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Our ref: AMK/00584927/000006

18 November 2021

Your ref: EN020022

Dear Mr Leigh

Application by AQUIND Limited for an Order granting Development Consent for the AQUIND Interconnector Project (PINS reference: EN020022)

Mr. Geoffrey Carpenter and Mr Peter Carpenter (Registration Identification Number: 20025030)

INTRODUCTION

1. We act for Mr Geoffrey Carpenter and Mr Peter Carpenter who are the freehold interest owners of Little Denmead Farm (and are Interested Parties).

2. These are the representations of the Carpenters to the letter from the Secretary of State dated 4th November 2021 ("**the Letter**").

3. The Letter relates Alternatives. It is clear from the queries raised in the Letter that there is choice of evidence. The existence of **a choice** of evidence means there is uncertainty. That uncertainty needs to be resolved in favour of the Carpenters because of the Prest case. It is akin to a situation where there are two sites and one of those sites in an alternative. The very existence of an alternative requires (as a result of the application of the Prest case) for the alternative to be chosen.

4. We have previously set out in our detailed Submissions on law and fact the basis for the Carpenters' Objection to the taking of their land against their will permanently. Without prejudice to that Objection, they have also provided Alternatives in the form of a signed DCO Obligation) and proposed Protective Provisions that together, enable development of their private land **in the alternative** for:

5. a) the siting of one (not two) convertor station on the northern side of the existing farm;

6. b) the below ground situation of electricity bearing cables and cables otherwise exclusively relating to the conveyance of electricity; and

7. c) the restoration of their farm to agricultural use so that farming can continue.

8. They also Object to the use of their land otherwise than on a temporary basis for construction of the convertor station. The Protective Provisions provided by the Carpenters enable the temporary construction to take place on their land in a way that supplies **a lawful and evidence-based alternative** to the use of compulsory purchase powers.

9. We note that the Minister *himself* is required under the Planning Act 2008 to determine whether or not the DCO be granted. The power to grant a DCO assumes logically prior relevant considerations - i.e. the Minister must resolve the issue of alternatives (as a logically prior relevant consideration) before he can exercise the power to grant a DCO.

10. Those "logically prior" relevant considerations include two that we have made detailed representations and summarise as follows:

a) DCO Planning Obligation

11. The Carpenters have submitted a signed DCO Obligation that contain alternatives for their land. This is a relevant consideration before any grant of a DCO, as it is a signed and binding DCO Obligation and it has been delivered before the Minister exercises any power to grant a DCO. This must be distinguished from mere promises of benefits that Aquind asserts can be delivered via DCO obligation **later.** I.e the benefits promised by Aquind that are **to be delivered** via DCO obligations cannot be taken into account by the Minister as relevant considerations. Before a DCO is granted, the Minister needs to have **a signed** DCO Obligation in front of him (as the Carpenters have delivered) – not the promise of one . To base a grant of a DCO on the mere promise of a benefit to be secured through a future DCO obligation (as Aquind is promising) is unlawful. That remains the case in law even if a DCO has been granted on this basis elsewhere (which is not a lawful precedent to follow). It therefore remains the case that it is chronologically impossible for the Minister *himself* to lawfully take account in advance of his exercise of power **any benefits not ensured to be provided** before he were to grant a development consent order. That simple legal analysis remains untrammeled. We understand that such a device has been considered in one DCO but that cannot make it lawful or immune from obvious illegality. . Hence, the Minister should treat the DCO Obligation submitted by the Carpenters as a relevant consideration in the context of alternatives, as that has already been signed; it is binding and it is therefore an alternative and a benefit that can be taken into account lawfully. The legal impossibility of putting the DCO cart before the planning obligation horse is self-evident. We advise the Minister to consider what is before him (and what is not before him) in advance of the exercise of powers under the PA 2008.

b) Protective Provisions

12. The Carpenter's protective provisions and their signed DCO Obligation form part of one package of alternatives which have the effect of modifying the scheme in relation to the Carpenter's land. Similarly, we have previously submitted that the structure of the PA 2008 provisions ensures that they do not subjugate the taking of a private individual's land against their will to the national matters under the Act. Rather, the structure of the statutory provisions ensures that private land remains safeguarded in line with common law protections most recently upheld by the Supreme Court in the *Sainsburys'* case.

