UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2013] UKUT 231 (LC)

UTLC Case Number: ACQ/78/2011

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

COMPENSATION – compulsory purchase – land in agricultural use acquired as part of major 420 acre strategic business park development – planning assumptions under ss 14-17 of the Land Compensation Act 1961 – whether permission to be assumed on basis that land "allocated" in development plan – whether planning permission to be assumed under "no-scheme" rule – cancellation assumption – statutory disregards – hope value – highways and access – valuation – compensation determined at £746,000

IN THE MATTER OF A NOTICE OF REFERENCE

BETWEEN

J S BLOOR (WILMSLOW) LIMITED **Claimant**

- and -

HOMES AND COMMUNITIES AGENCY **Acquiring Authority**

**Re: Land at Kingsway Business Park,
Milnrow, Rochdale, Lancs**

Before: His Honour Judge Mole QC and P R Francis FRICS

Sitting at: Manchester Crown Court, Ground Floor, Magistrates Wing, Crown Square, (off Bridge Street West), Manchester M3 3FL

on 9-17 January and 12-13 February 2013

Martin Kingston QC and *Richard Kimblin*, instructed by Cobbetts, solicitors of Leeds, for the Claimant

Michael Humphries QC, instructed by Eversheds, solicitors of Manchester, for the Acquiring Authority

The following cases are referred to in this decision:

Thomas Newall Ltd v Lancaster City Council [2010] UKUT 2 (LC) [Thomas Newall 1]
Waters v Welsh Development Agency [2004] 1 WLR 1304
Pointe Gourde Quarrying & Transport Co Ltd v Sub-Intendent of Crown Lands [1947] AC 565
Gajapathiraju v Vizagapatam [1939] AC 302
Lady Fox's Executors (1994) 2 EGLR 185
Transport for London v Spirerose [2009] UKHL 44
Fletcher Estates v the Secretary of State [2002] 2 AC 307
RMC (UK) Ltd v London Borough of Greenwich (2005)

Urban Edge Group Ltd v London Underground Ltd [2009] RVR 361

The following cases were also referred to in argument:

Thomas Newall Ltd v Lancaster City Council [2011] UKUT 437 (LC) [Thomas Newall 2]
City of Edinburgh v Secretary of State for Scotland [1997] 1 WLR1447

DECISION

Introduction

1. This is a reference, made by the acquiring authority, for the determination of the compensation payable to JS Bloor (Wilmslow) Ltd (the claimant) in respect of the compulsory acquisition of the freehold interest in two parcels of grazing land extending to 26.85 acres (10.86 ha) at Milnrow, Rochdale by the North West Development Agency (NWDA) under the North West Development Agency (Kingsway Business Park, Rochdale) Compulsory Purchase Order 2002 (the CPO). On 19 September 2011, pursuant to a Transfer Scheme, the NWDA's "property rights and liabilities" in the order lands were transferred to the Homes and Communities Agency (HCA) who are now the respondent in this reference and are thus responsible for payment of any applicable compensation.

2. The claimant seeks compensation in the sum of £2,593,000 on the premise that, absent the scheme, there was significant hope value that planning permission would have been granted on the reference land for residential development with access being obtained from Buckley Hill Lane through adjacent land that was outside the order lands but was also in the claimant's ownership (that land being known as "the Nib"). The acquiring authority's case is that in accordance with the relevant provisions of sections 14-17 and section 6 Schedule 1 to the Land Compensation Act 1961 (the Act), no such assumptions can be made and the land would have no value over and above its existing use value (estimated at £2,000 per acre) and thus the compensation due is considered to be £50,000 (rounded).

3. Mr Martin Kingston QC and Mr Richard Kimblin of counsel appeared for the claimant and called Mr Richard Brogden BSc MRICS of Bruton Knowles, Chartered Surveyors of Gloucester who gave valuation evidence, Mr Peter James Frampton BSc (Hons) TP MRICS MRTPI of Framptons Planning Consultants who gave planning evidence and Mr Phil Wooliscroft MSc MCITL of Croft Transport Solutions who gave highways evidence. Mr Mark Waite BA (Hons) Dip TP MSc MRTPI, Strategic Planning Director of the claimant gave evidence of fact.

4. Mr Michael Humphries QC of counsel appeared for the acquiring authority and called Mr Andrew Gerald Massie BSc (Hons) MRICS IRRV MCI Arb of Keppie Massie, Chartered Surveyors of Liverpool who gave valuation evidence, Mr Paul Nicholas Singleton BSc MA MRTPI who gave planning evidence, and Mr Roger Wall B Tech C Eng MICE of WYG Engineering who gave highways evidence.

5. We carried out an accompanied inspection of the reference land and the Kingsway Business Park scheme on 15 January 2013 and, following completion of the hearing, closing submissions in writing were received from the parties on 8 March 2013.

Facts

6. A brief statement of agreed facts was produced by the solicitors acting for the parties together with statements of matters agreed and not agreed by the parties' planning and highways experts, and a statement of agreed matters only by the valuation experts. From these, together with the statements of case, the parties' skeleton arguments and opening/closing submissions, the written and oral evidence and our site inspection, we find the following facts.

7. On 10 May 2002, the NWDA made the North West Development Agency (Kingsway Business Park, Rochdale) Compulsory Purchase Order 2002 under sections 20(1) and (2) of the Regional Development Agencies Act 1998 for the purposes of securing the assembly of some 420 acres (170 ha) of land at Milnrow, Rochdale (the order lands) in connection with the construction of the Kingsway Business Park (KBP).

8. The order lands are located about 1 mile east of Rochdale town centre and lie predominantly to the north west of the M62 motorway in the vicinity of Junction 21, and within the boundary formed by Broad Lane (B6194) and the Turf Hill estate to the west, Kingsway (A664) and the Rochdale Canal to the north, the Rochdale – Oldham railway line (now GMPTE Metrolink) to the north east, grazing land to the west of properties fronting Buckley Hill Lane, Egremont Road and Ashfield Lane to the east. The claimant's land (the reference land), shown as Plots 13 & 14 on the CPO plan, comprises two elongated parcels of former grazing which extend to some 26.85 acres (10.86 ha) and is situated towards the north east part of the order lands close to (but not immediately adjoining) the railway line and Buckley Hill Lane.

9. Prior to the proposed business park development the order lands comprised low-grade equestrian and grazing land with isolated buildings and farmsteads – including three listed buildings that were to be retained. The site was (and is) traversed by the Stanney Brook running from south to north through a defined valley, that area being designated as a site of biological importance.

10. The potential for developing an area of land in the vicinity of Kingsway and Buckley Hill Lane as a sub-regional industrial estate was first mooted in the 1960s. A joint feasibility study between Rochdale MBC and Greater Manchester Council (as they then were) was undertaken in 1979 and the Kingsway Industrial Park Feasibility Study Interim Report was published in July 1980 with a final report and synopsis published in November 1983. That concluded that the site was capable of, and suitable for, meeting the locational requirements of major inward investors.

11. In February 1998 Wilson Bowden Properties Ltd and English Partnerships submitted a planning application for the proposed business park and consent was granted in August 1998, but was subsequently overturned as a result of a successful judicial review. The developers then produced and published The KBP Development Framework (the Development Framework) in November 1999 in support of a revised hybrid (outline and full) planning application for the KBP and to comply with conditions that had been imposed in the 1998 permission. Its primary aim was to:

   "…guide the physical aspects of the development to ensure the ultimate creation of a cohesive business park of high quality within a landscaped setting, which relates sympathetically to its surrounding context. It provides the basis of a development masterplan. The document is itself a part of the planning application for the development and therefore will form an important part of the 'planning permission'".

   The framework also stated:

   "The Kingsway Business Park, although primarily a focus for business and employment uses, will be a high quality mixed use development, for business, light industry and distribution complemented by hotel and leisure facilities with small scale retailing, local services and residential areas".

and

Residential facilities are proposed in their limited form compatible with the requirement of criterion (p) of the [1999] UDP Policy EC/6, located on a site to the north of Buckley Hill, and within the integrated canalside development on Plot S".

12. The Development Framework included a Master Plan layout for the KBP development (the Master Plan) and provided for its phased development. Parts of Plots 13 and 14 in the Schedule to the CPO are within Plot X in the Master Plan which was designated for residential development, with the remainder of the reference land located within Plots P, Q and R designated variously for B1 Office and Floor Space. These areas were all planned to be in Phase 5 of the development.

13. Planning consent for the KBP, effectively tied to the Development Framework and the Master Plan was granted on 19 December 1999. These three principal planning consents, which remained extant at the valuation date and had all been commenced, comprised:

Reference No. 98/D35130*: Hybrid (Outline and Full) permission for the proposed Business Park within Development Plots C – X inclusive, as shown on the approved Masterplan.* This permission, subject to reserved matters that had to be submitted within 10 years, had to be commenced within 5 years (which it was) and was also subject to extensive conditions. It included the whole of the reference land.

Reference No. 98/D35132*:* It provided for a principal spine road (as required by policy EC/6 of the 1999 UDP) linking the new connection with Junction 21 of the M62 with the A664 Kingsway (to be the only vehicular accesses to the Business Park).

Reference No. 99/D36760*: Detailed permission for the construction of the loop roads and surface water attenuation areas to serve the business park.* Known as the "loop road permission", this provided for two main loops off the spine road which, by the construction of spur (attenuation) roads, would give access onto the individual developments/units/areas within the KBP. This permission included parts of the land in both of the reference plots.

14. The development permitted was to comprise approximately 3.6 million sq ft B1 commercial and business accommodation, 300 residential units, about 15,000 sq ft A1 retail and 9,000 sq ft A3 retail, a hotel, public realm, infrastructure and public open space together with ancillary uses. Stanney Brook was to be retained and landscaped on redevelopment and attenuation/balancing ponds provided as part of the land drainage scheme.

15. The project was subsequently taken over by the acquiring authority which entered into a Joint Venture Agreement (JVA) and a Collaboration Agreement (Collaboration Agreement) on 12 June 2002. These agreements set out detailed provisions relating to the development and phasing, the nature and timing of land transfer to WBD, the timing of the infrastructure works, funding and other financial matters. In essence, the agreements provided for the development to proceed in two distinct parts: the infrastructure works (stage 1) and the design and build elements and disposal of serviced sites (stage 2). By January 2006, the valuation date, the Collaboration Agreement had become unconditional.

16. Enabling works to provide for the diversion of a high pressure water main away from the proposed Junction 21 improvements, and for the construction of a cycleway along Stanney Brook were undertaken, and by July 2005 phase 1 of the major infrastructure contract had been let to cover the Junction 21 remodelling, the new Kingsway junction, the main spine road and parts of the southern loop road and attenuation ponds, earthworks and service connections for the business park. These works were underway by the valuation date.

17. At the time the CPO was made, the freehold of plot 13 (9.71 acres) was in the ownership Mr A Nall, Mr S Nall, Mrs R Smith and Mr J F Nall, and plot 14 (17.14 acres) was owned by Mrs L

Turner, Mr J F Nall, Mr A Nall, Mr S R Nall and Mrs R Smith (referred to hereafter as "the Nall family"). The land was occupied on the basis of a grazing licence by Mr R M Halliwell. A planning application had been submitted on behalf of the Nall family for residential development on part of the reference land and The Nib but was refused on 18 January 2002 on the grounds that it would be a piecemeal development.

