BNO/202/2005

LANDS TRIBUNAL ACT 1949

BLIGHT NOTICES – residential dwelling in vicinity of and in part physically affected by proposed trunk road improvement – whether objection to blight notices valid and/or well founded - Town and Country Planning Act 1990 sections 150(1)(b) and (c), 151(4)(c) and 166(2) – counter-notice valid and well founded

IN THE MATTER of a NOTICE OF REFERENCE

BETWEEN	**ANTHONY MACHIN** **JOAN MACHIN**	**Claimants**
	and	
	DEVON COUNTY COUNCIL	**Respondent**

Re: 27 St Lukes Road, Aller Park,
Newton Abbot, Devon, TQ12 4NE

Before: P R Francis FRICS

Sitting at: Exeter Independent Tribunal Service, Melrose House,
Pynes Hill, Rydon Lane, Exeter, EX2 5AZ

on

15 November 2006

Mr Anthony Machin, claimant, for himself and Mrs Joan Machin
Mr Simon Clary, solicitor of Devon County Council, for the respondent

The following cases are referred to in this decision:
Shephard and Others v Turner and Another [2006] RVR 298

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Entwistle Pearson (Manchester) Limited v Chorley Borough Council (1996) 66 P & CR 277

The following further cases were cited in argument:
Gennard v Bridgnorth District Council [2005] 45 RVR 275
Hurley v Cheshire County Council (1975) 31 P & CR 433
Smith & Smith v Kent County Council (1995) 70 P & CR 669
Randell v West Glamorgan County Council [1975] 1 EGLR 195
Sabey & Sabey v Hartlepool County Borough Council (1970) 21 P & CR 448
Lake v Cheshire County Council [1976] JPL 434

DECISION

1. The claimants are the owners of The Nook, 27 St Lukes Road, Aller Park, Newton Abbot, Devon, and a small part of the rear garden has been affected by a road proposal. On 13 July 2005 the claimants, through their then appointed solicitors, served 3 blight notices on Devon County Council under section 150(1) of the Town and Country Planning Act 1990 in respect of the property. They were all sent under cover of a letter of that date, and were in identical form, except that each identified a different provision of Schedule 13 to the Act under which the property had become blighted land: para 13(a), land indicated in a development plan as land upon which a highway is proposed to be constructed; para 13(b), land indicated in a development plan as land to be included in a highway as proposed to be improved or altered; and para 14, land on or adjacent to the line of a highway proposed to be constructed, improved or altered as indicated in an order or scheme under which CPO powers may become exercisable.

2. On 9 September 2005 the council served a single counter-notice under section 151(1) which referred to the "notice". Following representations from the claimants' former solicitors, the council wrote to them on 28 October 2005 correcting what it described as a typographical error in the counter-notice in that an "s" had been omitted, and it should have referred to "the notices". The intention, it said, was clear and no prejudice had been caused by the mistake.

3. The counter-notice specified the ground upon which the authority objected to the blight notice as (c) in section 151(4). It provides:

> "151(4)(c) that the appropriate authority propose in the exercise of relevant powers to acquire a part of the hereditament or, in the case of an agricultural unit, a part of the affected area specified in the counter-notice, but (unless compelled to do so by virtue of this Chapter) do not propose to acquire any other part of that hereditament or area in the exercise of such powers;"

Under section 166(1), it is provided that section 151(4)(c) shall not affect the right of a claimant under section 8 of the Compulsory Purchase Act 1965 to sell the whole of his hereditament, and section 166(2) provides that (in determining whether or not to uphold an objection under s. 151(4)(c)), the Lands Tribunal shall consider (in addition to the other matters which they are required to consider) whether -

> (a) in the case of a house, building or factory, the part proposed to be acquired can be taken without material detriment to the house, building or factory; or
>
> (b) in the case of a park or garden belonging to a house, the part proposed to be acquired can be taken without seriously affecting the amenity or convenience of the house.

Although this provision was not referred to in the counter-notice (and it was not necessary for the council to have done so), they referred to it in a letter to the claimants dated 14 December 2005 and said "Each blight notice is carefully considered on its merits..... however, it is

considered that the effect of the proposed bypass scheme on your property would not seriously affect the amenity or convenience of your property".

4. The claimants contended that the counter-notice was invalid in that it failed to identify which of the 3 blight notices it referred to. There is nothing in this point. It is clear that the counter-notice was intended to apply to each of the blight notices. That the counter-notice was not served in triplicate has not prejudiced the claimants. The sole issue that arises for determination under the counter-notice is whether the part of the garden to be acquired can be taken without seriously affecting the amenity or convenience of the property. In its reply to the claimants' statement of case and in its submissions, the council referred to the fact that as a result of recent revisions to the road proposals, none of the land forming part of the hereditament would be affected. The position, however, is that it is the date of the objection to the claimants' blight notice that is the material date for the purposes of determination and I can only have regard to the grounds of objection set out in the council's counter notice (see *Entwistle Pearson (Manchester) Limited v Chorley Borough Council*(1996) 66 P & CR 277).

