UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2016] UKUT 174 (LC)
LT Case Number: DET/74/2015

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

CERTIFICATE OF APPROPRIATE ALTERNATIVE DEVELOPMENT – compulsory purchase for replacement school – valuation by reference to agricultural value – whether housing would have been appropriate alternative development – whether the UDP settlement boundary should remain unaltered upon cancellation assumption – whether improvement of highway junction is likely to have been achieved to accommodate such development – appeal allowed

BETWEEN:

MICHAEL & MAGALIE MURIEL BOLAND

Appellants

and

BRIDGEND COUNTY BOROUGH COUNCIL

Respondent

Land adjacent to Pen-y-fai Primary School
Heol Eglwys
Pen-y-fai
Bridgend

Before: His Honour Judge Jarman QC and Mr A J Trott FRICS

Sitting at: Cardiff Civil and Family Justice Centre, 2 Park Street, Cardiff CF10 1ET on 7 and 8 April 2016

Graham Walters, instructed by Harmers Limited, for the Appellants
Wayne Beglan, instructed by the Respondent

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The following cases are referred to in this decision:

Grampian Regional Council v Secretary of State for Scotland [1983] 1 WLR 1340
Fletcher Estates (Harlescott) Ltd v Secretary of State for the Environment [2000] 2 WLR 438; [2000] 2 AC 307
J S Bloor (Wilmslow) Ltd v Homes and Communities Agency [2015] EWCA Civ 540; [2015] RVR 292
Tescan Ltd v Cornwall Council [2014] UKUT 0408 (LC); [2015] RVC 251
Grampian Regional Council v Secretary of State for Scotland and City of Aberdeen District Council 1984 SC (HL) 58
British Railways Board v Secretary of State for the Environment and Others 1993 WL 963747: [1994] JPL 32
Harringay Meat Traders Ltd v Secretary of State and Others [2012] EWHC 1744 (Admin)
Porter v Secretary of State for Transport [1996] 3 All ER 693

DECISION

Introduction

1. On 30 September 2005 the respondent council (the council) made a compulsory purchase order (the CPO) in respect of land which included 6,545.9 square metres of pasture land (the land) just to the west of the Church in Wales Primary School, Pen-y-fai, Bridgend, then in the ownership of the appellants Mr and Mrs Boland. The justification made out for the order was the replacement of the school building.

2. Compensation for the acquisition has been calculated by the council on the basis that the land would have retained agricultural value only if the replacement school had not proceeded. The appellants contend that in that event, housing would have been an acceptable alternative development of the land and that compensation should be calculated on that basis.

3. To that end they applied to the council for a certificate of appropriate alternative development under section 17 of the Land Compensation Act 1961 (the 1961 Act). On 3 June 2015, the council refused to grant the certificate on two grounds.

4. The first ground was that because the settlement boundary of Pen-y-fai had been redrawn in the Unitary Development Plan (UDP) adopted in 2005 on the basis of the identified need to build a replacement school at that location, had the scheme been cancelled then the settlement boundary would have reverted to its former line so as to leave the land in the countryside where policies of strict control of development applied.

5. The second ground was that it would not have been possible to carry out improvements at the junction of the school lane with the main road through Pen-y-fai, Heol Eglwys, which would be required if the land were to be developed for housing because such improvements would have entailed works on land outside the control of the appellants and, in any event, would have been disproportionate to the scale of the proposed development.

6. The appellants now appeal against that refusal to this tribunal under section 18 of the 1961 Act. They contend that the redrawing of the settlement boundary in the UDP to include the land was not predicated on the basis that the only appropriate development for the land was a school building, but had established the principle that the land is suitable for appropriate development. They also contend that it is likely that the junction could have been satisfactorily improved by the purchase of small slivers of land and/or traffic calming measures.

7. Mr Graham Walters of counsel appeared for the appellants and called Mr Laurence Forse MA (Cantab), MSc, MRICS, MRTPI, a director in Harmers Limited, as an expert town planning witness and Mr Roland Kelly BSc, CEng, MICE, MIHT of Traffic Transport Planning, as an expert highways witness.

8. Mr Wayne Beglan of counsel appeared for the respondent and called Ms Nicola Gandy, Principal Planning Officer with the council, as an expert town planning witness and Mr Robert Morgan BSc (Hons), AMCIHT, Senior Transportation Development Control Officer with the council, as an expert highways witness.

The facts

9. The relevant facts are not in dispute. The land formerly comprised a field used for agriculture rising generally northwards and accessed along the school lane about 50 metres from Heol Eglwys.

10. In 2001 the council published the statutory deposit of the UDP. Policy SC5(15) allocated the land for the provision of improved educational facilities. Policy EV12 dealt with development outside settlement boundaries and the proposals map showed the settlement boundary of Pen-y-fai as redrawn so as to include the land and also another field to the north also used for agriculture. Pen-y-fai Woodland Trust objected to that field being included in the settlement boundary.