18. The Nalls submitted objections to the proposed CPO, but then sold their interests in plots 13 and 14 together with a further area of 0.4 acres (the nib) lying between the north eastern corner of plot 14 and Buckley Hill Lane (to which it has a frontage of approximately 52m) to the claimant in May 2003 for a consideration of £1,250,000 together with the vendor's disposal costs making a total of £1,300,000. The claimant took over the objections and appeared before the Public Inquiry into the CPO seeking the removal from the order lands of the part of the reference land that fell within an area of 4.38 ha (10.82 acres) designated for residential development in the Master Plan for the KBP, and shown thereon as Plot X (Plot X).

19. Following that Public Inquiry, which was held between 24 June and 24 September 2003, the CPO Inspector reported to the Secretary of State who, on 5 October 2004, confirmed the CPO subject to modifications (none of which are significant within the context of this reference). In referring to the claimant's objection (and that of another developer, Hartle Estates) he concluded in his overall summary of findings at paragraph 562:

> "562 Primarily, however, quite apart from the question of their impact on the viability of the scheme, I have found each of those two sites, like all others the subject of statutory objections, to be intrinsic to the concept of the KBP, albeit for various differing reasons. I have also found that, were either of those two sites, or any of the others the subject of statutory objections, omitted, there can be no comfort that private investment would take place such as to achieve the regeneration purposes of the comprehensive KBP scheme as constituted in the NWDA's proposal. That being so, there can be no confident claim that private investment would be prejudiced were the CPO to be confirmed. The KBP proposal appears to me to be of very high quality and is as carefully timetabled as it is reasonable to expect at this stage. In contrast, proposals for land the subject of objections have either yet to reach a stage where their quality and likely implementation date can be objectively assessed or they lack detail or elaboration allowing any such assessment: accordingly they should not in my view carry weight."

20. A General Vesting Declaration was subsequently made, and the reference land (but not the nib) vested in the NWDA on 4 January 2006, which is the valuation date for the purposes of this reference.

Planning Policy Background

21. The KBP site (namely the 170 ha (420 acres) or thereabouts that eventually became subject to the CPO) has been allocated in the local development plans continuously from 1989. In that year, it was included in the South Rochdale local Plan, Policy E7 allocating it for large scale general and light industrial use, offices, distribution and storage, research and development and associated complementary uses.

22. The Statutory Development Plan at the valuation date was RPG13: Regional Planning guidance for the North West (RPG13) which had been approved in March 2003 and the Rochdale Unitary Development Plan (the 1999 UDP) adopted in March 1999. The KBP was listed in RPG 13 as one of 11 sites identified in the North West Regional Economic Strategy (RES) as Strategic Regional Sites and that they are critical to the strategy's effective implementation. In respect of Regional Housing Provision, Policy UR7 provided:

"Local planning authorities should monitor and manage the availability of land identified in development plans to achieve the annual average rates of housing provision set out in Table 5.1

[240 units pa within Rochdale] and in doing so must seek to minimise the amount of land needed for new housing:

…

Maximising the re-use of vacant and underused land and buildings within Policy UR4

…"

23. The KBP was allocated in Policy EC/6 of the 1999 UDP. There were sixteen criteria within that policy which the council stated they would "strictly apply". Those relevant to this reference were:

"(j) Vehicular access to the site to be from the A664 Kingsway and from Junction 21 of the M62 Motorway only; significant improvements to the geometric layout of the layout of the M62 Junction 21 will be necessary;

(l) Any individual development within the site must be compatible with the overall objective of a strategic business park development and must not constrain either a comprehensive overall development or the provision of a satisfactory highway link between the A664 and junction 21 of the M62;

(p) Limited residential development may be acceptable provided it is part of a comprehensive development scheme for predominantly business uses and would not undermine the site's primary role as a business park."

24. At January 2006 a draft replacement UDP (draft replacement UDP) was well under way, having been published in 2003 and the subject of a Public Inquiry in 2005 Within this draft, the KBP land was allocated under Policy EC/7 and a number of policies that had been within Policy EC/6 in the 1999 UDP were preserved. For example, criterion (j) from EC/6 remained intact and became criterion (j) in policy EC/7.

25. At the Public Inquiry into the draft replacement UDP, the Inspector identified seven key issues for examination and under the heading 'Background and General Principles' he said (at paragraph 8.50 of his report):

"Proposals for development of the KBP have had along and complex history and there have been several 'false starts' in bringing this development forward. It is likely however that the development will commence shortly. There is an extant and unchallenged outline planning permission for the comprehensive redevelopment of the site, together with a more detailed permission for infrastructure and other works. The recent inspector's report into the Compulsory Purchase Order (CPO) application, together with accompanying letter from the Secretary of State for Trade and Industry (who is minded to approve the CPO) together with the recent acquisitions by the NWRDA, indicates that land ownership constraints are likely to be overcome. Objectors' concerns have previously been discussed in several forums and, given the above, the broad brush principle of the development of the KBP has been clearly established. Policy EC/7 is a reasonable starting point."

26. Within the draft, criterion (l) from EC/6 was broken up, extended and incorporated into the proposed new criterion (p) which read:

"(p) Any development within the site will be required to accord substantially with an approved Master Plan for the comprehensive development of the whole site; and in any event to:

i. be compatible with the overall objectives of a strategic business park development;

ii. comply with, or allow and enable an overall scheme to comply with, all the criteria in this policy;

iii. not constrain a comprehensive and satisfactory overall development of the entire site;

iv. not hinder the provision of a satisfactory highway link between the A664 and Junction 21 of the M62; and

v. contribute to the total cost of all on and off site infrastructure works, including highways and services , necessary for the development of the entire site. Such contributions will be secured through planning conditions or other legal agreements."

27. Having considered an objection at the Inquiry on the grounds that the need to comply with a Master Plan was inflexible, the Inspector concluded, under a sub-heading 'Flexibility of the Policy' at paragraph 8.54 of his report:

"8.54 Deanbank Investments Ltd is concerned that the policy is inflexible. Essentially, criterion (p) requires developers to strictly follow an agreed masterplan. I acknowledge that this requirement may restrict the degree to which some individual developers could bring forward sections of the site but, given the importance of the comprehensive development of it (and in its specific circumstances), I consider it to be reasonable. The need for the site to be developed comprehensively has been clearly demonstrated by the Council and its development partners, in a number of forums. The provisions of the adopted plan are less stringent and would not provide for the degree of certainty that is required for comprehensive development of Kingsway Business Park. I do not consider that the main paragraph of criterion (p) would place an embargo on individual developments.

8.55 I do, however, have some sympathy with the objector's criticisms of the sub-criteria of criterion (p). All the matters addressed in these sub-criteria are largely administrative considerations and can be addressed either, in the reasoned justification (i and v) or, by the use of a masterplan (ii, iii and iv). To include these criteria in the policy is, therefore, unnecessary and repetitious."

As a result, the council accepted the Inspector's recommendation for the deletion of criterion (p) as drafted and it was incorporated into the reasoned justification thus:

"8.40 Development of the site is likely to be phased and it is essential that any development is compatible with the overall objective of a strategic business park and does not constrain a comprehensive overall development that meets all the criteria set out in the policy. Any development within the site will therefore be expected to accord substantially with an approved Master Plan for the comprehensive development of the whole site; and in any event to:

i. Be compatible with the overall strategic objectives of strategic business park development, which are primarily to attract major inward investment to the Region and sub region to support economic regeneration;

ii. Comply with, or allow and enable an overall scheme to comply with, all the criteria in this policy;

iii. Not constrain a comprehensive and satisfactory overall development of the entire site;

iv. Not hinder the provision of a satisfactory highway link between the A664 and Junction 21 of the m62; and

v. Contribute to the total cost of all on and off site infrastructure works, including highways and services, necessary for the development of the entire site. Such contributions will be secured through planning conditions or other legal agreements."

28. In regard to this paragraph, the planning experts agreed that the local planning authority would have continued to ensure that any development on the KBP accorded substantially with an approved Master Plan. They also agreed that the Inspector had specifically considered the possibility of individual development coming forward within the planning process and that the provision of the proposed criterion (p) to Policy EC/7 did not place an embargo on such development although it was accepted that planning permission would not have been granted for any employment development on the reference land with vehicular access from Buckley Hill Lane. Any individual development that might have been permitted would, it was agreed, have had to contribute to the onsite and offsite infrastructure costs of the KBP by means of a s.106 obligation or other appropriate mechanism.

29. As to what had been criterion (p) in EC/6 relating to residential development and was reworded as criterion (o) in the draft to: "limited residential development may be acceptable provided it is appropriate in scale, location, access and design", the Inspector continued at paragraph 8.56 of his report in response to an objection on the grounds that any such development would be contrary to the sequential test set out in PPG 3 and would restrict the flexible use of the site:

"…KBP is a greenfield site although the areas identified in the masterplan for housing are reasonably well located in terms of their connections to local services and public transport links. I can see that the limited housing may well be necessary as enabling development, particularly in terms of the significant infrastructure costs that the development of the site may accrue. It may also assist the vitality of mixed-use areas on the Park. However, beyond this fairly limited contribution, the development of extensive housing would be inappropriate under PPG 3 and would restrict the flexible use of the site. The wording of criterion (o) is clear in that extensive redevelopment would not be acceptable and that the design and siting of limited residential development must be such that it would not compromise the overall objective of the Business Park."

The proposed wording of criterion (o) was thus confirmed.

30. The revised UDP was not formally adopted until June 2006 and the operative development plan therefore remained the original 1999 UDP. However, as the revised UDP had reached an advanced stage of preparation it was agreed that it would have been material to any planning application made at the valuation date.

Highways

31. Mr Wall and Mr Wooliscroft agreed, in respect of a limited residential development on the reference land with access off Buckley Hill Lane, that whilst the independent development of the reference land for these purposes had not been formally accepted by Rochdale Borough Council, the advice given by the council's highway officers was that it could not be recommended for refusal on highways grounds. If such a development were to achieve planning consent (whether for residential only on the 4.88 acres comprising part Plot X (Mr Wooliscroft's Option 2) or for a mixed use scheme incorporating business use on the remainder of the reference land with access for that off Kingsway (Option 3)), section 106 contributions in the region of £115,000 would have been required. These were improvements to the traffic light control system beyond the junction of Buckley Hill Lane with Elizabethan Way where the latter meets Bridge Street and

Rochdale Road (the Bridge Street Junction), bus stop upgrades and footway improvements to the Buckley Hill Lane Bridge over the Metrolink railway line.

32. It was agreed that Mr Wooliscroft's three proposed development scenarios (option 1 being employment only on the whole of the reference land, and therefore not relevant to this decision) included all or part of the adjacent CPO plot 12 – the narrow strip lying between plot 13 and the railway line.

