant's representations, it was not bound to accept them. It would therefore be entitled to substantial weight save as mentioned above, see paragraph 3.16 of PPG12. There is no dispute that SPG4 was 'saved' after the introduction of the 2004 Act and therefore was extant guidance at the valuation date(s).

57. There was some discussion about drainage requirements. There was no evidence that this would provide grounds for refusing planning permission. Mrs Ryan considered that the lack of open space/landscaping would have resulted in planning permission being refused. We consider that any shortfall in this respect is modest and would be dealt with by the proposed landscaping conditions and a contribution towards a children's play area off site, see paragraph 86 below.

58. Returning to the issue of prejudice to the development of the remainder of Luneside East, the weight to be attached to this objection depends upon the likelihood of development coming forward on Luneside East if planning permission were refused for the claimant's proposal. The parties are agreed that the correct approach is to consider whether the degree of certainty of development coming forward on Luneside East justifies refusing planning permission for the claimant's proposal. We agree with the approach of the Inspector in the Northwich appeal who said:

> "a balance in favour of a comprehensive approach only exists if the scheme is to be implemented in a reasonable timescale and delivers the necessary investment. This in turn depends on commercial viability and commitment from the public and private sectors." (Ryan Appendix 13 para 17)

59. On the cancellation assumption only the acquiring authority's proposal to acquire the reference land has been cancelled. At the valuation date(s) the authority already owned a considerable amount of the land in Luneside East and had contracted to purchase the Transco land. The decommissioning and removal of the gasholder was underway as were flood prevention works. Planning permission had been granted for a scheme in accordance with SPG4. The benefits of development of Luneside East in accordance with the acquiring authority's proposals as described by Mr Lawson (section 5 of his Statement) would still apply and bringing forward such development would have strong policy support. Mr Lawson's evidence is that the acquiring authority considers Luneside East should be developed as a whole, that land assembly was the preferred method of achieving this and that if there was no proposal to acquire the reference land comprehensive development would have to be achieved through legal agreement. We find that, on the assumption that only the acquiring authority's proposal to acquire the reference land has been cancelled, the acquiring authority would still wish to acquire the remainder of the land in Luneside East, whether pursuant to the existing CPO or a fresh one in so far as necessary, and would still wish to achieve comprehensive development of the whole of Luneside East in accordance with SPG4.

60. A development agreement was in place, however it assumed the grant of 999 year leases by the acquiring authority to the Developer and other obligations covering the whole site which could

not be achieved if the reference land remained in private hands. A number of developers submitted proposals to the acquiring authority of which six were shortlisted and five put in submissions. There was therefore developer interest in taking forward the Luneside East project in principle. It would have been necessary for the acquiring authority to re-negotiate the development agreement or invite fresh bids from developers based on a scheme which either excluded the reference land or included it as part of a joint venture with the claimant.

61. Although Mrs Ryan agreed in cross examination that the reference land was key to achieving the acquiring authority's objectives, she referred to the need for the right form of development rather than it being in the same ownership as the rest of Luneside East. The claimant argued that there would be no certainty that the owner of the reference land would co-operate in bringing forward a scheme for the development of Luneside East as a whole. This is true, but, although it was reached against the background of the CPO, the claimant was willing to enter into an agreement with the acquiring authority and the Developer which reflected a development of the reference land that would fit in with the wider scheme for Luneside East. So long as development is more profitable than the existing use value of the reference land, there would be an incentive for the owner to join in a comprehensive scheme. There was no evidence that an owner of the reference land would only co-operate if profitability to the level of the claimant's proposal was achieved.

62. In his Closing Submissions Mr Denyer Green for the claimant argued that the need to remediate the remainder of Luneside East separately from the reference land might increase the cost and prejudice development coming forward. However, the claimant's evidence was that the remainder of Luneside East could be remediated separately from the reference land without significantly increasing costs (Jackson Statement para 3.2.1). The acquiring authority accepted that the increase would be no more than 10% of the cost. There was no evidence that an increase of 10% in remediation costs would render comprehensive development unviable (i.e. assuming separate development of the reference land and the rest of Luneside East in accordance with SPG4) and in any event the claimant's evidence was that the remediation costs would be significantly less that the figure of approximately £6m allowed for by Mr Massie. Further, if a comprehensive development were brought forward as a joint venture with the claimant remediation could be carried out as a single exercise without any increase in cost.