11. A public inquiry was held in 2002 and the inspector's report was published in May 2003. In respect of this objection, the inspector recommended no modification be made. His conclusions on this objection read as follows:

> "The objectors consider that any changes to the settlement boundary in this locality should simply facilitate future expansion of the primary school, and should not permit additional housing development. The Council explains that the settlement boundary to the south of the objection site has been delineated so as to permit future expansion of the Penyfai Church in Wales School. The neighbouring field to the north has been included in the settlement as it could be developed for 'rounding off' purposes, utilising the existing access. This would effectively prevent any further development opportunity as, to the north, the boundary excludes the extensions to gardens at the rear of Heol Eglwys.
>
> The objectors claim that the field to the north of the school would be large enough to accommodate five new dwellings which would damage the character and appearance of the area. However, I consider that the character of the access and the sensitive location of the site (between the school, Court Colman Landscape Conservation Area and established dwellings) limit the capacity of this modest site. I conclude that the settlement boundary is appropriately defined in this locality on the west side of Penyfai."

12. In October 2003 the appellants applied to the council for planning permission to build a nursing home on a site which included the land. The application was refused in January 2004 and the appellants appealed.

13. The council applied for planning permission for the replacement school in January 2004. At that stage the council was yet to issue its statement on the UDP inspector's recommendation. Because it was the council as the education authority making the application, it was referred to the council's planning and development committee. A full access feasibility study was carried out which overcame concerns expressed by the assistant director of transportation and engineering. The Environment Agency raised no objections. The officer's report to the committee said this:

> "Part of the site lies outside the designated settlement boundary and forms part of the Court Coleman Landscape Conservation Area as defined in the adopted Ogwr Borough Local Plan. However, the site is allocated as land reserved for educational facilities in the deposit UDP with the settlement boundary and landscape area amended accordingly. There are no objections specific to this allocation and as such due weight may be afforded to it. There are therefore no objections in policy terms.
>
> The development will result in the removal of a hedgerow and a number of trees protected under the Penyfai/Court Coleman Tree Preservation Order 1987. Whilst this is not an ideal situation in either visual amenity or ecological terms, their loss must be balanced against the need to provide a much needed educational facility. The loss of the trees can be mitigated by the replanting of new trees elsewhere within the site and the proposal will be subject to a comprehensive landscaping scheme."

14. Planning permission was granted on 11 May 2004, with a number of conditions imposed including six in the interests of highway safety. One of these required access onto Heol Eglwys to be laid out with vision splays of 2.4 x 70 metres (northerly) and 2.4 x 54 metres (southerly) with the northerly splay being completed in footway materials for a minimum width of 1.8 metres along the frontages of Nos. 16 and 18 Heol Eglwys. Another required traffic calming measures on Heol Eglwys comprising safer pedestrian crossing points, red tarmac strips, additional carriageway markings and enhanced signing.

15. The following week an inspector issued his appeal decision on the appellants' appeal in respect of the nursing home application. In his decision letter, he referred to the relevant development plan as consisting of the Replacement Mid Glamorgan Structure Plan (1997) and the Ogwr Borough Local Plan (1995). However he also referred to the emerging UDP and to the inspector's recommendation and said that its policies were to be given considerable weight where they are not the subject of objections and/or they carry forward the policy intentions of the adopted plan. At paragraph 8 he said:

> "Until the UDP is adopted, the whole of the appeal site remains subject to the countryside restraint policies, and that is the current situation in terms of the provisions of the development plan, to which I have to have regard in the determination of this appeal…The provisions of the emerging UDP are a material consideration, but half of the appeal site would still be subject to those restraint policies even if the UDP were to be adopted at some time in the future."

16. At paragraph 9 he said this:

> "The reason for the proposed modification to the settlement boundary in the UDP is to permit the provision of improved educational facilities in accordance with Policy SC5(15) of the UDP. The development of the appeal site in the way proposed would prevent the provision of those improved educational facilities."

17. The inspector dismissed the appeal for those reasons and also because the question of vehicular access to the appeal site had not been satisfactorily resolved by the appeal application.

18. The council issued its statement on the inspector's recommendation in June 2004, and after further modifications were published later in that year, the UDP was adopted in May 2005.

The legal framework

19. The 1961 Act was amended by the Localism Act 2011 as from April 2012, but as the CPO predates that time it is the former wording of section 17 which applies. The relevant subsections are set out below:

> "(1) Where an interest in land is proposed to be acquired by an authority possessing compulsory purchase powers, either of the parties directly concerned may… apply to the local planning authority for a certificate under this section.
>
> …
>
> (4) Where an application is made to the local planning authority for a certificate under this section in respect of an interest in land, the local planning authority shall...issue to the applicant a certificate stating either of the following to be the opinion of the local planning authority regarding the grant of planning permission in respect of the land in question, if it were not proposed to be acquired by any authority possessing compulsory purchase powers, that is to say-
>
> > (a) that planning permission would have been granted for development of one or more classes specified in the certificate (whether specified in the application or not) and for any development for which the land is to be acquired, but would not have been granted for any other development; …..
>
> (5) Where, in the opinion of the local planning authority, planning permission would have been granted as mentioned in paragraph (a) of subsection (4) of this section, but would only have been granted subject to conditions…the certificate shall specify those conditions…"

20. The certification procedure has been considered by the courts at the highest level on a number of occasions. In *Grampian Regional Council v Secretary of State for Scotland* [1983] 1 WLR 1340 at 1342, Lord Bridge observed that the sole purpose of the procedure is to provide for determining the development value, if any, to be taken into account in assessing the compensation payable on compulsory acquisition.