Issues

33. The sole matter for us to decide in this reference is the value of the subject land as at 6 January 2006 in accordance with section 5, Rule (2) of the Land Compensation Act 1961. The principal dispute between the parties is whether or not the reference land enjoyed any value in addition to its existing use value (which itself is not agreed) at the valuation date. In that regard, the evidence and argument as to whether the land enjoyed any hope value to reflect development potential centred principally on the statutory and case law context within which the issue is to be determined.

34. We proceed therefore by considering firstly the legal and planning issues and, having drawn our conclusions from this, then turn to the question of value.

The Law

35. The basic principle in accordance with the Land Compensation Act 1961, section 5, Rule (2), and the words of Lord Romer in *Gajapathiraju v Vizagapatam* [1939] AC 302, at 312, is that the value of land shall be taken to be the amount which the land, if sold on the open market by a willing seller to a willing buyer, might be expected to raise. The seller should not be regarded as disinclined to sell, nor should the buyer be regarded as under any urgent necessity to buy. The parties are to be taken as behaving reasonably and being properly informed about the attributes of the property and the market for it. (See *Lady Fox's Executors* (1994) 2 EGLR 185). It is common ground that the valuation is to be at the valuation date, which is 4th January 2006, assessed on the facts and circumstances at that date, so far as the law permits.

36. The issue between the parties is, as we have said, whether the reference land has any development value or is only to be valued on the basis of its existing agricultural use. The value results from the demand for the land, which is a consequence of a purchaser's view of the uses to which he may be able to put it and when. As the President of the Lands Tribunal observed in the case of *RMC (UK) Ltd v London Borough of Greenwich* (2005), at paragraph 35:

"The assumptions that fall to be applied in valuing the reference lands are, on the one hand, those relating to the planning permissions to be assumed in respect of each of the sites and, on the other, those relating to any increase or diminution in value arising from the proposal to acquire each compulsorily."

37. The first step is to identify the appropriate planning status and assumptions at the valuation date.

Planning Assumptions

38. Section 14 (1) of the Land Compensation Act 1961 provides that:

"For the purpose of assessing compensation in respect of any compulsory acquisition, such one or more of the assumptions mentioned in sections 15 and 16 of this Act as are applicable to the relevant land or any part thereof shall be made in ascertaining the value of the relevant interest."

39. Section 15 is not relevant as planning permission for the scheme underlying the order existed at the valuation date.

40. The parties now agree that KBP was not land subject to ‘comprehensive development proposals’, given the special meaning of those words, within section 16 (4). Therefore, the relevant parts of Section 16 are:

“(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.”

and

(6) Where in accordance with any of the preceding subsections it is to be assumed that planning permission would be granted as therein mentioned—

(a) the assumption shall be that planning permission would be so granted subject to such conditions (if any) as, in the circumstances mentioned in the subsection in question, might reasonably be expected to be imposed by the authority granting the permission, and

(b) if, in accordance with any map or statement comprised in the current development plan, it is indicated that any such planning permission would be granted only at a future time, then (without prejudice to the preceding paragraph) the assumption shall be that the planning permission in question would be granted at the time when, in accordance with the indications in the plan, that permission might reasonably be expected to be granted.

but then, significantly:

(7) Any reference in this section to development for which planning permission might reasonably have been expected to be granted is a reference to development for which planning permission might 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.

41. Section 16(7) enshrines what has been called the ‘cancellation assumption’ since the House of Lords considered the same words in section 17(4) in the case of *Fletcher Estates v the Secretary of State [2002] 2 AC 307*. It was held that the scheme must be assumed to have been cancelled on the relevant date. Apart from that, as Lord Hope said, “no assumption has to be made as to what may or may not have happened in the past.” (Para.105). This left open the question how much of the scheme should be assumed to be cancelled.

42. An answer was provided by the Tribunal in the case of *Thomas Newall Ltd v Lancaster City Council* [2010] UKUT 2 (LC) [Thomas Newall 1]. In that case the Lands Chamber had to consider certain preliminary issues, the first of which was whether, for the purposes of section 16 of the 1961 Act, it should be assumed that a certain planning permission would be granted. In order to determine that issue the Lands Chamber had to decide what assumptions should be made as to the factual background. In particular whether it should be assumed that the acquiring authority’s proposals underlying the compulsory purchase order had been cancelled and, if so,

how much of the authority's proposals should be ignored – the whole scheme for the area or only as much of it as affected the reference land? (See paragraphs 4-10.) The claimant submitted that the correct approach was that the whole scheme had been cancelled and (see paragraph 25) more generally argued that the effect of the *Pointe Gourde* principle was that the assumption to be made was that no land was proposed to be acquired pursuant to the acquiring authority's scheme. It was submitted that *Spirerose* supported that argument.

43. The Lands Chamber rejected that argument, distinguishing *Fletcher Estates* and *Urban Edge Group Ltd v London Underground Ltd* [2009] RVR 361 as being linear transport proposals. (The Lands Chamber plainly considered *Waters v Welsh Development Agency* [2004] UKHL 19 but did not make any express reference to it in their decision). In dealing with the statutory assumptions to be derived from section 16(7) they said (paragraph 28):

"…. 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 **the relevant land** were proposed to be acquired (Emphasis added)"

44. The Lands Chamber did not consider that reliance on the *Pointe Gourde* principle entitled an assumption to be made that the whole scheme was to be disregarded (see paragraph 29). *Spirerose* gave no support for such a submission. They said (paragraph 30):

"30. In our judgement 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) or 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 (the) *Rugby Joint Water Board* case and see also *Myers v Milton Keynes Development Corporation* [1974] 1WLR 696 at p702. 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 All ER 864."

45. It may be helpful to say something about the case of *Transport for London v Spirerose* [2009] UKHL 44, referred to as *Spirerose* above. That case seems to us to be little direct assistance on the issue of the cancellation assumption but it is of some relevance in considering the proper interpretation of the *Pointe Gourde* principle in the light of the *Waters* case. The issue was whether, where the success of an application for planning permission was probable but not a certainty, compensation should be assessed on the basis that planning permission would be granted or whether compensation should be discounted to reflect a degree of uncertainty (see Lord Scott at paragraph 1; Lord Walker at paragraph 27; Lord Collins at paragraph 66). The conclusion of the House of Lords was that the *Pointe Gourde* principle gave the lower courts no support for the proposition that the probability of permission should be treated as a certainty. In the course of their examination there was analysis of the juridical basis of the *Pointe Gourde* principle and some discussion of the *Waters* case (see particularly Lord Collins at paragraphs 127

to 129). After pointing out that the *Pointe Gourde* case provided no basis of authority or principle for the conclusion reached by the lower courts, Lord Collins continued (in paragraph 129):

"…*Waters v Welsh Development Agency* is an example of an extended interpretation of the concept of value in the context of determining the extent of a scheme in order to give effect to a Parliamentary intention to provide dispossessed owners with a fair financial equivalent: see at [61]. The underlying basis of the decision in *Waters* is that the extent of the scheme to be ignored for the purposes of valuation is not limited by the express provisions of section 6 and schedule 1. It does not go further, and does not support the conclusion of the Court of Appeal."

46. The claimants can fairly claim the support of paragraphs 24 to 31 of *Newall* in support of the submission that in the present case regard is to be had to the Acquiring Authority's underlying KBP proposal at the stage of considering the planning assumptions to be made. Indeed we do not think that this is contested by the acquiring authority. We agree. The assumption required by section 16(7) must be taken as far but no further than its language warrants. It is also important not to elide the stages of first identifying the planning status and then, when seeking to value on that basis, applying the 'disregards' to the result.

Disregards

47. A picture of the planning prospects that will be in the minds of the willing purchaser and seller will emerge from the analysis of the planning status. From this picture a judgement may be made about what would be offered and accepted for the land. But this judgement must then be adjusted by disregarding particular elements of actual or prospective development so far as they affect the value of the land. The disregards are to be found in section 6 and Schedule 1 of the LCA 1961 and in the *Pointe Gourde* principle. Section 6 reads:

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

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

FIRST SCHEDULE
Part I
Description of Development

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

48. In the case of *Waters v Welsh Development Agency* [2004] UKHL 19 the House of Lords decided that the *Pointe Gourde* principle applied as a principle of law and was not limited by the statutory provisions. The *Pointe Gourde* principle applies to any increase or decrease in the value of the subject land that is wholly attributable to the underlying scheme. The underlying scheme might well include a great deal more than the land involved in compulsory acquisition. That is well illustrated in the *RMC* case where the parties had identified 'the scheme' as encompassing either

181 acres or 294 acres, whereas the land included in the compulsory purchase order, and thus the subject of the statutory disregard, only amounted to 19 acres. (*RMC* case, paragraph 39).

49. The House of Lords in *Waters* considered that the *Pointe Gourde* principle had come to be applied too widely and should be restricted in its application (see Lord Nicholls at paragraph 56 and Lord Brown at paragraph 148).

Lord Nicholls said:–

"59. The extent of a scheme is often said to be a question of fact. Certainly, identifying the background events leading up to a compulsory purchase order may give rise to purely factual issues of a conventional character. But selecting from these background facts those of key importance for determining the ambit of the scheme is not a process of fact-finding as ordinarily understood.

60. Take the present case. The purpose for which the claimants' land was acquired can be identified at two different levels of generality: for use as a nature reserve, or for use as a nature reserve to compensate for loss of the Taff / Ely site of special scientific interest through construction of the Cardiff Bay barrage. Factually each of these stated purposes is correct. Which of these purposes is to be regarded as the more appropriate when identifying the scheme within the meaning of the *Pointe Gourde* principle is a matter for the tribunal's judgement.

61. A similar judgemental exercise is required with regard to the works said to comprise one scheme for the purposes of the *Pointe Gourde* principle. When deciding, for instance, whether a phased development constitutes a single scheme or more than one scheme the tribunal will consider all the circumstances and decide how much weight, or importance, to attach to the various relevant features. The tribunal will attach to these features the degree of importance it considers appropriate having regard to the purpose of the *Pointe Gourde* principle. What, then, is the purpose of this principle? Its purpose, in separating 'value to the owner' from 'value to the purchaser', is to forward Parliament's objective of providing dispossessed owners with a fair financial equivalent for their land. They are to receive fair compensation but not more than fair compensation. This is the over-riding guiding principle when deciding the extent of a scheme.

62. This statement of general principle does no more than articulate the approach already adopted intuitively by tribunals when faced with making a choice between competing views of the extent of a scheme in a particular case. It is to be hoped that bringing this principle into the open will assist decision-making in difficult cases.