63. The valuation evidence showed that the acquiring authority's preferred development was only viable if substantial public funding were available. Mr Asher's evidence was directed towards a development of the reference land in accordance with the claimant's proposal and then phased development of the rest of Luneside East for which he considered public funding would be available. This was disputed by the acquiring authority who produced letters from the HCA (formerly English Partnerships) and the NWDA which cast doubt on whether public funding would be available for Mr Asher's scheme. These letters make it clear that the agencies' support was dependent on a comprehensive scheme which included the reference land and delivered the same outcomes as the real world scheme. Any development in the no scheme world would therefore have to involve a joint venture with the claimant. For the reasons already given there was a reasonable prospect of such a joint venture. There was no

evidence that the agencies would have refused to support such a comprehensive scheme as they have not considered it.

64. In the light of the acquiring authority's commitment to the regeneration of Luneside East in accordance with SPG4, the substantial progress towards that end which had already been made through the acquisition of land, removal of the gas holder and flood protection works, the evidence of developer interest, the potential willingness of the claimant to co-operate in a comprehensive development and the willingness in principle of public agencies to consider funding a scheme which delivered the right outputs we consider that at the valuation date(s) the prospect of a comprehensive scheme for the whole of Luneside East would be given very considerable weight. Prejudice to this would be a strong objection to the grant of planning permission for development of the reference land for the claimant's proposal. In terms of s.38(6) of the 2004 Act, either the conflict with the policy objectives outlined in paragraph 42 above means the claimant's proposal is contrary to the development plan as a whole notwithstanding compliance with Local Plan policy H3 or such conflict is a material consideration to be weighed against compliance with development plan policy. In either case, balancing the support for the claimant's proposal from policy H3, the fact that it would bring forward development of previously developed land/buildings in an urban area in a sustainable location and include affordable housing against the prejudice to development of the rest of Luneside East and to a lesser extent the shortcomings in integration and lack of mixed uses we consider that a reasonable local planning authority would not grant planning permission for the claimant's proposal.

65. Finally, we do not consider it makes any difference to the outcome of the preliminary issues whether the assumption to be made under section 16(7) is that the whole CPO is cancelled or that the CPO remains extant (omitting the reference land). In the former case it would be necessary for another compulsory purchase order to be made for the acquiring authority to purchase the few remaining interests that could not be acquired by agreement. In the light of the positive factors identified above we consider that the prejudice to development of the remainder of Luneside East would remain a strong objection to the grant of planning permission for the claimant's proposal and the planning balance would still strongly favour refusal of permission.

The second preliminary issue: was there a prospect of planning permission pursuant to section 14(3) of the 1961 Act?

66. In this respect neither party argued that a different approach should apply to consideration of the planning merits under section 14(3) from that under section 16 on the first preliminary issue. Nevertheless it is necessary to address the issue, albeit briefly in the light of this common ground.

67. Section 14(3) provides

> "Nothing in those provisions shall be construed as requiring it to be assumed that planning permission would necessarily be refused for any development which is not

development for which, in accordance with those provisions, the granting of planning permission is to be assumed;…"

In *Urban Edge* the Tribunal held at paragraph 46 that the cancellation assumption should also apply to consideration of any planning permission under section 14(3). Although in *Spirerose* the House of Lords held that the statutory code in the 1961 Act did not demonstrate that all cases were to be treated as materially similar, in the case of section 14(3) some assumption must be made to disregard the compulsory purchase proposals. Otherwise it is unlikely the planning permission could be assumed for anything. In our judgment this would be contrary to the purpose of section 14 and the succeeding provisions as a whole which is to identify what planning permissions may be assumed for valuation purposes ignoring (in one way or another) the authority's proposals for compulsory acquisition. This would not amount to introducing a new assumption which is not warranted by the statutory language contrary to *Spirerose*, rather it would be to apply purposive principles of statutory construction. To fail to ignore the compulsory purchase proposals would wholly defeat the purpose of the provision. There is therefore no reason not to apply *Urban Edge* and the cancellation assumption should be made.