21. Section 17 was again considered by the House of Lords in *Fletcher Estates (Harlescott) Ltd v Secretary of State for the Environment* [2000] 2 WLR 438; [2000] 2 AC 307, a decision relied upon heavily by Mr Walters who cited a number of passages in the leading speech of Lord Hope, at pages 323 to 325. Lord Hope said that the language of the critical words in section 17(4), namely "if it were not proposed to be acquired," was not of the past but of the present conditional and continued :

> "The assumption which the local planning authority must make relates to the situation as at the relevant date. The scheme for which the land is proposed to be acquired, together with the underlying proposal which may appear in any of the planning documents, must be assumed on that date to have been cancelled. No assumption has to be made as to [what] may or may not have happened in the past…
>
> The system of planning control which requires planning permission to be obtained for the development of land brings into account a variety of facts and circumstances… It is one thing to examine these factors, on the assumption that the proposal has been cancelled on the relevant date, in the light of existing circumstances. It is quite another to look back in the past and to try to reconstruct the planning history of the area on the assumption that the proposal had never come into existence at all. The further back in time one goes, the more likely it is that one assumption as to what would have happened must follow on another and the more difficult it is likely to be to reach a conclusion in which anybody can have confidence…
>
> I can find nothing in the overall scheme of the Act which requires the question whether planning permission would have been granted for any classes of alternative development to be determined by reference to events which may or may not have happened in the past if the proposal had not come into existence. It may be, as Mr.Ouseley [counsel for the Secretary of State] suggested, that these wider issues can be raised under section 9 of the Act when the amount of the compensation which is to be paid for the land which is to be taken compulsorily is being assessed by the Lands Tribunal….But that is not a matter which your Lordships need to resolve in this case. I would hold that these wider issues are not relevant to the determination which the local planning authority must make as to the contents of a certificate of appropriate alternative development."

22. Mr Beglan preferred to place reliance upon another case, *J S Bloor (Wilmslow) Ltd v Homes and Communities Agency* [2015] EWCA Civ 540; [2015] RVR 292. Whilst acknowledging that that was a case which concerned the statutory disregards under section 6 and Schedule 1 of the 1961 Act rather than a certificate under section 17, Mr Beglan nevertheless submitted that some of the observations of Patten LJ are pertinent. At paragraphs 33 and 34, Patten LJ said:

> "The cancellation assumption may in some cases require the UT to assume the cancellation of the development project but this is not one of those cases. The s.6 exercise is more complicated because it is designed to neutralise the effects on the value of the site of the CPO scheme so as to produce a fair valuation of the reference land which recognises what would otherwise be its inherent development value but does not over-compensate the landowner by reference to development value which is entirely the product of the CPO or the development proposals of which it forms part, nor under-

> compensate the landowner by reason of diminution in development value attributable to those proposals…..The hypothetical planning status of the reference land is modified for the purpose of the valuation by positing what is commonly referred to as the 'no scheme world.'"

23. At paragraph 38, he referred to the phrase "the prospect of development" in section 6(1) which in his view must denote the scheme of development itself with the development plan strategy and policies it contains and the implementation of those policies in the form of the grant of planning permission and the making of the CPO and that it would "be completely unrealistic to regard the scheme as not including the planning policies and objections which underpin it and dictate its form and scope." Referring to the decision of the Upper Tribunal in that case, he continued at paragraph 40:

> "What it should have done was to consider the planning potential of the reference land without regard to the development scheme and its underlying policies and therefore its effect on value."

24. It is agreed that in order for the appellants to succeed, they must establish on the balance of probabilities that planning permission would have been granted for housing (see *Tescan Ltd v Cornwall Council* [2014] UKUT 0408 (LC); [2015] RVC 251). That requires consideration of the planning policies set out in the development plan.

Planning policies

25. It is agreed in this case that the planning policies which are relevant to the consideration of whether housing is appropriate alternative development of the land on the assumption that the replacement school were cancelled are to be found in the now adopted UDP.

26. Policy EV1 provides that development in the countryside will be strictly controlled, and sets out a number of exceptions, none of which are relevant and none refer to educational facilities. The justifying text defines the countryside as: "That area of land lying beyond designated settlement boundaries (the latter are defined in Policies EV12, H3 and H4 and their justifying texts) and sites allocated for development in the UDP."