63. In applying this general principle there is of course no magical detailed formula which will provide a ready answer in every case. That is in the nature of things, circumstances varying so widely. But some pointers may be useful. (1) The *Pointe Gourde* principle should not be pressed too far. The principle is soundly based but it should be applied in a manner which achieves a fair and reasonable result. Otherwise the principle would thwart, rather than advance, the intention of Parliament. (2) A result is not fair and reasonable where it requires a valuation exercise which is unreal or virtually impossible. (3) A valuation result should be viewed with caution when it would lead to a gross disparity between the amount of compensation payable and the market values of comparable adjoining properties which are not being acquired. (4) When applied as a supplement to the section 6 code, which will usually be the position, the *Pointe Gourde* principle should be applied by analogy with the provisions of the statutory code. Thus in the class 1 type of case the area of the scheme should be interpreted narrowly, for instance, so as to embrace the property acquired under the compulsory purchase order and property which would probably have been so acquired had it not been bought by agreement. In other cases, such as case 2, Parliament has spread the 'disregard' net more widely. Then it may be appropriate to give the scheme a wider

scope. (5) Normally the scope of the intended works and their purpose will appear from the formal resolutions or documents of the acquiring authority. But this formulation should not be regarded as conclusive. (6) When in doubt a scheme should be identified in narrower rather than broader terms."

50. Mr Humphries' submissions on the extent of the disregards were uncompromising and essentially simple. He submitted that one should ask "would that development have come forward if the authority had not acquired any of the land?" The answer to that he said must be no. Then, he asked, "does the rest of the compulsory purchase land increase the value on the relevant land?" The answer to that is clearly yes. And "would the rest of the development on the KBP land have come about anyway?" To this, he submits, the answer is no clearly not. That is the scheme that the law requires to be disregarded. It is the whole of the KBP proposal. All of the permissions are required to bring about the comprehensive development that comprises the KBP scheme. Once that is disregarded, all value is removed from the reference land other than its existing value. Any additional value would mean that the reference land was taking advantage of the underlying and partly publicly funded scheme.

51. Mr Kingston by contrast had less to say about the disregards or the *Pointe Gourde* principle. He stressed that what had to be disregarded was the value attributable to so much of the development 'as would not have been likely to be carried out' in the absence of the acquisition. On the facts he submitted that a significant amount of development would have been likely to be carried out in any event and it was that that the claimant said gave extra value to the land. So far as *Pointe Gourde* was concerned, he relied on Lord Nicholls in *Waters*, particularly his principle 4, that applied as a supplement to the section 6 code, which was the case here, the scheme should be interpreted narrowly and not extend the disregard further than the statutory provisions took it. He emphasised that it was for the tribunal to find as a matter of fact what the scheme was.

The Nature of the Exercise

52. The impulse not to move any further away from reality than the law compels is evident in the cases. It is a powerful impulse which we share; but it seems impossible to avoid considering life in at least two parallel universes: the 'cancellation assumption' universe and the 'disregard the scheme' universe (called "no KBP" for short).

53. Both parties focused in their evidence and submissions upon the prospects of a purchaser obtaining a residential permission on the reference land in those two different situations. The "cancellation universe" assumed that the compulsory purchase orders on the reference land had been cancelled but that access could be obtained through the KBP. In that situation it was broadly agreed that the reference land might indeed have some potential hope value for residential development.

54. The claimant said it would be substantial. The acquiring authority maintained that any such hope value would be much reduced, probably to nil, because the planning authority would not be prepared to grant a permission that did not conform with the master plan requirements for phasing, which would delay residential development, or make a very substantial financial contribution to the infrastructure of the KBP. Finally, the acquiring authority submitted, any such value that remained should be disregarded as a matter of law.

55. The second situation was postulated in order to consider what value the reference land might have if the law required that the whole of the KBP proposals had to be left out of consideration. That situation was chiefly one where permission was being sought for a development with access from Buckley Hill Lane, although we do not think the claimant completely abandoned the possibility that in the "no KBP" universe a purchaser would still contemplate the development of a business park by another scheme.

The Evidence and Submissions on the Planning Assumptions

56. Mr Frampton, for the claimant, drew attention in his evidence to the identification as at April 2002 of plot X as part of the housing land supply which was being relied upon to resist development on a new greenfield sites. The site was a commitment for new housing at the valuation date. The UDP Inspector had said that his view was that the assessment of the commitment element of the supply, including plot X, was "fairly robust". One of the purposes of the Urban Potential Study 2005, with a base date of 14 April 2004, was to estimate the likely level of land that could realistically come forward for housing within the next 5 to 15 years. The study adopted a "Priority Area approach" to identify potential sites for future housing. One criterion was to draw an 800 m radius from "key public transport interchanges". The reference land was within such a radius from Milnrow Station and was considered to be within the defined urban area as designated in the UDP. In the full list of sites, plot X of the KBP was recorded as being "likely" to come forward within 10-15 years. Mr Frampton said that the time horizon in that document was not determinative. He considered that it would be seen as perfectly possible that residential development would come forward earlier than that timescale. He felt that it had been put in the 10 to 15 year category because the planning officers had looked at the development framework and seen that plot X fell in phase 5 of the framework. He noted that plot S had actually come forward early, although it was also within the 10 to 15 year period. He pointed out that there was nothing in EC/6 or EC/7 that precluded individual development nor was there anything to justify it being regarded as simply "enabling development" and a necessary evil. It was evident from the framework, which had been incorporated into the planning permission, that the ancillary uses, including residential, were there to ensure the "vitality" of the business park. Mr Frampton's opinion was that residential development would add to the vitality of the business park. It would to its attraction. It would not be inconsistent with development policy. There would be no harm to the underlying purposes of the interim housing policy. That was intended to reflect the advice of PPG 3 and declared that it would not be prudent to release further greenfield land beyond that already committed. However, Mr Frampton noted, the land on plot X was already committed.

57. At the valuation date, with KBP but on the cancellation assumption, the planning policies and permission would have meant that the reference land would have had significant hope value attached to it. He drew attention to the illustrative layout plan showing a 60 dwelling layout, 56 of which would be on the reference land, 4 on the nib, with access from Buckley Hill Lane. Such a development would not prejudice the development of the remainder of plot X or the reference land. Mr Frampton did not accept that any value would have been sucked away by a requirement to make a substantial contribution to the infrastructure of the KBP. By the valuation date the funding was in place for that infrastructure, much of it was either built or building and the collaboration agreement had become unconditional. A contribution might be expected from a development with access onto Kingsway but it would be negotiated on the basis that it should be reasonably related in scale and kind to the development. The planning authority would have had no warrant for demanding an excessive sum. Nor would there be any justification for an over-strict insistence upon compliance with conditions in circumstances where the cancellation assumption meant that achieving development in the northern part of KBP would have to become a matter of cooperation and negotiation. In summary Mr Frampton said –

(i) Residential development on the reference land would provide appropriate separation between existing residential development and proposed business uses;

(ii) Early residential development would provide confidence for the market for this important, strategic site;

(iii) There was scope to provide aspirational housing to attract future senior employees;

(iv) There would have been no prejudice to the future development of KBP;

(v) There would be no financial impediment by reason of contributions to existing infrastructure because there could be no lawful basis upon which to require those contributions;

(vi) There would be no objection to the use of land fronting Buckley Hill Lane for residential development, as he believed the acquiring authority agreed;

(vii) With substantial infrastructure on the KBP land, but no CPO on the reference land, there would have been planning advantage in bringing forward development on that land.

58. Indeed, even absent the KBP scheme, Mr Frampton believed that, at the valuation date, on the basis of the policy development to that point there was a prospect that residential development of part of the reference land would come about anyway, with access to Buckley Hill Lane. The same planning arguments would largely apply. If the development was independent of the KBP land there would be no justification for any contribution to the KBP infrastructure. He did not accept that it could properly be regarded as back-land development. The nib had a frontage of 52 m to Buckley Hill Lane. The land was not in the green belt, it was out of any protected corridor, it was sustainable, it was in a priority area and there was no technical constraint for up to 74 houses. He considered it would be perverse to suggest that it would not be developed.

59. Mr Frampton was cross-examined about the refusal of permission on 18 December 2002 on an application (02/D40001) by A and J. Nall and Mrs Turner for 50 dwellings with an access off Buckley Hill Lane. It was put to him that this was a "real world" refusal for what he was contemplating. Mr Frampton examined the reasons for the decision. They were largely based upon the failure to comply with policy EC/6 but there was no adequate explanation of the harm that would be done to that policy by such a development and he did not feel that the reasons could be justified. It was wrong, in reason number 5, to apply a sequential test under PPG 3, given the policy status that Mr Frampton had already set out. Mr Frampton agreed with Mr Massie that the nib would have had significant development potential at the valuation date.

60. The claimant drew attention in submissions to the points Mr Frampton had made in his evidence about the extensive planning history, particularly Policy EC/6 of the 1999 UDP and the way that became modified in policy EC/7 of the 2006 UDP. It was agreed that, although the 2006 UDP had not been adopted at the valuation date, it had reached a very advanced stage and would have been accorded very considerable weight. It was pointed out that there was no requirement in either EC/6 or EC/7 that the housing element would be restricted to enabling development. Mr Singleton had agreed in cross examination to most of the salient points on the policy background. The reference in both policies to strict application of the criteria should not have prevented the planning authority from taking a sensible view of the purpose of the policies in the light of all the circumstances at the time of the application. The acquiring authority's real difficulty was identifying the harm that would flow from a grant of planning permission. There would be no harm to the underlying purpose of the policy. The CPO had been confirmed because at least, in part, the acquiring authority had told the inspector that it was vital to have the reference land. In a "cancellation assumption" universe the planning authority would not have the reference land, but it would still be important to the KBP to incorporate it by agreement if it could. That would be a material consideration that the planning authority would correctly take into account in deciding what permission to grant. It would also be a very material change from the circumstances in which the Nalls' 2002 application and the section 17 certificate application were refused.

61. The planning permissions that were granted in December 1999, which included in permission D 35130 references to housing plot X, were to be taken into consideration under section 16 under the cancellation assumption.

62. Mr Frampton's evidence about the prospect of planning permission for a residential development remained sound in a "no KBP" universe he said. If the tribunal were driven to contemplate a "no KBP" universe in which it was to disregard the physical reality of the KBP site's installed and

committed infrastructure, it remained a fact that an independent access could be achieved from Buckley Hill Lane. The evidence suggested that this could be done either through the nib or by the acquisition of two of the existing houses.

63. The acquiring authority, through Mr Singleton, argued that the reference land is "back land" with no direct access to the highway. The hypothetical purchaser considering development independently of the wider comprehensive scheme would face the problem that he would need to buy other land to obtain access. To the price he would have to pay for the reference land he would have to add the cost of purchasing the land for an access, the prospect of obtaining planning permission for that access and the holding costs involved in keeping the land until permission was obtained. For there to be any "hope" value in the reference land on the basis that some form of independent development might be permitted, that is development not deriving its value from the scheme, there would need to be a very high prospect of planning permission granted and that high prospect would have to be at or very shortly after the valuation date. Any other outcome would result in the costs of purchasing and holding the access land, and indeed the reference land, wiping out any hope value in the reference land.

64. We were urged in submissions to put no weight on the offer Mr Massie made for the reference land. He was under pressure to dispose of an objection to the CPO enquiry if he could do so. It should be borne in mind that compensation is to be determined by reference to the price which a willing vendor might reasonably expect to obtain from a willing purchaser. The price a purchaser with an urgent necessity to buy might offer is not the test. The claimant's purchase of the reference land and the nib for £1.25 million might support the proposition that a hypothetical purchaser would pay more than existing use value to implement part of the actual planning permission in accordance with the overall comprehensive scheme, but that extra value would have to be disregarded.