68. The purpose of section 14 is to permit consideration of any planning permission that might otherwise have been forthcoming notwithstanding that none of the statutory assumptions as to planning permission arise. That enquiry would only be relevant when considering the value of the relevant land on the open market on the valuation date. Therefore any assumption that proposals to acquire the relevant land have been cancelled should logically also apply at the time that enquiry is being made i.e. the valuation date.

69. As to whether the whole scheme is assumed to be cancelled or only so much of it as affects the reference land, for the reasons set out in paragraphs 26-28 above we consider that *Fletcher Estates* and *Urban Edge* are distinguishable from the present case. The approach adopted by the House of Lords in *Spirerose* suggests that any assumption made should go no further than necessary to give effect to the statutory purpose and we consider that the reasoning set out in paragraphs 29-31 above is equally applicable to section 14(3).

70. Our conclusions on the first preliminary issue indicate that the strongest objection to the grant of planning permission for the claimant's proposal is the prejudice to development of the rest of Luneside East which would result. The weight to be attached to this objection would diminish as time went on if no progress were made in bringing forward comprehensive development of Luneside East. If there came a time when the prospect of a comprehensive development was slim then we consider that a reasonable planning authority would prefer to grant planning permission for the claimant's proposal rather than there be no development at all of any of Luneside East. The more modest objections relating to integration and lack of mixed uses would be outweighed by compliance with H3 and the benefit of bringing forward development of previously developed land/buildings in an urban area in a sustainable location. In other words something would be better than nothing. For the reasons set out in paragraph 64 above at the valuation date(s) it could reasonably be expected that a comprehensive scheme would come forward so that the prospect of the claimant's scheme being granted detailed planning permission in the future would be low. In any event it would not reasonably be expected that planning permission for a comprehensive

scheme would be granted for 3-4 years at the earliest as it would take time for negotiations with public funding agencies and developers to be undertaken as well as with the claimant.

71. In the light of all these considerations we consider that there was no hope of any planning permission for the claimant's proposal for at least 5 years after the valuation date. Thereafter the chance of such a planning permission being granted would depend upon whether comprehensive development of the whole of Luneside East came forward. While any assessment of such a chance must by definition be speculative, we consider that the factors set out in paragraphs 58-64 above mean it is more likely than not that a comprehensive development would come forward and that there is a 60% chance that it would. Thus there would be a 40% chance that 5 years after the valuation date(s) planning permission would be granted for the claimant's proposal. At this stage the benefits of development of the reference land would outweigh prejudice to the comprehensive development having regard to the lengthy delays in bringing forward a comprehensive development.

72. The detail of any such planning permission would depend upon resolution of the access issues raised at the hearing as well as conditions and planning obligations.

Access

73. The acquiring authority's case was that the claimant's proposal provided an access which would be of insufficient width with inadequate sightlines. In the event there was no dispute that satisfactory access could be provided to the proposed development. The claimant's highway expert Mr Regan produced a drawing no.6220-07 (his Appendix 8) showing the following:

- Vehicular, cycle and pedestrian access through the existing archway which would have to be widened
- No narrowing of St George's Quay
- Sightlines with an x distance of 2.4m and a y distance of 60m
- 6m radii
- A 6m wide carriageway with 2m wide footways either side of the access road.

Both Mr Regan and the acquiring authority's highways expert Mr Robson agreed that such an access would be satisfactory and gain planning permission. The issue is whether the same is true of Mr Regan's alternative drawings 6220-01 (his Appendix 3) or 6220-04 (his Appendix 6) which show a narrowing of St George's Quay to 6.1m and 6.75m respectively in order to provide adequate sightlines, 4m radii in both cases and no footway, only a verge. Pedestrian and cycle access would be provided separately, either along the road to the west of the reference land or by creating a new arch in the building to the east of the existing arch. The significance of these alternatives is that neither involves demolishing any of the existing arch of the mill building.