5. This reference, made under section 153(1), was heard under the Simplified Procedure (rule 28, Lands Tribunal Rules 1996), and I undertook an accompanied inspection of the property and familiarised myself with the surrounding area on the day before the hearing.

6. The subject property comprises a detached 1930s built chalet bungalow situated on the Aller Park estate on the outskirts of Newton Abbot. Its plot lies between St Lukes Road to which it has a frontage, and a run-in junction immediately at the point where Addison Road joins the busy A380 trunk road that provides the main route between Exeter and Torquay. The rear boundary, of about 12 metres, abuts a shallow embankment giving on to that junction (which is on the east side of the main road) and the site slopes steeply downwards from front to rear.

7. Devon County Council, in conjunction with Torbay Council, are promoting an improvement of the existing A380 between Penn Inn, Newton Abbot, and Kerswell Gardens, Torquay, by the construction of what is known as the Kingskerswell bypass. This will serve to replace the existing two-lane highway with a dual carriageway which, where it passes the Aller Park estate (and the subject property), will follow the line of the existing road. It was, at the time the blight notices were served, proposed that Addison Road, which currently runs parallel with and immediately adjacent to, the A380 should be extended southwards from a point immediately behind the subject property, and converted to a bus and cycle lane. Planning permission for the scheme has been obtained, but it continues to evolve with some design amendments having recently been made, and no steps have yet been taken to compulsorily acquire any of the additional land required.

8. Mr Machin said that the property was first put on the market for sale by private treaty in June 2004 at an asking price of £274,950. In December 2004, alternative agents were appointed at a reduced price of £259,950 and in September 2005 another agent was instructed at a price of £247,500, subsequently reduced to £245,000 and latterly to £239,995. No offers had been received by the time the blight notices were served, and the property remained unsold at the date of the hearing, although an offer, subject to contract, had recently been received.

He said that the scheme as proposed would have affected approximately 52.37 sq m of land to the rearmost part of the rear garden of the property. The council would require title to about 14.71 sq m to enable it to construct and thereafter maintain the footings for a new retaining wall (which, he acknowledged, would itself be just outside the current boundary line), together with the reservation of rights of access over a further 37.66 sq m for the purposes of inspection and maintenance.

9. He said it was clear that the proposals had been the sole reason why, even after such a long period of marketing, and despite a number of price reductions, the property had failed to find a purchaser. Although the land to be taken into the council's ownership amounted to only 3.5% of the total plot, the overall area affected was 12.3%. Whilst he accepted that the construction of the retaining wall in its proposed location would effectively give them the use of very slightly more land than they currently have (once the back-filling had been done), Mr Machin said that in essence the far end of his garden had been sterilised, and he had now lost interest in maintaining it. The proposed bus lane would be nearer to the house than the existing road, he said, and that would result in intrusion caused by passengers on the top deck looking in.

10. The adjacent property, number 25 St Lukes Road, had been purchased by the council following a blight notice, and Mr Machin said the circumstances there were little different. Whilst it was accepted that the continuation of the retaining wall would actually be on land that was formerly part of its rear garden, and the amount of land required to be taken and have rights reserved was more in terms of area, as a proportion of the overall plot (which was larger in the fist place) the percentage was 15.2 (as against 12.3). There was therefore no logical reason why the council should object in the case of the subject property, especially in the light of the evidence that had been produced to support the argument that the property could not be sold due to the scheme.

11. Mr Machin said that in the early part of 2006, he and his wife found a property being built by Barratt Homes at nearby Westwood Cleave, and the developers were offering a part-exchange scheme. An acceptable deal was struck, albeit at what he considered to be a price below open market value for the subject property. Unfortunately, he said, when Barratt's solicitors undertook legal searches, they discovered the blight notice, and withdrew. On 22 August 2006, Barratt confirmed in writing that their solicitor had considered the property would be unsaleable due to the existence of the notice.

12. He said there was extensive evidence of sales having taken place on the Aller Park estate and produced a schedule of properties that had been sold in the period that the subject property had been on the market. It was only those having a frontage to the A380 that were, in effect, "frozen". Several others on the frontage were currently on the market and it was anticipated that further blight notices were likely to be served. He said that although he accepted that under sections 150(1) and 151(4) of the Act the council was not statutorily obliged to purchase the property, the circumstances preventing the sale were such that their blight notices should have been accepted. Mr Machin then referred to a number of earlier Lands Tribunal cases, where it had been determined that counter-notices were not well founded, and said that the facts of this case were so similar that I should find likewise.

13. The council had acquired over the past 5 years, in connection with the scheme and as a result of successful blight notices, the following nearby properties:

> 25 St Lukes Road (adjacent to the subject property). Bought in April 2006 for £210,000 and re-sold subject to contract in November 2006 for the same price.
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> 9 St Lukes Road. Bought August 2003 at £245,000 and re-sold December 2003 at £246,000.
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> 1 St Lukes Road. Blight notice accepted but purchase not completed as at the hearing date.
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> 2 Aller Brake Road. Purchased July 2003 for £240,000 and re-sold September 2003.
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> 12 Aller Park Road. Acquired for £222,500 in April 2006 on compassionate grounds.