27. Policy EV12, already referred to, provides that development outside boundaries of designated main and smaller settlements (Pen-y-fai being designated in the latter category) will not be permitted. The justifying text indicates that all settlement boundaries had been reviewed during the UDP preparation and had been independently scrutinised at the inquiry.

28. Policy EV45 provides that development which achieves a good standard of design will be permitted. The policy sets out nine criteria for the achievement of such good design, of which No.8 is:

"[By] being compatible with the creation of an environment which is safe, friendly to the disabled, sustainably accessible, manageable, and pollution-free."

29. Policy H4 provides that small scale sites within the designated boundaries of the smaller settlements, including Pen-y-fai, will be permitted for housing. The justifying text explains that such settlements are considered to be sufficiently served by existing community facilities, utility services and employment opportunities and capable of supporting further development in a manner consistent with preferred use strategies of the UDP "and the principles of sustainable development; and which will not result in environmental harm (including encroachment/sporadic development into the countryside)." Small scale sites are defined as those accommodating less than 10 dwellings and will include an "infill site." Such a site was in turn defined as " a site flanked by existing development within a substantially built up frontage, or a 'limited rounding-off site', which would constitute a site whose development would extend an existing built-up area in a manner which rationalises surrounding land use and does not result in environmental harm."

30. Policy SC5 provides that educational facilities will be permitted at locations enumerated including at SC5(15) Heol Eglwys, Pen-y-fai. The justifying text provides that the proposals map indicatively shows the general location for educational facilities but that the exact land take and site boundaries have not been specified.

31. At the relevant date Welsh Office Circular 11/95: Use of Conditions in Planning Permission was in force. The Secretary of State took the view at paragraph 14 that planning conditions should only be imposed where they satisfied all of the following tests, namely that the conditions should be:

(i) necessary;

(ii) relevant to planning;

(iii) relevant to the development to be permitted;

(iv) enforceable;

(v) precise; and

(vi) reasonable in all other respects.

The parties' submissions on ground 1: settlement boundary

32. Mr Walters submitted that EV1 is a general restriction on development outside the settlement boundary subject to exceptions. The reason that the replacement school building complies with policy is because countryside excludes allocated sites such as SC5(15). EV1 is neither necessary nor sufficient to enable policy compliant development of the school outside the boundary and it is not necessary to allow development within it. Accordingly, cancelling the scheme involves only cancelling the SC5(15) allocation, and that is inadequate to provide a precise settlement boundary. Such a boundary is a general policy based on a number of factors,

including existing planning permissions, but also factors such as defensible boundaries, settlement patterns, rounding off and in-fill. In this latter respect he relied upon the evidence of Mr Forse.

33. Whilst Mr Walters accepted that the reason that the settlement boundary was redrawn to include the land was the emerging proposal for the replacement school building, he submitted that such a building amounts to development. There was no discussion or indication that only development of a school was considered appropriate and not, for example, housing.

34. Mr Beglan submitted that the SC5(15) allocation and the redrawing of the settlement boundary so as to include the land are inextricably bound up. The need for a replacement school building was what justified the order. If that scheme is cancelled then the justification for redrawing the settlement boundary also falls away. In this regard he relied upon the evidence of Ms Gandy who was not involved in the UDP process but was involved in the council's response to the present application.

35. Mr Beglan further submitted that the prospect of such development comprises the declared objective of the council to promote a replacement school, the putting into place of planning policies to promote that objective, which provided the only reason for altering the settlement boundary, and the implementation of those policies by the granting of the planning permission and the making of the CPO. Once the scheme is assumed to be cancelled, the underlying planning policy would not have led to redrawing the settlement boundary and the land would have remained subject to countryside policies of strict control. If, on the other hand it is proper to have regard to the site specific policies of the UDP, SC5(15) would have required refusal of planning permission for housing on the land.

Conclusions on ground 1

36. Mr Walters' submissions are to be preferred. It is clear that it was the replacement school building proposal that prompted the redrawing of the settlement boundary so as to include the land in the emerging UDP, and the field to the north by way of rounding off. But such a redrawing was not necessary for the proposal to comply with the policies of the emerging UDP, because those policies included a specific allocation of the land for the proposal, which entailed development. That was a general allocation however and did not specify the site boundaries. The redrawing of the settlement boundary must be taken to indicate that the principle of development of the land was acceptable. As Mr Forse said such a determination is likely to have necessitated other considerations, such as rounding off, as the inclusion of the field to the north indicates.

37. There is nothing expressly to indicate, as Ms Gandy accepted in cross-examination, that only this particular sort of development, and none other, was considered appropriate in redrawing the boundary. If that were the case, then the proposal most likely would have been supported, and sufficiently supported, by the allocation in the emerging UDP and not by redrawing the boundary. The only evidence of an objection to redrawing the boundary at this

location was that made by Pen-y-fai Woodland Trust which considered that any changes to the boundary on the west side of Pen-y-fai should simply facilitate future expansion of the school and should not permit housing development. That consideration appears to have focussed upon the field to the north, which from the wording of the inspector's conclusions appears to have been the objection site. However, the broad issue of whether changes to the boundary should simply facilitate future school expansion was raised and the inspector recommended that no modification be made.