65. Mr Singleton had stressed the conditions attached to the KBP planning permission. He particularly emphasised the requirements in conditions 1.7 and 1.12 that the development should be carried out in substantial accordance with the principles, proposals and layout in the development framework and Master Plan. Phasing was to be in accordance with the framework (condition 1.13) and various enhancement and landscaping works were to be done before the implementation of particular phases. Policy EC/6 would have been strictly applied. Mr Humphries referred us to section 38 (6) of the Planning and Compulsory Purchase Act 2004 and the requirement that "the determination must be made in accordance with the plan unless material considerations indicate otherwise." He referred us to the judgement of Lord Clyde in *City of Edinburgh v Secretary of State for Scotland* [1997] 1 WLR1447 to support the proposition that there was a presumption that the development plan would govern the decision unless the applicant could show that there were material considerations in the particular case that indicated the contrary.

66. In both evidence and submissions particular criteria of policy EC/6 were emphasised. Criterion (j) required vehicular access to be from Kingsway and junction 21 only. 'Independent' development of the reference land would clearly conflict with this criterion. It was submitted that the claimant had not justified any departure from this criterion. There was a well recognised junction capacity problem at the Bridge Street and Elizabethan Way signalised junction. Residential development on the reference land with vehicular access on to Buckley Hill Lane would put more traffic through that junction. Mr Wooliscroft's analysis had assumed a completion date in 2008 and that the KBP development did not exist. He had simply looked at changes in percentage flows. This was inadequate for this difficult junction which was crucial to the delivery of the KBP scheme. In those circumstances the planning authority should strictly apply criterion (j). That would be consistent with the Nall application refusal, reasons 1 and 2. While it is correct that there was no highway impact reason for refusal in the Nall decision, the CPO had not actually been promoted at that stage. In the officer's report on the application for a section 17 certificate (paragraphs 10.5.5 and 10.5.6) there had been no highway objection but no allowance had been made for KBP.

67. We pause to note that what the officers said in that report was that on the basis of 60 houses with access off Buckley Hill Lane –

> "The conclusion that was reached in our capacity as Highway Authority was that as a **stand-alone** development it could not be recommended for refusal. This was subject to a section 106 agreement for minor improvements to the junction of Bridge Street and Elizabethan Way to leave it in a no worse state. These were for the installation of an intelligent traffic signal control system such as MOVA and modifications to the signal timings as suggested in the TIA. In my opinion that squeezed the last improvements out of the junction that are possible without substantial work to the junction. It should be noted that the TA made no allowance for Kingsway Business Park as in our opinion should the application (D40001) have been successful the Business Park would not be constructed and hence have no impact on the Bridge Street/Elizabethan Way junction."

68. Mr Wall pointed out that on the basis of the conditions at the valuation date the developer of KBP had no intention of opening the spine road early to through traffic. Thus, on the cancellation assumption, the council would have known that there would be up to 90,000 m^2 of development from junction 21 which would have taken up any spare capacity remaining at the Bridge Street/Elizabethan Way junction.

69. EC/6 criterion (l) required that any individual development must be compatible with the overall objective of a Strategic Business Park and must not constrain a comprehensive overall development or the provision of a satisfactory highway link. Mr Singleton explained that he considered that this meant not only physical constraints but also other constraints including financial contributions to the provision of infrastructure. At the valuation date the failure of an independent development on the reference land to contribute to the wider infrastructure would constrain the comprehensive overall development and damage the viability of the scheme. It was pointed out that it was such an argument that was part of the reason why the CPO inspector rejected the claimant's objection and this was explored in some detail in evidence with the structure of the JVA being explained. An independent development on the reference land would make no contribution whatsoever towards the overall infrastructure costs of the KBP.

70. Criterion (p) required that limited residential development should be part of a comprehensive development scheme for predominantly business uses. That would be a further fundamental objection to 'independent' residential use.

71. In summary, submitted Mr Humphries, there would have been a strong development plan objection to any independent development on the reference land and similar points would be made on the basis of the emerging draft policy EC/7. In addition there would have been an objection based upon PPG 3 and the interim housing policy to any development of the reference land that was not in accordance with policy EC/6 and the comprehensive outline planning permission. The council, it was submitted, was not relying upon any part of projects coming forward within a three or five-year period from the valuation date.

72. The criteria in EC/6 and EC/7 had plainly been important in the considerations of the replacement UDP inspector and the CPO Inspector. It would be wrong to apply the cancellation assumption in such a way as to suggest that there would be any weakening of the emerging development plan policy.

73. Mr Singleton said that it was clear that the large infrastructure works necessary to open up the KBP site could not have come forward without public funding. Any planning permission on the retained land as part of the KBP would derive its value from the existence or prospect of development of that infrastructure.

74. Mr Singleton's opinion was that the prospects of planning permission for an early residential development outside the development plan would be small. He answered Mr Frampton's summary points in favour of a grant of permission in the following way.

75. Safeguarding the amenity of the houses on Buckley Hill Lane by the separation of that residential area and the business uses offered no advantage compared with the planned provision of landscaped bunds between the different elements of KBP.

76. He did not agree that an early start would be any benefit to market confidence. It was a start on a high quality business park that the market wanted to see. In any event at the valuation date significant progress could be seen on the ground. A start on a small part of residential development would have provided no contribution; indeed it might even been seen as a disadvantage. There would be no protective effect for other greenfield sites; on the contrary the planning authority's position might be disadvantaged.

77. Nor would aspirational housing be much of an advantage. A handful of senior executives might choose to live there, but it would not be of significance. Against that should be set the fact that phasing would pass out of control of the developer and residential development might not be brought forward at the best time.

78. He did not think that there would be advantage in early provision of mixed development. Housing was supposed to be complementary to the business park and support it. Insofar as earlier provision of the Entwhistle Bridge was claimed as an advantage, it could be achieved any way and the advantage would be extremely limited.

79. Mr Humphries acknowledged that, on the cancellation assumption, the value of the reference land "could be considerable, depending on its contribution to overall infrastructure costs." He added that "it is accepted of course that the hypothetical purchaser might pay more than existing use value for the reference land to develop it as part of the KBP scheme." But his simple point was that such value had to be disregarded. That was not a matter of valuation judgement – it was a matter of law.

Consideration: the Cancellation Assumption

80. The cancellation assumption requires the Tribunal to imagine all the facts on the ground and all the planning permissions, plans and potentialities as they were at the valuation date but to assume that the compulsory purchase order on the reference land, and only on the reference land, had been cancelled. That, of course, can have a significant effect upon some of the planning assumptions. In the present case it is to be assumed that the KBP had been begun in accordance with the Master Plan. The junction with the motorway, the central spine road and part of the southern loop road were built or in the course of construction, and some development had already begun. Part of the northern loop road at the western end had also been started. It was too late for the developer to pull out of its commitments to build out the KBP according to the master plan.

81. If that had actually happened it would at least present the authorities responsible for developing the KBP with major challenges. At worst it might be regarded as a disaster. Planning judgements could not be unaffected by the change. The planning authority would be as anxious as the developer to see as coherent a development as possible as much in accordance with the master plan as could be achieved. However neither the planning authority nor the developer could simply impose its will. The owner of the reference land could always refuse to do a deal. For that reason it seems to us quite unrealistic to suppose that, much as it might wish to do so, the planning authority could extract a contribution to the infrastructure of the business park that was so substantial that it would remove most of the potential profit from the reference land. Mr Humphries submitted that it would be wrong to suppose the development plan would be weakened. In our view this is to miss the point: it is not suggested that the development plan policy would be "weakened" but in a cancellation assumption universe those policies could not be applied to the reference land as if nothing had happened and the compulsory purchase order had been confirmed. It might not be wise to insist strictly on elements of the plan, such as the timing of the housing development, that may have made sense when the developer was confident of building the northern loop road at an appropriate stage, but which would make less sense if the

strict insistence of the planning authority on the letter of the policies left the owner of the reference land with no incentive to do a deal that would enable the northern loop road to be built. There would have to be a sensible negotiation on the basis that both the planning authority and the owners of the reference land had an interest in achieving a planning permission that would contribute towards an appropriate development of the reference land. For the same reason there would be more scope for debate about the conditions to be imposed upon any development on the reference land and the timing of it.

82. In brief summary, our view of the planning assumptions to be made on the basis of the cancellation assumption is that the owner of the reference land would perceive himself to be in a stronger rather than a weaker position and would have a well nourished expectation of some housing development on the reference land within a reasonable time.

83. Indeed, in the 'cancellation assumption universe' it would have been very much as if the claimant's objection to the compulsory order had succeeded. The £1.25 million price the claimant paid the Nall family for the reference land, subject to the proposed CPO at the time, and the nib, is a transaction that gives some indication of the level of value of the reference land, as long as it is borne in mind that the value of the Nib would have to be deducted and that there must have been a significant discount to reflect the chance that the CPO would might not be confirmed. The 'without prejudice' offer of £1million for the reference land and the Nib made by the NWDA seems to us to be consistent with a substantial market value against a background of uncertainty about the success of the CPO. Mr Massie gave evidence that he was, at that stage under pressure to settle the Nall's objection to the CPO and, of course, that price included the Nib, to which he attributed the value of £770,000, leaving £230,000 for the reference land. It was argued that this pressured transaction was of no evidential value to us. In our view it may not be a transaction capable of bearing much weight, but it is not wholly without significance. Whatever Mr Massie wanted to offer, and whatever his motives for offering it, he knew that to have a chance of success he would have to offer a sum that would be competitive in a real market. What he did actually offer is comparable to the sum actually paid. That offer is consistent with a view of the value of the reference land and Nib under the shadow of the CPO. In a world where the shadow of the CPO over the reference land had finally and permanently lifted, it is difficult to see how the value of the land could possibly be lower than those levels. We consider that in a cancellation assumption world the reference land would have had a substantial value.

84. However we do not seek to quantify that value because we agree that so far as it is attributable to the KBP scheme, it must be disregarded.

The Nib

85. It appears to be common ground between the parties that there would be a good prospect of development on the Nib. This would make it valuable in its own right. The ownership of the Nib needs some explanation. By an agreement dated 11 November 2004 J S Bloor (Wilmslow) Ltd, the claimant, transferred the Nib for no consideration to JS Bloor (Tamworth) Ltd, an associated company. The agreement imposed restrictive covenants. The restrictions defined a boundary strip and the transferor undertook not to construct any access over it and, importantly, not to use the retained land or any part thereof for any purpose other than agricultural land or grazing land. As Mr Humphries pointed out, in circumstances where it is assumed that the purchaser of the reference land (the retained land) would need to purchase an access to Buckley Hill Lane, the owner of the Nib would be in an extremely strong position. He could insist upon being bought out at a ransom price and would be invulnerable to the threat that the prospective purchaser of the reference land might achieve an access to Buckley Hill Lane by some other means, for example by purchasing two of the existing houses, because he could use his restrictive covenant to prevent any development at all on the back land. However the parties initially appeared not to have accorded it any significance, having assumed that the restrictive covenants would be released or modified for no consideration in the event of the claimant wishing to develop the retained land. Given that, unless the restrictive covenants were first released, no reasonable hypothetical

purchaser would pay anything other than existing use value for the land and the whole argument about hope value would be pointless, we think it is a reasonable assumption to make that the restrictive covenants would be released between the two companies in any event and we need say no more about it.