14. Mr Paul Ewings C Eng MICE, Chief Highways Officer with the council, explained that whilst it was not disputed that the claimants had made efforts to sell the property without success as at the date of the blight notice, it was the council's view that the effects of the proposed bypass on the property would not be significant. Once it had been constructed and the retaining wall had been built, the land that had been transferred into the council's ownership would be reinstated and returned to the claimants on licence for them to continue to use as garden ground to be enjoyed with the property. The only effective restriction would be that no deep-rooted trees could be planted, any screening would have to comply with that being provided to adjacent properties, and the council would retain rights of access purely for maintenance purposes. It was Mr Ewings' view that in reality they would only need to come onto the land perhaps once every 20 years as most inspections and maintenance could be undertaken from the highway. Compensation would be payable to the claimants pursuant to the Land Compensation Act 1973 for depreciation and injurious affection, and it was, he said, the council's view that such compensation would provide sufficient remedy.

15. Mr Ewings said that the circumstances relating to the adjacent property, 25 St Lukes Road, and others along the frontage to the A380 were different, in that more land was required to be taken, and the retaining wall would be built on land that was formerly part of their gardens rather than, as was the case with the subject property, just outside the rear boundary. Each case was decided on its own merits, and the circumstances here, he said, clearly did not warrant the blight notice being upheld. The A380 was already a major and extremely busy tourist route that becomes heavily congested at peak times and in holiday periods. He said, if anything, the conversion and extension of Addison Road would reduce the number of vehicles using the part of the highway immediately in front of the subject property. Mr Ewings said that under the original proposal, the new bus lane was to be some 2.3 metres below the rear garden of the subject property and with the provision of new fencing or hedging behind the proposed retaining wall, privacy from people looking into the garden from the top deck could be restored. He also said that the proposed speed limit on the new dual-carriageway would be 50 mph and it was predicted that noise levels would only increase by 2.4 to 3.0 dB(A).

Conclusions

16. Reference was made by the parties to previous Lands Tribunal blight notice cases, and compared the facts in these with those in the present case. It is relevant in this context to note the words of Carnwath LJ in *Shephard and Others v Turner and Another* [2006] RVR 299, a decision of the Court of Appeal, where he said (at 306):

> "57. In reviewing these [Lands Tribunal] decisions, it is important to keep in mind that tribunal decisions are not to be regarded normally as setting any precedent in relation to what must be essentially a question of fact and degree. However, one of the functions of a specialist tribunal such as the Lands Tribunal (made explicit by s4(1)(b) of the Lands Tribunal Act 1949) is to promote consistent practice in the application of the law to its specialist field. Unexplained inconsistency of approach may in certain circumstances amount to an error of law."

As Mr Ewings said, each case is considered upon its own merits, and the sole consideration here must be whether or not the proposal to take what amounts to a very small area of land at the rear of the property, and reserve rights over a slightly larger area, seriously affects the amenity or convenience of the property. That is a question of fact and degree.

17. The fact that the property has proved more difficult to sell than others on the Aller Park Estate is not the issue I have to determine, but I suspect that a major reason is its close proximity to the major and extremely busy trunk road in comparison with those that do not back directly on to it. In my view, the loss of ownership of an extremely narrow strip of land along the rear boundary, under which it was proposed was to bury the footings for a new retaining wall, together with the fact that when completed and reinstated as garden, the area for use would be very slightly greater than is currently available, would not seriously affect either the amenity or convenience of the property. The same, in my judgment, goes for the fact that the council would be retaining the right to enter onto a further strip of land for inspection and maintenance purposes. In that regard, I accept the council's submissions that such access is unlikely to be required on anything other than the rarest of occasions, and it seems to me that unless there were evidence of major structural problems to the wall, most periodic inspections and maintenance works (such as repointing) could effectively be carried out from the highway in any event.

18. As to the property being overlooked from the top deck of double-decker buses using the new bus lane when the proposed bypass is completed, the council has said that a new screen fence would be provided above the retaining wall. In my view, whilst the removal of the existing mature privet would be unfortunate, its replacement with alternative screening (behind which a new hedge could possibly also be planted), will effectively reinstate, or even improve, the existing screen. That buses will be marginally closer to the property, would not in my view seriously affect the amenity or convenience of this property.

19. It is unfortunate that Barratt Homes chose not to proceed with the proposed part-exchange, but that fact does not affect the conclusions I have reached on the issue I have to determine under s.166(2). It follows that I am satisfied the council's counter-notice was well founded, and its objection to the blight notice is, therefore, upheld.

20. This decision determines the substantive issues raised by the parties and is final. The reference was heard under the Simplified Procedure and, there being no exceptional reasons for doing otherwise, I make no award as to costs.

DATED 8 December 2006

(Signed) **P R Francis FRICS**