38. The proposal for a replacement school building is assumed to be cancelled, but that does not necessarily require the reversion of the settlement boundary to its previous line to exclude the land. That would, as Mr Walters submitted, amount to reconstructing the planning history. The relevant UDP process took place over 12 years ago. Although that may be seen as relatively recently, the passing of time has meant that only scant documentary evidence of relevance was made available and no oral evidence was given by a witness with direct involvement. Lord Hope's warning in *Fletcher Estates* about the difficulties of coming to a safe conclusion as to what might have happened is apposite.

39. It is important to bear in mind that in considering whether or not to grant a certificate under section 17 of the Act, the proposal must be considered as cancelled. This is something which is different to considering what might have happened in a "no scheme world" for the purposes of the final assessment of compensation. Lord Hope recognised that wider considerations might be appropriate in such an assessment, but said such considerations are not relevant in the determination of the contents of a certificate under section 17 of the 1961 Act.

40. That is to be contrasted to the "no scheme world" which was being considered in *J S Bloor.* As Patten LJ stated, that was not a case where the cancellation assumption applied. It does in the present case.

41. In conclusion, on the assumption that the proposal for a replacement school building was cancelled, the land remains within the settlement boundary. Policies EV1 and EV12 do not apply to it, but Policy H4 does. Mr Forse was frank in his oral evidence that the reference to nine houses in the application (albeit 14 ultimately) was chosen to bring the alternative development within that policy. In principle, and having regard to the UDP policies, housing development of the land is an acceptable alternative within the meaning of section 17 of the 1961 Act.

The parties' evidence and submissions on ground 2: highways

42. The council's second ground for refusing to grant the certificate was that planning permission would not have been granted due to a highways objection that could not be overcome by a condition or a planning obligation. In her third witness statement Ms Gandy said that if it were to be determined that highway mitigation measures could have overcome highway safety concerns the council would have had to consider whether the necessary planning conditions would satisfy the tests set out in Welsh Office Circular 11/95 (see paragraph 31

above). She said that the mitigation measures that would be required would be so extensive as to be disproportionate to the scale of development ultimately proposed, i.e. 14 dwellings. She thought that a condition requiring the carrying out of such extensive works would not be reasonable for the purposes of Circular 11/95 paragraph 14, test (vi). This would be so notwithstanding that the appellants had indicated that they were willing to fund any necessary highway mitigation measures since "an unreasonable condition does not become reasonable because an applicant suggests or consents to its terms." (Paragraph 42, Circular 11/95)

43. Ms Gandy said that unless the council was satisfied that the appellants had sufficient control over the land upon which the highway works were to be carried out it could not impose a condition requiring the carrying out of such works. Since the appellants did not own or control the land required to provide a satisfactory vision splay at the junction with Heol Eglwys, any planning condition requiring those works to be done would have been ultra vires. Elsewhere in her evidence Ms Gandy said "It is not possible to grant planning permission subject to conditions relating to land not covered by the application." Ms Gandy accepted during cross-examination that this was not an accurate statement of the law.

44. Mr Walters submitted that there were two aspects of the highways issue: firstly, the width of the access lane, and, secondly, the need for an improved vision splay. The first issue was not a problem since the appellants owned the relevant land to enable the access lane to be widened. The need for an improved vision splay was dealt with by conditions attached to the 2004 planning permission for the replacement school. Mr Walters submitted that the proposed residential development would not generate a higher level of vehicular movement than the school and should therefore be considered equally acceptable.

45. In his first expert report Mr Morgan referred to a planning application made in 2013 for six detached houses on land close to the application land and with access from the improved highway which had been provided as part of the school replacement scheme. The council refused the application and was upheld on appeal. In his decision letter the inspector referred to the uncertain status of the stretch of lane beyond the school entrance and to the inadequate arrangements for refuse collection. The inspector said that this would not accord with Policy EV45 of the UDP. In his skeleton argument Mr Beglan submitted that it would have been contrary to Policy EV45 for residential development to have taken place in the absence of substantial improvements to the access lane and junction. In cross-examination Ms Gandy accepted that Policy EV45 was a design policy that would not have been relied upon by the council as a reason to refuse the appellant's proposals. Mr Walters submitted that in the light of this concession there was no policy reason to justify refusal on highway grounds. Insofar as it was supportive Policy EV45 would have been a material consideration.

46. The appellants submitted that the junction vision splay was not recognised as sufficiently material to merit assessment until after the council's refusal of the section 17 application. In his evidence Mr Morgan referred to the highway authority's statement in the appeal against the council's refusal in 2003 to grant planning permission for a 64-bed nursing home on the application land. But that statement contained no clear evidence base and lacked a specific

traffic assessment for residential development, relying instead upon general statements about the "additional vehicular use of the substandard access onto Heol Eglwys."