74. We consider that planning permission would be refused for both these alternative access arrangements.

75. In concluding that it would be acceptable to narrow St George's Quay Mr Regan relied upon TA79/99 'Traffic Capacity of Urban Roads.' However, the issue is not the capacity of St George's Quay, rather whether the access to the proposed development would be safe in terms of its impact on traffic on St George's Quay. The identification in Table 2 of TA79/99 of 6.1m as the minimum width of a two-way single carriageway urban all purpose road is an indication in general terms that in some circumstances such a width my be appropriate for such a road. Paragraph 2.6 advises that "The lowest widths are unlikely to be suitable for bus routes or for significant volumes of heavy goods vehicles." At the valuation date(s) St George's Quay was about to be a route for the X1 bus and Mr Regan accepted that it carried significant volumes of HGVs, it being the designated HGV route to Luneside Industrial Estate to the west of the reference land. Paragraph 3.3 of Lancashire County Council's Residential Road Design Guide advises that a carriageway width of 6.75m is required for a local distributor road. All are agreed that St George's Quay has the characteristics of a local distributor road. Accepting that guidance is to be applied flexibly rather than as a prescriptive standard, we consider that a narrowing of St George's Quay to 6.1m would not be regarded as appropriate.

76. On the other hand Mr Robson was unable to point to any guidance which supported his view (and that of the highway authority) that 7.3m was a recognised desirable single carriageway width for most roads. He drew attention to the fact that with a 7.3m carriageway a car could pass a stationary HGV and not collide with a car coming in the other direction. However, there is no evidence that HGVs have any need to park along the frontage to the reference land and it is agreed that if planning permission were granted a traffic regulation order would be necessary to prevent on street waiting on the frontage of the reference land. Accordingly we do not consider that a narrowing of St George's Quay to a minimum of 6.75m would be unacceptable in principle, provided that the access was otherwise safe.

77. Our attention was drawn to the fact that St George's Quay had been narrowed to below 6.1m to the east of Carlisle Bridge where access to new residential development had been permitted in recent years. We do not consider this justifies a reduction in width at the proposed access junction to the reference land to 6.1m. The evidence was that this road narrowing took place many years ago and was therefore already in place when planning permission was granted for new residential development. In the light of the smaller numbers of new residential units to the east the local planning authority may have considered the access was not so unacceptable as to require refusal of permission having regard to the fact that any significant improvement in the access would have required part demolition of listed buildings in a conservation area. The access to the reference land is not constrained by any conservation issues.

78. Turning to the issue of radii, Design Bulletin 32 and Lancashire County Council's Residential Road Design Guide both advise that at the junction with a local distributor road the radius should be 10m so that radii of 6m already represents a relaxation of the guidance. Mr Regan accepted that this was material guidance but gave more weight to 'Places, Streets and Movement' the Companion Guide to DB32 and the draft Manual for Streets, published in June 2006, which he considered better reflected then current thinking as to highway design.

79. The Companion Guide to DB32 p.57 advises that 'For most residential areas the frequency of larger vehicles is low. If this is the case they should be permitted to use the whole road area, particularly if vehicle speeds can be designed to 20mph.' The reference land is not in a residential area and the frequency of HGVs on St George's Way is not low. Further, although the frequency with which larger vehicles may visit a residential development is generally low that does not necessarily apply in the present case. The access to the reference land is the only current access to the industrial land to the rear which has rights of way over it. Whatever the precise level of future use of the land to the rear it is reasonable to assume that its owners will want to put it to some profitable use, even if low key, and therefore it is reasonable to expect some HGV traffic to it. If the land to the rear is redeveloped access may still need to be provided through the reference land even if land to the west of the reference land is also developed and provides a second means of access. The swept path analyses on Mr Regan's drawing no.6220-06 show that all larger vehicles would encroach significantly onto the opposite carriageway of St George's Quay when turning left out of the access and a pantechnicon would also encroach when turning left into the access. While not providing advice as to specific radii the draft Manual for Streets advocates keeping corner radii low so as to make it easier for pedestrians to cross the road and states that enabling vehicle turning movements is only a secondary function. In the light of significant volumes of HGV vehicles on St George's Quay and the anticipated use of the proposed access we do not consider that it would be acceptable for larger vehicles using the access to encroach onto the opposite carriageway of St George's Quay and that, in this instance, less weight would therefore be placed on the draft Manual for Streets than the then adopted guidance. This would also be consistent with paragraph 1.1.2 of the draft Manual for Streets which states that although some of its key principles apply to other road types, it focuses on residential and other lightly trafficked streets which St George's Quay is not. An access providing 6m radii would enable larger vehicles to enter and leave the reference land without encroaching materially on the opposite carriageway of St George's Quay and we consider that planning permission would be refused for an access with radii of less than 6m.