13. In particular, and with particular relevance to the contents of the Letter, that case re-affirmed that the *Prest* case remains good law today. We attach *Prest* (again) **in Appendix A** together with the *Sainsbury's* case (again), **also in Appendix A**so that these are ensured to be placed before the Minister who is required under the Planning Act 2008 to make the decision.

14. The *Prest* case *requires* the Minister to give the Carpenters' the benefit of all reasonable doubt and as against Aquind as the land taker. Examples of evidence on which that requirement bears include:

    i. The evidence previously provided showing that in the event of some kind of access becoming necessary over the Carpenters' land for heavy load access to the Convertor Station, then a temporary haul road can be situated for a short period over the land to afford access before being removed and the farm (again) being reinstated for ongoing farm use;

    ii. Paragraph 5.5.16 NPS EN 1 states " Substantial weight should be attached to the risks of flooding and coastal erosion. The applicant must demonstrate that full account has been taken of the policy on assessment and mitigation in Section 4.22 of this NPS, taking account of the potential effects of climate change on these risks as discussed above." Paragraph 5.5.17 NPS EN-1 provides for mitigation. and states: "Applicants should propose appropriate mitigation measures to address adverse physical changes to the coast, in consultation with the MMO, the EA, LPAs, other statutory consultees, Coastal Partnerships and other coastal groups, as it considers appropriate. Where this is not the case the IPC should consider what appropriate mitigation requirements might be attached to any grant of development consent." So here, the application of paragraph 5.5.17 NPS EN1 recognises that that flood risk would not be permanent in the event that the Carpenters' Protective Provisions were accepted as mitigation. In particular:

    iii. Paragraph 5.7.3 NPS EN-1 states "The aims of planning policy on development and flood risk are to ensure that flood risk from all sources of flooding is taken into account at all stages in the planning process to avoid inappropriate development in areas at risk of flooding, and to direct development away from areas at highest risk."

    The Applicant's flood risk assessment identifies an area at high risk of flood comprised of a water course running diagonally across the Carpenters' land from north-west to south-west that the permanent

provision of an access road would permanently affect (which may be the real explanation as to why the Applicant has designed water attenuation ponds on the Carpenter's land and then try to use that as justification for CPO). Thus, the proposed permanent presence of an access would be in breach of the NPS EN (EN-1) paragraph 5.5.16 because the Carpenters' land would be flooded by the presence of an impeding permanent road. There would also be a breach of NPS EN-1 in relation to flood risk because the location of a permanent road on an area at high risk of flood in itself increases the existing high flood risk even further, rather than mitigate or avoid that flood risk. The proposed location of a permanent road on an area at high risk flooding on the Carpenter's land conflicts with the NPS EN-1 which requires developers to direct development away from areas at high risk of flooding. There is also no evidence from Aquind that flood mitigation measures relating to the proposed permanent road across the Carpenter's land have been designed to meet Standard S7 in DEFRA Guidance.

iv. Paragraph 5.7.3 NPS EN1 recognises that Aquind is required to ensure that its development that comprises the construction accessway does not permanently remain present on that area of the Carpenters' land identified in the FRA as being a water course and, therefore being a linear area "at risk of flooding" and that paragraph can only be satisfied to direct the permanent emplacement of an access way away from that area by ensuring that it does not remain a permanent feature on the Carpenters' land. We solve that through the Carpenter's Protective Provisions. This is an example of an alternative through the flood analysis which will ensure that that breach of the NPS EN1 will not occur. If the road is allowed to stay permanently on the Carpenter's land, the breach of NPS EN-1 in relation to flooding will occur. That is way we have been submitting that the Carpenter's Protective Provisions must be adopted – to avoid such a breach. We again refer to the Prest case above which requires the Minister to adopt the reasonable alternative that favours the Carpenters.