47. The appellants acknowledged that the junction with Heol Eglwys as it existed at the relevant date was substandard by reference to the then extant Technical Advice Note (TAN) 18: Transport (July 1998). That required a major road Y-distance of 90m for a speed limit of 30 mph given a minor road X-distance of 2.4m. The actual Y-distance to the north of the junction was 17m. After the improvement of the junction following the CPO the stated Y-distance to the north is 57m although in cross-examination Mr Morgan suggested that because the road to the north curved concavely to the right there was additional visibility beyond the properly measured Y-distance.

48. Mr Walters submitted that paragraph B8 of TAN 18 required visibility standards to be assessed in the light of all the circumstances of each case and that it may not always be possible to comply with the full visibility standards. In the present appeal the council had not undertaken a proper or timely assessment of the vision splay taking into account the traffic that would be generated by the proposed development. Mr Walters said that the council's failure to make such an assessment was due to its case that any number of proposed houses would justify refusal on highway grounds given the assertion, acknowledged by Ms Gandy in cross-examination to be wrong, that a planning condition cannot be imposed if it concerns land outside the applicant's ownership.

49. Mr Walters said that planning conditions could be imposed which related to land outside the ownership or control of the appellants: see *Grampian Regional Council v Secretary of State for Scotland and City of Aberdeen District Council* 1984 SC (HL) 58. In the present case it would be possible to restrict the commencement of the proposed residential development until improvements had been carried out to the junction of the access lane with Heol Eglwys in accordance with approved plans. Nor were perceived difficulties in implementing a planning permission necessarily a reason to refuse permission. The fact that the junction improvements could not be carried out without acquiring land from neighbouring landowners was not of itself a sufficient reason to refuse planning permission. Mr Walters referred to *British Railways Board v Secretary of State for the Environment and Others* 1993 WL 963747; [1994] JPL 32 in which Lord Keith said:

> "The owner of the land to which the application relates may object to the grant of planning permission for reasons which may or not be sound on planning grounds. If his reasons are sound on planning grounds no doubt the application will be refused. But if they are unsound, the mere fact that the owner objects and is unwilling that the development should go ahead cannot in itself necessarily lead to a refusal. The function of the planning authority is to decide whether or not the proposed development is desirable in the public interest. The answer to that question is not to be affected by the consideration that the owner of the land is determined not to allow the development so that permission for it, if granted, would not have reasonable prospects of being implemented. That does not mean that the planning authority, if it decides that the proposed development is in the public interest, is absolutely disentitled from taking into account the improbability of permission for it, if granted, being implemented. …But there

is no absolute rule that the existence of difficulties, even if apparently insuperable, must necessarily lead to refusal of a planning permission for a desirable development. A would be developer may be faced with difficulties of many different kinds, in the way of site assembly or securing the discharge of restrictive covenants. If he considers that it is in his interests to secure planning permission notwithstanding the existence of such difficulties, it is not for the planning authority to refuse it simply on their view of how serious the difficulties are."

50. The appropriate question to be addressed, said Mr Walters, was whether a suitable condition could be properly imposed and, in the case of a section 18 appeal, whether on a balance of probabilities planning permission would be granted for the classes of development applied for without the Tribunal having to assess more precisely the chance or prospects of that development happening or of the permission being implemented: see *Harringay Meat Traders Ltd v Secretary of State and Others* [2012] EWHC 1744 (Admin), per McCombe J at [11] and *Porter v Secretary of State for Transport* [1996] 3 All ER 693 per Stuart-Smith LJ at 704e.

51. Mr Walters said that the necessary highway improvements could be achieved by improving the vision splay at the junction of Heol Eglwys and/or by introducing traffic calming measures to reduce vehicular speeds. He said that the council appeared confused about the required visibility to the north of the junction. Condition 8 of the planning permission for the new school referred to a requirement for a sight line of 70m whereas the vision splay as actually built provided a sight line of only 57m. Mr Kelly's evidence was that a development (eventually) of 14 houses on the application land would generate less traffic than the new school and the four properties in Heol Eglwys that used the access lane following the implementation of the CPO. Therefore the highways improvements associated with the school development would also have been adequate for the proposed residential development. To achieve such improvements in the absence of the CPO required the acquisition of land from properties in Heol Eglwys to the north of the junction, including from Nos.16 and 18. Mr Walters said that this was the type of situation commonly faced by developers and would be a matter of negotiation with the landowners concerned.