The Disregards

86. In section 6(1) and the first Schedule Parliament has attempted to specify the element of value that must be disregarded. Our task must be to interpret those provisions and to apply them in accordance with what we understand to be their meaning. The effect of section 6 and Schedule 1, case 1, is that there must be left out of account any increase or decrease in value of the reference land that is attributable to the development or prospect of development of the other land subject to the compulsory purchase order for the purposes of the acquisition and which would not have been likely to be carried out without compulsory acquisition. In this case, because the compulsory purchase order area included the whole of the KBP scheme up to the highway boundary of the motorway (but not including the motorway junction; see drawing CPO/001, revision H, attached to the CPO), that means the development of the whole scheme. But that disregard only has effect if and so far as the increase in value would not otherwise have been likely to come about if the authority had not acquired and did not propose to acquire any of 'that land', meaning "any of the land authorised to be acquired". "**Authorised** to be acquired" must mean actually authorised by the existing compulsory order. This is a point of some significance in this case because of the long history of policies and proposals to develop this land for a business park, which might have given rise to some hope that there would ultimately be a major development on the site, even disregarding the KBP scheme itself.

87. What if the authority had acquired part of "of that land" on an earlier occasion, for example, to build the motorway junction? Lord Nicholls in his pointer (4) in *Waters* refers to applying the *Pointe Gourde* principle by analogy with the provisions of the statutory code; for example, with the area of the scheme being "interpreted narrowly, for instance, so as to embrace the property acquired under the compulsory purchase order and **property which would probably have been so acquired had it not been bought by agreement**." (Our emphasis.) It seems to us that Lord Nicholls thought that property bought by agreement but which would have been bought by CPO if necessary, would not be caught by section 6 but might be by *Pointe Gourde*. While this statement is *obiter dicta*, it is interesting and persuasive.

88. We are therefore led to consider whether the development of the reference land would otherwise be likely to be carried out.

89. We think that simply on the cancellation assumption there would have been a reasonable prospect of some residential development on the reference land with access from a northern loop. However, it would seem that such an increase in the value of the relevant interest would have to be disregarded. It would be unequivocally attributable to the development of part of the land authorised to be acquired other than the relevant land, and it would not have been likely to be carried out in the absence of the acquiring authority's proposals to acquire the land for such a road.

90. The next challenge for us is to decide whether that question is answered on the basis of what was on the ground at the valuation date, or whether ignoring the increase in value brought about by the development of the "other land" means in effect ignoring the development of the "other land" altogether. To take the example of the KBP: if there had been no development at all on any of the KBP area, so that the reference land was not physically surrounded by development or the prospect of development (subject to arguments about the effect of the planning policies), development of the reference land might be thought less likely to be carried out. Is the conclusion to be drawn from that that, to a degree, the carrying out of development on the "other land" has increased the value of the relevant interest, and that increase must be disregarded? We think the answer to that must be yes.

91. We remark at this juncture that it does not seem to us to be a case where the *Pointe Gourde* principle has anything to much add. This is not a case where the statutory disregards would produce a much narrower answer than the *Pointe Gourde* principle (as, for example, in the *RMC* case). That is because the "other land" included in the compulsory purchase order does encompass all the land that could be described as "the scheme". There is little point, therefore, in considering whether it would make a difference to the extent of the disregards whether the *Pointe Gourde* principle is given a wide or a confined meaning. In this case so far as the *Pointe Gourde* principle has any application it would only be as a supplement to the section 6 code and as such it is not needed. The statutory code, it seems to us, in the circumstances of this case, gives the whole answer. The *Pointe Gourde* principle cannot operate to narrow the statutory code.

92. A powerful head of planning steam had built up behind the prospect of a business park development on the reference and other land in any event. Other plans had been put forward, had looked promising but had come to nothing. We have no doubt that if the KBP scheme had failed the planning policies of the area would have continued to support such a development and the authorities would have done their best to bring another scheme forward. So we accept Mr Frampton's evidence that such a development might have been anticipated by a purchaser, even in the absence of the KBP scheme. In that planning context there might well have been some prospect of residential development on the reference land eventually. But in our view the prospective purchaser would perceive the chances as slim and the possible delays as substantial. It would have been regarded as a long shot and on its own would not have added much, if anything, to the existing use value of the reference land. In our view that must be disregarded.

93. The only development that would produce an increased value on the reference land which would not have to be disregarded under the statute would be a 'likely' development that took no part of the "other land". In other words that would have to be a development which took its access from the existing Buckley Hill Lane.

94. In arguing that there would have been little prospect of permission for residential development on the reference land taking access from Buckley Hill Lane, the acquiring authority put a lot of weight on the refusals of the Nall planning application and section 17 certificate application. They argued that the same policy objections based upon EC/6 and emerging EC/7 would carry weight. There are, of course, specific arguments to the contrary which were raised by Mr Frampton, based upon the planning authority's failure to explain with any particularity or persuasiveness why such a permission would damage the underlying objectives of the policies. But there is, it seems to us, another point that requires consideration in the context of the disregards. The statute requires that what should be left out of account in assessing the value of the reference land is any increase <u>or diminution</u> attributable to the acquisition of the other land for the purposes of the order. *Point Gourde* is to similar effect so far as the "scheme" is concerned. It is to try and understand what valuation effects do flow from the scheme that it is necessary to visualise a 'no KBP' universe.

95. When it comes to considering a residential development with access from Buckley Hill Lane no increase in value due to KBP should be taken into consideration. For example improved access to the area due to the KBP infrastructure should be left out of account, as should, perhaps, any claimed advantage that the proposed residential development would have in screening the KBP development from the existing houses. But, by the same token, any disadvantages arising from the KBP development should also be left out of account. Thus, it seems to us that it cannot be said against an independent residential development in the "no KBP world" that it would face a traffic objection because the KBP traffic would need and use up existing highway capacity. To take that into account would be to permit a diminution of the value of the reference land which would be attributable to the scheme. In the same way, a policy objection based upon a failure to make a substantial contribution to the infrastructure of the KBP scheme or a failure to comply with the KBP development plan is also something that, it seems to us, must be left out of account. That is not to say that there might not be a broader and more general policy objection along the lines that development of the reference land could potentially prejudice the conception of some

future scheme, but such an objection would be very different in weight to the situation where the planning authority is seeking to relate the policy and the objection based upon it to a specific scheme which is just starting to get off the ground.

96. For those reasons it does not seem to us that we should attach much weight to the refusals of either the Nall application in 2002 or the section 17 application. The reasons for those refusals rely almost exclusively upon policy EC/6 and the need to bring about a comprehensive and properly funded KBP scheme. In a universe where there is no such scheme, while accepting that the planning authority would not wish to do anything to impede a substitute plan, those reasons for refusal would have to be very carefully reconsidered and might carry much less weight. The possible exception is the reason for refusal based upon the sequential development of a greenfield site, which might gain more force in the absence of any active scheme for a business park. However such a reason would have to consider very carefully the extensive policy support for residential development on part of the reference land. There would be a reasonable argument, in our view, in favour of permission in those circumstances.

97. It was evident from our site visit that there has been development off Buckley Hill Lane in the comparatively recent past on its eastern side. The long history of the identification of the land of which the reference land forms part for substantial development would weaken a PPG 3 greenfield objection to a residential development on the west side of the lane, incorporating the nib. It was agreed between the highway witnesses that a substantial number of houses could take an access on to Buckley Hill Lane although the witnesses differed as to whether the maximum would be 60 or 74. For the reasons we have just given we think we should give less weight, in considering the prospects of this hypothetical permission, to an objection based upon policy EC/6 or emerging policy EC/7 and no weight to a highway objection based upon traffic flows from the KBP development. On the other hand the motorway junction itself was a fact on the ground at the valuation date. It was not part of the compulsory purchase order and it does not seem to us that it would be right to extend the definition of the scheme to include it.

98. Taking all those matters into consideration and doing the best we can to make sense of a number of assumptions of varying solidity, in our judgement the hypothetical purchaser would have considered that the reference land would have had some extra hope value of a permission for residential development. However we would not put a percentage better than 50/50 on the chances of success.

99. That hypothetical purchaser would have to acquire an access, probably but not necessarily through the Nib, which has its own substantial value for residential development. An alternative means of access, by buying two existing houses fronting the Lane, if possible, would also be expensive and uncertain and, as the Nib is currently undeveloped infill land with the potential we have described, it is much more likely that the owner of the reference land would be able to do a deal with the owner of the Nib. However, the fact that it might be possible to gain access to the reference land elsewhere would be likely to have the effect of moderating whatever ransom the owner of the Nib was able to demand. We also think that the hypothetical purchaser would have to contemplate a delay of some years before he could achieve any return and this will of course have an impact on holding costs.

100. To that extent we prefer Mr Massie's general approach to valuation to that of Mr Brogden and, reflecting upon what we have said above, now turn to their evidence.

Valuation

101. Mr Brogden produced expert witness and rebuttal reports together with his valuation and, during the course of the hearing, provided some amendments and revised calculations to reflect Messrs Wooliscroft and Wall's agreement on land areas (4.88 acres) which were less than he had originally calculated (5.2 acres), and to correct a number of errors. This was his Addendum 1 in which the claim figure became £2,433,000. We note, as pointed out by Mr Humphries in his

closing submissions, that Mr Brogden's initial valuations did not reflect section 16 assumptions and the revised valuation in his rebuttal report following Mr Frampton's rebuttal statement relied upon section 16(4) which is no longer pursued. Indeed, Mr Brogden admitted in cross-examination that compulsory purchase was not his speciality, he had not previously undertaken valuations in accordance with the compensation code and was not familiar with the relevant law as he was principally a development valuer.

102. In the light of our conclusions on planning and the law above, we do not, in any event, think it would be helpful to say much more here about the claimant's initial valuation arguments other than in the context of Mr Brogden's second Addendum valuation which he produced immediately prior to giving his evidence in chief on the fifth day of the hearing. In it he said:

"Following comments from the Tribunal with regard to the valuation approach and following more closely Rule (2) (thereby distinguishing solely market value for the reference land and severance) and then identifying a separate stand-alone value for the retained land (Nib), I have prepared this addendum."

He said that this was contrary to the approach he had used in his initial valuation (which had assumed no ransom value in respect of the Nib) but placed an 'equalised' value over it, reflecting the fact that, as in his Addendum number 1 produced on the fourth day of the hearing, pre-CPO it had been in the same ownership as the reference land. On the basis of the £1.25 million that the claimants paid for the 27.75 acres of the reference land and the Nib in 2003, this indexed to £2,638,000 at the valuation date. From this, he deducted the cost of providing access to the reference land and the value of the Nib based upon the four plots shown by Mr Frampton in his supplemental report.