80. As for pedestrian and cycle access, the town centre, railway and bus stations lie to the east of the site and Mr Regan accepted that the majority of pedestrians and cyclists would arrive and depart from the east. Access for them should therefore be provided either under the existing arch including footways a minimum of 2m wide or by means of a new access further to the east. We consider it would be regarded as unacceptable to provide the only pedestrian and cycle access to the west of the reference land. Whatever measures were adopted to dissuade them, in practice pedestrians would use the carriageway of the vehicular access under the existing arch rather than walk all the way to the end of the building and come back on themselves. This would create conflicts between pedestrians and vehicles, including HGVs accessing the land to the rear.

81. Turning to other highway issues, the acquiring authority relied on the requirements of SPG4 and in paragraph 7.12 of his Report Mr Robson listed the design requirements of the SPG which he argued any development of the reference land should comply with. In the event there was little dispute about these and we do not consider that planning permission would be refused on the ground of conflict with any highway or transport requirements of SPG4.

82. Mr Regan and Mr Robson agreed that it would not be reasonable to require the claimant to provide for the re-alignment of St George's Quay or make provision for buses to enter the reference land. They also agreed that the car parking proposed was acceptable, whether 143 or 111 spaces as shown on Mr Regan's drawing no.6220-05D, and that the proposed development would not prejudice the provision of a second access point into the main Luneside East site from St George's Quay to the west of the reference land. The appropriateness of the access has already been dealt with. Although the experts differed as to whether the existing proposed layout made adequate provision for pedestrians and cyclists Mr Robson agreed that such provision could be made. Finally, it was agreed that if necessary bus stops could be provided within 400m of the development, the recommended maximum walking distance to a bus stop. Accordingly planning permission would not be refused on the grounds that the development could not properly relate to any future development and use of other adjacent land.

Conditions/planning obligations

83. The conditions were largely agreed and we accept that those conditions set out in the joint note 'Summary of Planning Conditions and Section 106 obligations' would be imposed on any planning permission. Condition (ii) would provide for vehicular access as shown on drawing 6220-07 for the reasons already given. Condition (iii) would provide for a pedestrian and cycle link either in accordance with the same drawing and/or by means of a new access further to the east.

84. In addition, condition (iii) should require the layout to make provision for a link to pedestrian/cycle access to Quay Meadow. Proper integration of development and improved pedestrian and cycle access are an important theme of national policy, in particular PPG13, and development plan policy, in particular policy 1 of the Structure Plan and policy T16 of the Local Plan. SPG4 also seeks the improvement of links for pedestrians and cyclists between Luneside East and the castle area, city centre and green spaces. One aspect of this is the requirement to provide a link to the east from within the reference land under the arches of Carlisle Bridge. Although development of the reference land cannot provide this link off site, it should not prejudice the realisation of this requirement. At present the parking layout to the rear of the Mill building does not allow for such a link. We consider that the local planning authority would reasonably require the layout to be adjusted so that as and when such a link can be provided to the east it integrates with the development of the reference land.

85. As to planning obligations the acquiring authority now agree that affordable housing is to be provided on site so it is not necessary to consider the amount of any payment in lieu. We agree that the obligation would make provision for 20% affordable housing i.e. 30 units, the precise mix to be agreed with an RSL.

86. The acquiring authority object to the level of open space shown on drawing 6220-02 (Krassowski App 7) on the grounds that it does not comply with policy H12 which requires high quality landscaping and R11 which requires recreational open space to be provided in accordance with Appendix 1 of the Local Plan. Policy R11 only requires provision of recreational open space necessitated by the development and paragraph 6.3.19 states that in the densely developed urban

area of Lancaster it is particularly important that adequate provision is made. We therefore agree that the acquiring authority would require a contribution to provide a children's play area off site in the sum of £45,000 as outlined in Mr Krassowski's evidence. However, we do not consider that a planning authority could reasonably require a further sum towards provision of a grassed area which would be in excess of the total area required by Policy R11 (750m2), taking account of the on site provision and children's play area (720m2 + 200m2). In the light of the flexibility over the number of parking spaces required (see paragraph 82 above) we consider that adequate landscaping could be provided.