52. Mr Morgan's evidence was based upon the guidance on vision splays contained in the edition of TAN 18 (1998) that was in force at the relevant date. The speed limit on Heol Eglwys at the relevant date was 30 mph and a speed survey undertaken for the council in March 2004 indicated an actual southbound speed of 35.9 mph (85th percentile) which Mr Morgan took to be a dry weather speed. Correcting for wet weather gave an equivalent speed of 33.4 mph. Applying the appropriate table in TAN 18 showed that this speed required a sight line of 70m. Even if the speed had been as low as 20 mph the vision requirement would have been 33m, the lowest figure quoted in the document and nearly twice the distance that was actually available at the unimproved junction. Mr Morgan concluded that there was no safe reduction in speed that would enable a sight line of 17m to be considered adequate.

53. Mr Kelly used a later (2007) edition of TAN 18 that was not in use at the relevant date. This document gave stopping sight distances ("SSD") which were lower than those shown in the previous edition. Mr Morgan calculated using the more recent guidance that a vision splay

of 17m would be suitable for approaching southbound vehicles travelling up to 14 mph. Mr Kelly's assessment on the same basis was 17 mph.

54. Speed reduction measures such as road tables (flat top humps) were accepted by Mr Morgan in cross-examination as being in use and subject to Department of Transport guidance in 2005. Mr Walters submitted that such measures would have enabled speeds to be reduced to 14-17 mph which was the speed appropriate to the existing vision splay to the north of the junction of 17m. Mr Morgan said that he had consulted the council's traffic management officers about the possibility of introducing traffic calming measures. He said they would not have supported a scheme relying wholly upon traffic management measures but when asked in cross-examination to produce details of the advice that he had received Mr Morgan declined to do so.

55. Mr Walters' submissions about traffic calming were based on Mr Kelly's evidence that the installation of road tables 20m either side of the junction would reduce the speed of a vehicle approaching at 30 mph to 17 mph as it went between the tables. He based this assessment on Local Transport Note (LTN) 1/07: Traffic Calming (March 2007), Table 4.3. That being so Mr Kelly concluded that the installation of such speed tables would have been suitable at this junction and that there would have been no highway reason for the refusal of the application.

56. Mr Morgan disagreed with Mr Kelly's analysis for several reasons:

(i) Mr Kelly's evidence was based on guidance that was not available at the relevant date;

(ii) Even if one took account of the more recent guidance its correct application, allowing for the road gradient and an SSD of 14.6m, showed that the existing junction was only suitable for top speeds of 14 mph;

(iii) Mr Kelly had misinterpreted LTN 1/07, Table 4.3 since for two speed tables located 40m apart (20m *each side* of the junction), the intermediate speed between the two tables would be 18 mph;

(iv) A more realistic assessment of the actual traffic speed was 35 mph rather than 30 mph which meant that the intermediate speed would be 20 mph; and

(v) Even if traffic was slowed sufficiently to make the existing vision splay acceptable the highway authority would still have objected to the application on the grounds of traffic safety concerns due to a single width access point, the narrow junction (tight radius) and the lack of a footpath along Heol Eglwys. The only way to resolve those concerns was to widen the junction in the way it was done under the CPO.

57. In his closing submissions Mr Beglan said that the appellants had not produced any scheme which illustrated how the junction problems could be resolved. In the absence of the CPO scheme it would have been necessary for the appellants to agree a deal for the acquisition of land from several landowners. There was no material for the Tribunal to conclude that there

was a balance of probability in favour of planning permission being granted subject to *Grampian* conditions. A planning inspector had already refused planning permission for residential development because of the access difficulties and there was nothing to show that the appellants' scheme could be successfully brought forward.

Conclusions on ground 2

58. In our opinion the highways objection could not have been overcome by traffic calming measures alone. We are satisfied from the evidence that, at best, this would have been a marginal solution, even if we adopted guidance that was not available at the relevant date. Mr Morgan's criticisms of this approach seem to us to be fair, although his evidence was not assisted by his reluctance to disclose the outcome of his consultation with the council's traffic management officers and an approach to cross-examination generally that was defensive to the point of stonewalling. Such an approach from an expert witness does not assist the Tribunal.

59. Condition 8 to the 2004 planning permission for the new school required a vision splay to the north of the junction with Heol Eglwys measuring 2.4m x 70m. In the event it was constructed to a lower standard of 2.4m x 57m, although Mr Morgan says that the actual visibility is better than this suggests because the road has a right hand (concave) bend at this point. There is little comparative evidence about the respective traffic generation from the CPO scheme and the appellants' proposed residential development. Mr Kelly's evidence was based upon TRICS, a national trip-rate database, which he said had not significantly changed over the last 10 years and which showed that a development of (up to) 14 houses would generate fewer trips in the morning peak than did the new school. In the absence of any material challenge to this analysis and given that the council has not produced its own figures we accept Mr Kelly's evidence on this point.