103. As the possibility existed for separate access by potentially buying a pair of semi-detached road frontage houses that backed onto the reference land and demolishing them, with one additional plot provided on the frontage land when the access had been made, he considered this would serve to moderate the expectations of the owner of the Nib and assessed the net cost of purchase of that land at £300,000. He then assumed the owner would accept a lesser sum (£250,000) as he would also be receiving payment for the four plots as part of the overall development. Those four plots he estimated to have a total value of £140,000 (on an equalised basis assuming say 66 plots on the reference land) which, when added to the cost of access payment gave £400,000. This figure, he said, exceeds the value of the Nib as a development site just for four plots with no discount for uncertainty about getting planning permission, so it was reasonable to assume therefore that the landowner would be willing to sell. The result was a net value for the reference land of £2,238 million.

104. Mr Brogden then went on to say:

"I then need to identify the marriage value lost as a result of the reference land being severed from the nib by the scheme CPO. I have assumed four frontage plots with a theoretical [unequalised] value of £90,000 per plot assuming a readily implementable planning permission. As planning permission has not been granted I have deducted 40% risk (for consistency with my approach in… my initial report). This results in the Nib having a value of £192,000 to reflect its hope value as a stand alone proposal."

The severance under this approach became £208,000 which, when added to the £2,238,000 produced a revised claim value of £2,446,000 which, he said, was sufficiently close to the £2,433,000 which his Addendum 1 had produced to mean the claim did not need to be re-assessed. He confirmed that, within that claim figure, there was no specific allowance for the rest of the reference land that was without part Plot X as it was acknowledged this was purely agricultural value – but he did not accept that that was only £2,000 per acre as promulgated by Mr Massie and thought £3,500 to £5,000 per acre as shown in some of the acquiring authority's other settlements, or up to £15,000 per acre for the part Plot X land that was immediately behind the Buckley Hill Lane houses as pony paddocks or lairage.

105. In cross-examination, Mr Brogden firstly accepted that the figure he had arrived at for the value of the Nib at £192,000 was mathematically incorrect and should have been £216,000. He confirmed that the 40% discount he had applied to the development value was an assumed figure that encompassed both planning risk and deferral. He was of the view that the site could be developed "very quickly" and certainly within much less than the "medium term" of 5-20 years referred to in the planning evidence (as set out at paragraph 5.5 of his first report). Thus, in his view, the issue of deferral was more to do with how long it would take to negotiate the purchase of the access than how long it would take to get planning consent. He accepted that he had made no specific allowance for holding costs, and acknowledged that if we found that prospects of obtaining consent were not as high as he thought, or that there would be an extended timescale, the 40% discount he had allowed would have to be considerably greater. Nevertheless, he said he did not agree with Mr Massie's assessment of the price the owner of the reference land would have to pay for the Nib as it needed to be remembered that the Nib would also not have had planning consent in the no-scheme world, and there would be planning risks to consider in that scenario as well as in respect of the reference land. If the price being demanded was too high then efforts to gain access elsewhere would be re-doubled – the owner of the Nib could only realistically expect to receive one bid above what he would get in the market if selling it elsewhere.

106. In submissions, Mr Humphries said it was completely inappropriate to use the price paid by the claimant for the land as the basis for his assessment as they were also purchasing the Nib (which had access to Buckley Hill lane); they were purchasing land that had the benefit of planning consent for residential and employment development as part of the KBP scheme and there was, of course, a premium element to reflect the potential to remove the Nalls' CPO objection. This had been accepted by Mr Brogden in cross-examination. The idea that access might be gained from elsewhere was inherently risky, Mr Humphries submitted, and fraught with further planning difficulties. On analysis, Mr Brogden's value for each of the four potential frontage plots at £35,000 was clearly insufficient, especially as it was the claimant itself which had described Buckley Hill lane as one of the prime residential areas of Rochdale. His estimate of the cost of acquiring the access was patently inadequate. The 40% discount (meaning a value at 60% of the full unfettered development value) was wildly optimistic. No holding costs had been allowed for. None of his figures were supported by reliable comparable evidence, and his revised valuation still did not address the fundamental flaws included within his original assessment.

107. Mr Massie said that he had been involved with the KBP since 1996, acting for NWDA and thence HCA, had been involved in the CPO Inquiry and had initially undertaken negotiations with the previous owners of the reference land and the Nib. Those negotiations continued with the claimant when the land was acquired by it in full knowledge, he said, of the impending CPO. He said he has negotiated the acquisition of the majority of the land required for the scheme.

108. He has consistently argued that, taking into account all the relevant planning assumptions and the law, together with, for example, the massive contribution to the infrastructure costs that would have to be made, the hypothetical purchaser of the reference land at the valuation date if it were to be hived off would not consider it had a value of anything more than for its existing use as grazing land which he assessed at £2,000 per acre. Neither in his expert or rebuttal reports did he produce a valuation in the alternative.

109. However, in response to Mr Brogden's Addendum number 2, he provided a series of 're-workings' of it which, he said, were solely to demonstrate what the outcome would be if more appropriate figures and assumptions had been used, based upon the reference land coming forward for development within 5, 10, 15 and 20 years respectively.

110. Those assumptions, which he said were for the most part based upon Mr Brogden's own figures, and did not therefore necessarily reflect his own views were:

(a) that in the absence of the KBP scheme, there would be no prospect of development on any of the reference land beyond the 4.88 acres in part plot X, and the remainder was therefore included at agricultural value only per his estimate of £2,000 per acre.

(b) realistically, the whole of Nib would have to be purchased, its value being assessed on the value of the main land, together with a ransom element which he calculated at 40% of the uplift in the development value released.

(c) the number of houses that would be permitted on the reference land would be 74 (using Mr Brogden's figure rather than the 60 units reckoned in the acquiring authority's evidence).

(d) section 106 and servicing costs at £40,000 per plot, per Mr Brogden's valuation.

(e) the "hope window" assessed at 5, 10, 15 and 20 years.

(f) prospect of planning consent being obtained assessed at 30%.

(g) deferment assessed at PV @ 7%.

111. On the 5 year deferment assumption, the valuation became:

Part Plot X Land (plus developable part of Nib)

	Acres	£ p ac	£	£	£	£	£
Part Plot X	4.88	1,300,000	6,344,000				
Plus							
Part of Nib for development	0.20	1,300,000	260,000				
Less							
S.106	74	40,000	-2,960,000				
Present Day Value of Part Plot X				3,644,000			
Defer until anticipated development							
PV	5 years		7%	0.7130			
					2,598,122		
Allow for "prospect" of hope being realised							
Prospect;	Say 30% chance					779,436	
Less ransom sum payable to Nib for access				40%		-311,775	
Hence, Reference Land						467,662	
Allow for purchase of Nib:							
		Acres	£ p ac				
Nib		0.40	1,300,000	520,000			
Plus ransom for Nib 40% (see above)				311,775			
				831,775			
Finance of Nib purchase until developed			7%	334,832			
Total "holding cost" of Nib						-1,166,607	
Hope Value of Part Plot X							-698,945

Remaining Reference Land

Assume grazing land to remainder of Reference Land				
	Acres	£ p ac		
Remaining Land	21.97	2,000		43,940
Overall Value of Reference Land with Hope Value assumption				-655,005
			Say	-655,000

112. Mr Massie explained in examination in chief that in his view the hypothetical purchaser would want to acquire the whole of the Nib, to give him complete control, and would develop out the part of it that was not required for access (with 4 houses). He said he had assumed £1.3 million per acre as residential development value for the developable part of the Nib and for the whole of the Part Plot X element of the reference land (this being marginally more than the £1.2m per acre used by Mr Brogden in his addendum report of 15 January 2013). The multiplier for the 5 year deferral in this example, at 0.713 reflected a 28.7% discount from the full development value. Applying that (proper) multiplier to Mr Brogden's basis of adopting a composite discount of 40% for both deferral and risk meant that the reduction for the expectation of gaining planning permission in the 5 years became only 10%. In other words, he was assuming a 90% chance of consent being obtained within that period which, in Mr Massie's view, was overly optimistic.

113. As to Mr Brogden's revised assessment of the value of the Nib at £400,000, Mr Massie said this was wholly inadequate. It was firstly inconceivable for him to have to assumed 4 building plots at £35,000 each when the fact was that there was a semi-detached house currently on the market in Buckley Hill Lane at £465,000. Building plots in this part of Rochdale would command very substantially more. Secondly the remainder of the value to the Nib owner, assessed by Mr Brogden as the ransom element at £250,000, was far too low when one considers that he effectively holds the key to the development of some 74 houses on the reference land. Mr Massie went on to say that Mr Brogden's approach to the marriage valuation was not only mathematically incorrect, but was also an inappropriate way to calculate it being based as it was upon a severe underestimate of the value of the Nib, against an over-assessment of the value of the land to the rear. Regarding his own assessment that there was a 30% chance of planning consent being obtained within the 5 year deferment period, Mr Massie accepted in cross-examination that that figure was not scientifically obtained, and there was no evidential source for it.

114. In each of the subsequent assessments reflecting extended planning delays, the negative figure, Mr Massie said, became significantly higher. In his view the exercise proved beyond doubt how flawed Mr Brogden's valuations were and strengthened his own argument that with proper account being taken of the planning risks, costs of acquiring access and holding costs, paying anything more than EUV would not have made economic sense. Certainly an investor or speculator looking to add to a land bank or to hold for long term returns would not see this as a viable proposition.

115. In connection with the argument that, if the claimant was prepared to offer £1 million (and eventually pay £1.25 million) for the reference land with the Nib, that must be a good indicator that development value did exist, Mr Massie explained the background to the context around talks that had been held initially with Mr Peter Higham, the Nalls' agent, and then with the claimant. Asked how he could initially offer £230,000 for the reference land (without the Nib) based upon 10 acres at £17,000 and 17 acres at £3,500 and then come before this Tribunal with a valuation of £2,000 per acre (£50,000) for the whole, Mr Massie said that they were trying to acquire the few remaining sites by agreement pre-CPO. The situation regarding the cancellation

assumption was not clear, he said, as this was before the significant cases that clarified those issues and pre *Thomas Newall*. He said, in precise terms:

"The offer was made to acquire the land by agreement before the CPO. At that time I was uncertain as to the definitive position on the cancellation assumption. This was subsequently clarified in the case of *Thomas Newall*. At that time, I was concerned that the cancellation principle might result in the whole of the scheme being assumed to be cancelled including policy EC/6. In that event, it was likely that the land would have been designated as greenbelt but there was a small risk that it would not be designated as greenbelt. The risk was small but the effect of that was great, and there was a possibility that the site might have been designated as residential land. I therefore built some hope value into the calculation."