87. Other proposed planning obligations relating to highways matters are in dispute. Provided the development makes appropriate contributions towards improving the accessibility of the reference land by public transport, cycling and walking we do not consider there is any justification for contributing towards a residents parking scheme in the surrounding area.

88. Although there would be no objection to providing parking at significantly lower levels than the maximum provision of 225 spaces i.e. between 111 and 143 spaces, we consider that in these circumstances the local planning authority would reasonably require a contribution towards improvements in the provision for pedestrians and cyclists in the area and particularly through Quay Meadow and under Carlisle Bridge to enhance the attraction of these modes in accordance with policy 1 of the Structure Plan and policy T16 of the Local Plan.

89. As already mentioned the parking levels proposed are significantly less than the maximum. The acquiring authority considered that the development should provide a contribution towards the SCOOT system in the town centre. However, no traffic generation figures have been produced nor any analysis of the impact which development traffic would have on traffic light junctions in the city centre. Mr Regan's evidence, which was uncontradicted, was that the claimant's proposal would add about one vehicle every minute onto the highway in the peak hour. We do not consider that this would justify a requirement to contribute towards SCOOT. For the same reason, insofar as it was suggested that a contribution should be made to prevent rat running on Long Marsh Lane, it is not justified by the level of traffic generated.

90. The only bus service which would be close to the reference land is the X1. This only operated one way, for 19 weeks of the year and not at all at weekends. The next nearest bus service is the number 7 with a stop 580m away, beyond the recommended maximum walking distance of 400m. We consider that for a development of 150 residential units the local planning authority would reasonably have required a contribution from the claimant to run the X1 service in both directions 52 weeks a year for a period of 5 years from completion of the first residential unit to enhance the attraction of this mode in accordance with policy 1 of the Structure Plan and policy T16 of the Local Plan. The X1 bus stops lie 230m to the east and 380m to the southwest of the site within the recommended maximum walking distance. We do not consider that any further contribution towards bringing the bus stops closer to the site would be appropriate.

91. We consider that in the event that planning permission were granted for the claimant's proposal the reasonable local planning authority would in principle require some contribution towards improving the entrance or gateway to land to the west of the railway bridge. However, the highways witnesses agreed that it would not be reasonable to require the development to provide for re-aligning St George's Quay and there was no evidence as to what other measures could be taken or what contribution should be made.

The third preliminary issue: would reserved matters approval have been granted pursuant to the outline planning permission?

92. By virtue of section 14(2) of the 1961 Act any planning permission which is in force at the date of service of the notice to treat can be taken into account for the purposes of assessing compensation. The OPP was granted on 6 November 2002 and amended on 24 April 2006. As amended condition 1 requires application for approval of reserved matters to be submitted 'before expiration of 5 years from the date of the Parent Consent.' The Parent Consent is not defined but clearly means the OPP granted in 2002. Accordingly on the valuation date(s) an application for approval of reserved matters would still be in time.

93. Conditions 12 (as amended) and 14 require submission of reserved matters for approval i.e. siting, design, external appearance, means of access and landscaping. Condition 12 requires reserved matters to be approved prior to development commencing on each phase of development. Therefore before any such application can be made the phases of development must be identified. This is dealt with in condition 10 which provides:

> "Before any works for the redevelopment of the site are commenced on site, a detailed phasing scheme for the comprehensive mixed use redevelopment of the site, including infrastructure and disposition of uses, in accordance with the aims of the local planning authority's development brief for the site and the contents of this outline proposal, shall be submitted to and approved in writing by the local planning authority. The redevelopment of the site shall thereafter be carried out and completed in accordance with the approved comprehensive scheme and any amendments to it which may subsequently be submitted to and approved in writing by the local planning authority."

94. Mrs Ryan's evidence was that significant co-operation with other landowners would be required for this condition to be discharged. We consider that this is incorrect and confuses the approval of reserved matters with the ability to implement any such approval. Implementation is not something we are required to consider as part of the preliminary issues. There is no reason why the claimant could not have submitted details for approval pursuant to condition 10 and then sought approval of reserved matters for an individual phase or phases of development. Provided such details were in accordance with the outline planning permission and were acceptable in planning terms it would not be open to the acquiring authority as local planning authority to refuse them simply because they as landowner or any other landowner objected to them. The issue is whether phasing and reserved matters which would enable the claimant's proposal to be built would be in accordance with the outline planning permission and acceptable in planning terms.