The Carpenters have, therefore, submitted a package of alternatives for their land through their signed DCO Obligation and their Proposed Protective Provisions, which the Minister must therefore also take into account as a relevant consideration before exercising the power to grant a DCO.

15. We now summarily address the Letter in reverse order. That is because we are starting with the Carpenters land first in our representations, and then move geographically outwards in our analysis.

Micro-siting of the converter station on the carpenters land

16. Paragraph 10 of the Letter states: "The Secretary of State requests that the Applicant provides an update on the discussions with National Grid Electricity Transmissions regarding the micro-siting of the converter station at Lovedean. The update should state whether or not an agreement has been reached on the location

for the converter station. If the agreement has not yet been reached, the Applicant should explain when this is anticipated"

17. The micro siting shows that there is a choice of evidence. Regrettably Aquind mis-describes the location of its converter station as "micro- siting". It is not micro siting. If this were to be micro siting, the Rochdale Envelope box would have been represented as a single box inside of which Aquind could put a smaller parameter anywhere inside that box. Whereas here, Aquind has submitted two different Rochdale Envelopes relating to the location of the converter station - put more simply, Aquind have got two separate boxes – two separate Rochdale Envelopes which are mutually exclusive. Therefore, the phrase "micro siting" is misleading the Minister in relation to the true position in law – see PINS Advice Note 9 on the Rochdale Envelope. The *Prest* case requires that the Applicant be *certain* of its development. The Minister would be incorrect in law to categorise the evidence of a choice of Rochdale Envelope parameter boxes (instead of a single box containing site options) as otherwise than evidence of ambivalence. Applying *Prest*, the Minister is *required* to resolve the doubt about 'which location' in favour of the Carpenters by finding that that question is evidence of *uncertaint* . Once it is recognized there is a choice of two sites, the reasobable doubt is about **where is the location is it at all**, not which one of the two boxes should the converter station be located in. In CPO, there needs to be certainty. To achieve that certainty, there needs to be one Rochdale Envelope – not two. This throws doubt over the location is itself, which is a doubt over whether the project be located **on the Carpenter's land at all.**

18. The absence of a concluded agreement with National Grid reinforces that existing uncertainty and, again, the evidence of an absent agreement engenders a reasonable doubt of an agreement that is also required to be resolved in favour of the Carpenters.

National Planning Policy Framework (2021)

19. Paragraph 9 of the Letter states: ". The Secretary of State notes that Chapter 14 of the NPPF which covers Flood Risk was updated in July 2021. The Secretary asks the Applicant to advise if they have any comments to provide in light of these changes to the NPPF."

20. The recent changes to the NPPF(2021) do not apply to the extent of a project for electricity because the NPS EN-1 applies to that extent. However, any other development (such as fibre optic cables not exclusively relating to the purpose of electricity conveyance) would attract the requirements of the NPPF(2021) NON-NSIP IS CAUGHT BY NPPF). In this respect (FOR THE NON- NSIP ELEMENTS OF THE SCHEME), paragraph 167 NPPF prohibits consent for such development because no site specific FRA has been undertaken of that development in compliance with the NPPF(2021). Consequently, the Minister is not in a position to know whether or not the requirements of up to date national flood policy (along the whole length of the cable, including through Portsmouth and the Carpenters' land) have passed the sequential and

exception tests, and also the requirements of paragraph 167 in relation to the non-NSIP parts of the scheme, including any cables that are not exclusively for the purposes of conveying electricity.