116. The Nalls had inherited the land and were not farming in the area. They would only contemplate selling the whole (to include the Nib) which of course held a high prospect of gaining permission for development. Although it had not been scientifically worked out, Mr Massie said there was potentially some element of hope value in the reference land – hence the higher values per acre, and the remaining £770,000 of the offer related to the Nib, which he had always considered to be very valuable. He had originally considered the frontage land would create 5 plots at approximately £120,000 each making a minimum of £600,000 with possibly more if a flatted development could have been created. He had been instructed to offer £1 million, and the additional £250,000 related to stamp duty and the vendors' professional fees. There could, he said be no comparison with the circumstances of that acquisition and the current dispute. Also, post *Newall* and upon advice from Mr Singleton, Mr Massie no longer considered there to be development value in the reference land without the Nib and in cross-examination he confirmed that his evidence before this Tribunal is critically reliant upon the statutory assumptions. He was of the view that the claimant had taken a calculated gamble on getting the land taken out of the CPO and that that gamble had not worked. He accepted that there was an element in the price eventually agreed of "buying-off" objections to the CPO.

Conclusions on value

117. As we have said in our conclusions on planning and the law, we do think that there would have been a 50/50 chance of planning permission being obtained on the reference land in a no KBP world, and we think it realistic to assess the period of deferral at 5 years. There would thus, as Mr Massie admitted, be some hope value.

118. We focus upon the evidence and argument pertaining to Mr Brogden's second Addendum and Mr Massie's re-workings of it. Accepting Mr Massie's opinions relating to the inadequacies of Mr Brogden's allowances for the value of the Nib, and the inappropriateness of his other figures, and whilst as we have said above, we prefer Mr Massie's general approach, there do however appear to be a number of serious errors in his re-working which, when taken with our findings on various figures and percentages, shows that the significant negative sum he arrived at is just not sustainable.

119. Firstly, we note that in the top-half of Mr Massie's version of Mr Brogden's 5 year cycle (as set out at paragraph 112 above), he has included in his assessment of the value of the reference land the sum of £260,000 that relates to the development value of part of the Nib, meaning that the 40% of the development value he uses includes a ransom payment for part of the land that is not part of the reference land. Secondly, he has not taken account of the fact that, if the Nib is purchased, there will need to be added to the value of the whole an allowance for the fact that the purchaser will be obtaining the value of an additional four plots (which the parties agreed could be built once the access had been provided) less the cost of servicing them.

120. Thirdly, no account is taken of the fact that it would most likely be possible to develop those 4 units much sooner than the 74 he has allowed for on the reference land – say within 2 years. Fourthly, Mr Massie goes on to assess the "chances" of obtaining planning consent at 30%. As

mentioned above, we consider prospects to be 50/50. Fifthly, he has assumed that the vendor of the Nib would demand 40% of the increased development value of the reference land as a *Stokes v Cambridge* ransom. In the light of the fact that, although arguably an extremely risky strategy, the purchaser *might* be able to gain access from elsewhere, we think that, on balance, the maximum that the vendor could extract would be 30%. As will be seen from our own "re-working" of the valuation which we come to below, the existing use value of the developable part of the reference land (the part Plot X land) will need to be deducted in calculating the ransom element as it is a percentage of the increase in value over the EUV that needs to be taken. Sixthly, we also note that Mr Massie's calculation double-counts the ransom value (£311,775) and seventhly, he has double-counted at least part of the holding costs/deferral.

121. Turning to the question of EUV, both in respect of the developable 4.88 acres of the reference land and the remainder, we do not accept Mr Massie's view that the value was only £2,000 per acre. We are persuaded by Mr Brogden's arguments that, although it makes very little difference in terms of the overall compensation payable against the sum claimed, the evidence shows an agricultural value nearer £3,500 per acre and rather more for the land that forms part of Plot X being as it lies directly behind Buckley Hill Lane. We conclude that the 4.88 acres should be valued on the basis of pony paddocks or other 'lairage' uses at £15,000 per acre. It will also be noted that we have assumed a two year deferment for the four road frontage plots as it was not in issue that development prospects on the Nib were considerably higher.

122. The overall valuation therefore becomes:

Developable Part of Reference Land

4.88 acres at:	£1,300,000	£6,344,000
Less Servicing costs 74 units at	£40,000	£2,960,000
		£3,384,000
Less 50% Planning risk		£1,692,000
		£1,692,000
Deferred	5 years @ 7%	0.713
Development value of part plot X		£1,206,396

The Nib
Development value of whole of Nib

0.40 acres at	£1,300,000	£520,000
Less Servicing 4 plots at	£40,000	£ 160,000
		£ 360,000
Deferred	2 years @ 7%	0.873
		£ 314,280
Add Ransom for reference land		
Development value		£1,206,396
Less EUV 4.88 acres at	£15,000	£ 73,200
Net development value	£1,133,196 @ 30%	£ 339,958
Gross cost of acquiring Nib		£ 654,238
Less Value of retained developable	(50% of £314,280)	£ 157,140

part of Nib			£ 497,098
Add Finance (holding cost) of the retained part of the Nib (access)	additional 3 years at 7%:	£180,000 x (1 – 1.073)	<u>£ 40,508</u>
Net cost of acquiring Nib			<u>£ 537,606</u>
Value of developable part of reference land			£ 668,790
Add EUV of remaining un-developable	21.97 acres @ £3,500 pa		<u>£ 76,895</u>
			£745,685
		Say	<u>**£746,000**</u>

123. In the light of all the evidence and our findings relating to the issues of planning and law, we are satisfied that this is a figure which, in all the circumstances, the hypothetical purchaser would be prepared to pay for the reference land, and we determine compensation therefore in the sum of £746,000.

124. A letter concerning costs accompanies this decision, which will become final when the question of costs has been determined.

DATED 28 May 2013

His Honour David Mole QC

P R Francis FRICS

ADDENDUM

125. Submissions on costs have been received from the parties. The claimant says it should have its costs, assessed on an indemnity basis. The acquiring authority argues that in all the circumstances of the case, the Tribunal should exercise its discretion (per paragraph 12.2 of the Practice Directions) and should conclude that each party bear its own costs.

126. The claimant said that it had always been willing to settle, but the HCA (which had made the reference in the first place) had shown a "dogged attachment" to its argument that the reference land benefited from nothing more than its existing agricultural use value, despite the obvious planning assumptions that unarguably suggested there was an element of development value in the land. Furthermore, not only did the HCA stick rigidly to Mr Massie's expressed opinion that the land was worth no more than £50,000 despite clear and indisputable evidence that even at agricultural values the land was worth significantly more, but it had made a sealed offer in February 2012 of £275,000 plus reasonable professional fees. This offer was over 5 times the amount that Mr Massie had attributed to the land in his expert report. That alone suggested that the valuation was not an amount that could be realistically justified, but despite this, and the Tribunal's indications as to its initial thoughts during the early part of the hearing, no alternative valuations had been produced. Instead, Mr Massie chose simply to dissect Mr Brogden's revised valuation in an attempt to demonstrate that even if there was potential development value, the costs of achieving it outweighed any benefit.

127. It was acknowledged that a sealed offer had been made to HCA by the claimant in November 2012 at £1,250,000 plus costs, and a that a further without prejudice offer was made at a meeting between the parties on the first day of the hearing (9 January 2013) whereby the claimant offered

to settle for £750,000 plus costs. This offer was confirmed in writing on 29 January 2013 which was after the close of the claimant's case, and before the resumption of the hearing on 12 February 2013. It was submitted that the acquiring authority should have accepted that offer as it was within £4,000 of the amount eventually determined by the Tribunal. Thus it is clear that the case could, and should, have settled on the first day of the hearing. The acquiring authority's offer (of £275,000) was 2.7 times less than the compensation actually determined, and there was no question therefore that the sealed offer had been well beaten and that in accordance with overriding principles, the claimant was entitled to all its costs. The HCA's intransigent and inflexible approach justified, it was submitted, costs being awarded on an indemnity basis.

128. The acquiring authority set out the legal framework relating to costs in the Tribunal at some considerable length and, in referring to *AEI Ltd v Phonographic Performance Ltd* [1999] 1 WLR 1507 (which related to the [then] new CPR Rules, the principles of which the Tribunal follows in respect the exercise of discretion), where Lord Woolf said (at pp 1522–1523):

"I draw attention to the new [CPR] rules because, while they make clear that the general rule remains, that the successful party will normally be entitled to costs, they at the same time indicate the wide range of considerations which will result in the Court making different orders as to costs. From 26 April 1999, the 'follow the event principle' will still play a significant role, but it will be a starting point from which a Court can readily depart… The most significant change of emphasis of the new Rules is to require the Courts to be more ready to make separate orders which reflect the outcome of different issues… It is now clear that too robust an application of the 'follow the event' principle encourages litigants to increase the cost of litigation, since it discourages litigants from being selective as to the points they take. If you recover all your costs as long as you win, you are encouraged to leave no stone unturned in your effort to do so."

Thus, it was submitted, 'follow the event' must be seen as a starting point from which the conduct of the parties may cause the Tribunal to readily depart, and there were a number of factors in this case that are relevant to the exercise of the Chamber's discretion.

129. Firstly, it was argued that the claimant had failed to properly plead its case on the law or the facts – for example there had been no reference to the section 16 planning assumptions in the statement of case or in its expert valuation report. Further, those issues were only dealt with in rebuttal and it was then, only on the first day of the hearing, that the claimant stated it was dropping its case in relation to section 16(4). There was also no reference to the statutory disregards in the statement of case, despite the acquiring authority having set out its own case relating to those in detail in its statement of case which preceded that of the claimant. The HCA was thus put at a disadvantage from the outset as to knowing precisely how the claimant's case was to be pleaded.

130. Secondly, whilst it was acknowledged that the Tribunal's determination was significantly above the acquiring authority's valuation, it was some £3.6 million below the claimant's alternative pleaded valuation. That the claim was exaggerated was, therefore, unarguable.

131. Thirdly the claimant's suggestion as part of its case that the remainder of the reference land (outside part plot X) supported employment land value was not accepted by the Tribunal as it had concluded that that land should only reflect agricultural value. Mr Brogden's various valuations and addenda were each produced upon the basis of different methodology and approach, and the acquiring authority had to respond to each one as it came along.

132. There were also sections of the decision relating to an analysis of section 6 and Schedule 1 to the 1961 Act in connection with hope value that formed no part of the claimant's case and were not canvassed at the hearing. It would be unfair, it was argued, that the acquiring authority should have to pay any of the costs where the scale of the determination reflected un-argued legal issues.

133. In all the circumstances, it was submitted that the acquiring authority was perfectly justified in declining to accept the claimant's revised offer of £750,000 and the fairest conclusion would be for there to be no award of costs.

134. We are not persuaded by the acquiring authority's arguments. Whilst some of the criticisms relating to the pleadings, and to Mr Brogden's initial valuation approach undoubtedly have some merit, there were equally (as submitted by the claimant) aspects of the acquiring authority's approach to valuation that created difficulties – particularly Mr Massie's continued failure to provide any alternative valuation to reflect the claimant's arguments, other than his 're-working' of Mr Brogden's addendum No 2, that contained a large number of inaccuracies.

135. We are entirely satisfied that the claimant should have all of its costs, and there is in our judgement no justification whatsoever in the suggestion that there should be no award. However, we do not consider that there are any grounds for costs to be assessed on an indemnity basis. The costs awarded to the claimant shall therefore be on the standard basis, such to be the subject of assessment by the Registrar if not agreed.

Dated 1 July 2013

HH David Mole QC

P R Francis FRICS