95. The OPP decision notice describes the proposal as:

> "Outline application for comprehensive mixed use development as an "urban village" comprising up to 350 residential units and up to 8,000 square metres of business floor space and ancillary leisure uses and other 'support uses'"

and continues

> "Lancaster City Council hereby give notice that OUTLINE PLANNING PERMISSION HAS BEEN GRANTED for the development described above in accordance with your planning application dated 15 November 2001, and the plans, drawings and documents which form part of the application, subject to the following conditions and reasons:-"

Condition 2 states that

> "This permission relates solely to the application as described in the following documents submitted on 15 November 2001 and furthermore, the reserved matters submissions shall take account of all the conclusions contained therein:-
>
> i Supporting Statement
>
> ….
>
> The development hereby permitted shall be carried out strictly in accordance with the documents submitted above and any amendments which may subsequently be submitted to and approved in writing by the local planning authority."

Condition 3 provides:

> "This consent relates to the "Layout Plan Showing the Outline Scheme Proposed" and does not purport to grant any consent for the submitted "Illustrative Urban Village" scheme which was submitted for background illustrative purposes only."

96. The OPP plan referred to in condition 3 is at CD28 page 20 and forms part of the Supporting Statement referred to in condition 2. Although the application form was not in evidence, the Planning Committee report dated 21 October 2002 which considered the application (CD29) describes the proposal in the same terms as the decision notice and continues "as detailed in the Supporting Statement (a copy of the relevant section of this statement is attached… and gives full details of the proposal together with the application plan.)"

97. The OPP plan shows proposed highways, off road pedestrian/cycle routes and numbered development sub-areas. These numbers can only be understood by reference to the Supporting Statement and in particular that part of it attached to the committee report. We therefore conclude that this part of the Supporting Statement is incorporated into and forms part of the OPP for any one of the following reasons: it is one of the documents which the development must be 'in accordance with' in the operative grant of planning permission, it is defined as that to which the OPP 'relates' in condition 2 and it is incorporated into the application plan be reference to the numbered sub-areas on the OPP plan. Any amendment to the plan or Supporting Statement would

therefore require a amendment to the OPP i.e. a fresh planning permission which would be outside section 14(2) of the 1961 Act.

98. The mill building on the reference land lies within sub-area 2 on the OPP plan. Sub-area 2 also includes land to the west of the reference land and immediately south of St George's Quay and is described in the Supporting Statement as follows:

> "Sub-area 2 (including St George's Works mill building site)
>
> Permission is sought for B1 business uses, residential dwellings and A3 food and drink uses.
>
> It is intended that the existing St George's Works mill building be retained and converted and refurbished. The addition of a further storey to this building could be considered. All new building including any replacement for the mill building were this to be demolished would be similar in scale, massing and height to that of the existing mill building.
>
> There is a particular opportunity on building ground and first floors for:
>
> - Cafes and/or restaurant
> - Business uses including workshops, craft activities and any retailing ancillary only to these uses
> - Live and work accommodation
>
> Upper floors would represent a significant opportunity for residential use. The structure of the existing mill building would readily convert to a mix of flats and apartments and possibly live/work accommodation."

It then goes on to deal with parking.

99. The claimant's proposal would not be in accordance with this description of development for sub-area 2 because it does not include any business or A3 uses. We do not consider that wholly residential uses in the mill building would be in accordance with the OPP on the grounds that the business and A3 uses would go in sub-area 2 to the west of the mill building. That is not a sensible or reasonable construction of the description of sub-area 2 which does not differentiate between the mill building, which comprises the majority of sub-area 2, and the land to the west of it.

100. Further, the claimant's proposal would not be "in accordance with the aims of the local planning authority's development brief for the site" (i.e. SPG4) as required by condition 10 of the OPP. Paragraph 7.12 of SPG4 states

> "the Council requires a mixed use development which delivers the following essential elements:
>
> - ….

- Uses on ground floors that give vitality to the street outside, particularly around the main gateway at Carlisle Bridge, fronting onto St George's Quay, the main public spaces and riverfront. These uses should include cafes, pubs, restaurants, heritage and local shopping uses."

Again this could not sensibly or reasonably be construed as excluding the mill building. Thus, even if the design could otherwise achieve the objectives of SPG4, the claimant's proposal would be contrary to it on land use grounds.