60. Since the traffic likely to be generated from the proposed residential development would be no greater than that from the new school and associated other users of the access lane, we consider that a similar junction improvement to that constructed under the CPO scheme would be an appropriate highway solution to the inadequate vision splay. However, there are two outstanding problems: (i) the 2004 planning permission for the new school contained a condition requiring a greater vision splay than that actually provided; and (ii) a sight line of 57m did not meet the requirements of TAN 18 (1998) which was in force at the relevant date. These criticisms were addressed by Mr Morgan in the context of the CPO scheme by reference to paragraph B8 of TAN 18 (1998) which states:

> "Visibility standards, like all other material considerations in development control, need to be assessed in the light of all the circumstances of each case. It is not always practicable to comply fully with visibility standards, for example for conservation requirements. In addition, planning applications may be submitted within an existing development site and served by an existing substandard highway access. A limited redevelopment which incorporated a substantial access improvement may be allowed even though the improved access would still be below standard. While it may not be practicable to comply with full visibility standards in these circumstances the application

> may be acceptable. However, visibility should not be reduced to such a level that danger is likely to be caused."

Mr Morgan said that the highway authority would have taken this paragraph into account when considering the CPO scheme development and would have recognised the benefits of a significant improvement of vision from 17m to 57m in conjunction with the proposed traffic calming measures and the provision of a new footway. He concluded: "Together these would have been significant enough to accept that development in line with para B8 of TAN 18." Mr Morgan also pointed out that a sight line of 57m equated to a vehicle approach speed of between 31-37 mph under the more recent (2007) TAN 18 guidance.

61. We consider that these considerations would have applied equally to the appellants' proposed residential development and that they would have been acceptable for the same reasons, provided they were accompanied by appropriate traffic calming measures such as those contained in condition 11 of the 2004 planning permission for the new school.

62. In our opinion these highway works and traffic calming measures could be achieved by the imposition of *Grampian* style conditions on a planning permission. The mere fact that the implementation of these works would depend upon the agreement of third parties to sell part of their land to the appellants is not sufficient, in our view, to refuse planning permission for the proposed residential development. But there remains the issue raised by Ms Gandy that the required highway mitigation works (the improvements to the junction and the traffic calming measures) would be so extensive as to be disproportionate to the scale of the proposed development (nine houses initially) and that therefore any *Grampian* condition requiring the works to be undertaken before the commencement of development would be unreasonable for the purposes of paragraph 14 of Circular 11/95, or, alternatively, to be avoided as being too onerous under paragraphs 36 and 42 of that circular.

63. At the end of his judgment in *British Railways Board* Lord Keith said:

> "What is appropriate depends on the circumstances and is to be determined in the exercise of the discretion of the planning authority. But the mere fact that a desirable condition appears to have no reasonable prospects of success does not mean that planning permission must necessarily be refused. Something more is required before that can be the correct result."

64. That "something more" is apparently represented by Ms Gandy to be the disproportionate scale of the required highway works compared to the proposed development. There was no evidence on the point; we have been provided with no estimates of value or cost against which to consider this assertion and we do not understand Ms Gandy to be qualified to give expert evidence about the viability of the proposed scheme. In our opinion the council have not sustained the argument that the proposed works would be so disproportionate as to be unreasonable, or too onerous, for the purposes of Circular 11/95.

65. On the balance of probabilities we are satisfied that the highways objection could have been met by the imposition of suitable *Grampian* conditions requiring both junction improvement works and traffic calming measures to be completed before the residential development commenced.

Determination

66. We allow the appeal and the section 17 certificate issued by the council on 3 June 2015 is hereby cancelled and replaced by the certificate issued at Appendix A to this decision.

67. The appellants have succeeded in their appeal and their expenses reasonably incurred of making the section 17 application and the section 18 appeal are to be taken into account as part of the compensation payable by the acquiring authority (Bridgend County Borough Council) as yet to be agreed or determined.

Dated 7 July 2016

His Honour Judge Jarman

A J Trott FRICS

APPENDIX A

LAND COMPENSATION ACT 1961
CERTIFICATE OF APPROPRIATE ALTERNATIVE DEVELOPMENT
LAND ADJACENT TO PEN-Y-FAI PRIMARY SCHOOL,
HEOL EGLWYS, PEN-Y-FAI, BRIDGEND

PURSUANT to the Tribunal's powers under section 18 of the Land Compensation Act 1961 it is hereby CERTIFIED in relation to the said land that for the reasons set out in its decision dated [ ] June 2016:

(1) The section 17 certificate issued by Bridgend County Borough Council on 3 June 2015 is cancelled.

(2) Planning permission would have been granted for development of the land by nine houses subject to the following conditions, mutatis mutandis, attached to the planning permission for the development of a replacement primary school dated 11 May 2004:

Conditions 1 to 7;

Condition 8, amended as follows:

"No works whatsoever shall commence on site until the proposed means of access into Heol Eglwys shall be laid out with vision splays of 2.4 x 57 metres (northerly) and 2.0 x 54 metres (southerly), with the northerly vision splay being completed in footway materials for a minimum width of 1.8 metres along the frontages of Nos. 16 and 18 Heol Eglwys, as approved by the Local Planning Authority.

Conditions 9 and 11.

Dated 7 July 2016

His Honour Judge Jarman

A J Trott FRICS