101. For these reasons we do not consider that a phasing scheme and reserved matters which provided for the claimant's proposal would be in accordance with the OPP. Further, neither would they be acceptable in planning terms for the reasons given in paragraph 64 above. Accordingly, we find that at the valuation dates(s) it could not reasonably have been expected that approval of reserved matters would be granted for development of the reference land for the claimant's proposal.

Conclusions

102. We therefore determine the preliminary issues as follows:

(a) No

(b) There is a 40% chance that planning permission for the claimant's proposal would be granted 5 years after the valuation date(s). Any such permission would be subject to the conditions and planning obligations set out in paragraphs 83 to 91 above.

(c) No

As agreed at the hearing the parties are now invited to make any submissions as to costs and directions for the further conduct of the references. A letter concerning costs accompanies this decision. This decision will become final when the question of costs has been determined.

Dated 8 February 2010

Her Honour Judge Alice Robinson

N J Rose FRICS

Addendum

103. We have received submissions on costs from the parties. The acquiring authority's submissions were contained in letters from Eversheds dated 19 and 25 February 2010. The claimant's representations comprised a submission from Mr Denyer-Green received on 19 February 2010 and a brief letter from Holdens, dated 26 February 2010, enclosing a bundle of inter party correspondence. In a letter dated 1 March 2010, Eversheds suggested that part of the bundle of correspondence contained without prejudice material which should not have been disclosed to the Tribunal. The remainder was irrelevant, consisting of requests to the acquiring authority, either to make a payment in addition to the advance payment of £2m which had been paid, or to enter into negotiations on the claim. In the absence of any further communications from Holdens on the subject, we have ignored the contents of their letter of 26 February 2010.

104. The claimant's primary submission is that it should be awarded the costs of the preliminary hearing as a whole, or if not in part. Alternatively, if the Tribunal is minded not to award any costs to the claimant at this stage, the question of the costs of the preliminary issue hearing should be reserved to the outcome of the remaining substantive issues between the parties.

105. The claimant submits that it succeeded in relation to preliminary issue (b). Although it did not succeed on issues (a) and (c), the claimant says that the determination of issue (b) involved a consideration of practically all the planning issues that also had to be considered in relation to preliminary issues (a) and (c). The issues that each expert addressed, and their respective conclusions, covered largely the same ground in relation to each of the three preliminary issues.

106. Having regard to the position taken by the acquiring authority on preliminary issue (b), the hearing of the preliminary issues, and particularly the hearing of the expert evidence, is most unlikely to have been extended by reason only that the Tribunal had to determine issues (a) and (c). It was necessary for the claimant to seek a determination of the Tribunal in relation to issue (b), which was an issue necessary to establish its entitlement to a compensation measure. The acquiring authority should therefore pay the claimant's costs of the preliminary issues hearing.

107. The acquiring authority submits that it has been successful on all issues of substance, and should therefore receive its costs from the claimant. The claimant's limited degree of success on issue (b) must be considered in context. The costs incurred in relation to the preliminary issues were incurred in order to dispose of the claimant's contention that planning permission would have been granted for the provision of 150 flats in the mill building; if that contention had been found to be correct, it would have been unnecessary to spend time and costs on assessing the existing use value and the disturbance claim, both of which appeared to be contentious and likely to require detailed evidence. If the claimant had not advanced that contention, it is unlikely that either party would have applied for any planning matters to be determined as preliminary issues, or that either party would have considered it necessary to devote a seven day hearing with several experts of different disciplines to the question of hope

value which, even on the basis of the claimant's pleading, only accounted for an uplift of approximately £1.14m above existing use value. In short, the costs incurred in relation to the preliminary issues have been incurred in order to dispose of the claimant's contention (a) above, on which the acquiring authority has been successful. The fact that the claimant has achieved a limited degree of success in relation to preliminary issue (b) should not carry weight in determining the award of costs in relation to the preliminary issues.

108. Having considered the parties' submissions, we have concluded that we should defer any award of costs in respect of the preliminary issues hearing until the final outcome of the claimant's claim in known. Costs of the preliminary issues hearing are therefore reserved.

Dated 29 March 2010

Her Honour Judge Alice Robinson

N J Rose FRICS