Portsea Island

21. Paragraphs 6 to 8 of the Letter state:

"*6. The Secretary of State notes the concerns raised by Portsmouth City Council regarding the potential impact of the proposed AQUIND Interconnector on the construction programme for the North Portsea Island Coastal Defence Scheme ("NPICDS"). The Secretary of State understands that the same six construction compound areas required for the NPICDS are also required for the proposed AQUIND Interconnector.*

7. The Secretary of State therefore requests that the Applicant provides further information detailing how the construction programme and use of the relevant construction compounds for the proposed AQUIND Interconnector will be managed to avoid causing delay to the NPICDS construction programme.

8. The Secretary of State also requests an update from the Applicant on the proposed co-operation agreement between the Applicant and Portsmouth City Council"

22. Any possible alignment between schemes in this resect will need to comply with the revised flood risk assessment tests contained in Chapter 14 of the NPPF 2021. The Portsea Island scheme itself will need to be revisited to ensure it is evaluated in accordance with the new flood risk tests in the NPPF 2021, in order to protect to protect the citizens of Portsmouth from flood risk and property damage. It cannot be said the same flood risk protection outcome that arose from an evaluation based on the NPPF 2019, will arise again, given that the NPPF 2021 presents a new way to evaluate flood risk.

23. We attach at Appendix B more detailed information about Portsea Island. We recognize that that flood alleviation scheme may require to be re-evaluated in light of the NPPF(2021). These are notes to assist the Minister we have extracted from Portsmouth City Council's letter to the Minister dated 30 September 2021, providing background to the importance of the Portsea Island scheme.

Alternative Interconnector Site at Mannington

24. Paragraphs 4 and 5 of the Letter state:

"*Consideration of Alternatives*

4. The Secretary of State notes that the document Environmental Statement Addendum – Appendix 3 – Supplementary Alternatives Chapter1 states that ten existing substations were evaluated as part of a feasibility study carried out by National Grid Electricity Transmission. One of the substations which was assessed in the feasibility study was the substation at Mannington. That substation was not considered to be suitable for the proposed connection because, at the time of the feasibility study, there was already a connection agreement in place for the proposed Navitus Bay offshore wind farm. The Addendum notes that

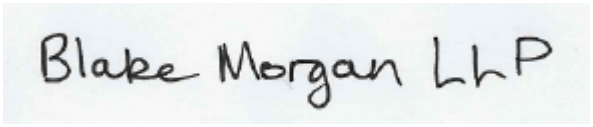
the Navitus Bay project was subsequently abandoned but the connection agreement remained in place "for some time following the feasibility study" during which "significant progress" was made on the AQUIND interconnector proposal meaning that it was not reasonable for the Applicant to re-consider the potential for a connection at Mannington at that later stage.

5. The Secretary of State is aware that the decision to refuse development consent for the Navitus Bay development was taken on 11 September 2015. He would be grateful for clarification from the Applicant in respect of how long the connection agreement for the Navitus Bay development remained in place following that refusal, what enquiries the Applicant made in respect of the potential use of the Mannington substation following the refusal of the Navitus Bay project and at what stage the development of the AQUIND interconnector project was when the connection agreement ended."

25. We attach at Appendix B more detailed information about the alternative site available at Mannington for an interconnector that was produced in relation to the Navitus Bay DCO. That information set out at Appendix B to this letter sets out why the Mannington alternative site is a reasonable and realistic alternative that has not been properly evaluated by the ApplicantWe also draw the Minister's attention to the *Prest* case in Appendix A that requires him to resolve disputes about alternative sites in favour of the private landowner (here, the Carpenters') *because* that is how the common law ensures that private land is protected from compulsory acquisition as only being used as a last (not a first or *Wednesbury* rational) resort. We also attach in **Appendix C to this letter**, plans from the Navitus Bay DCO application which show the location of existing Mannington substation and the preferred location of the converter station site that was proposed by Navitus Bay (which we contend is still an alternative the Aquind should have fully and properly consider further. If that site was good enough for Navitus Bay, it should be good enough for Aquind. That is because both Navitus Bay Ltd and Aquind propose(d) ASbringing in electricity from offshore to onshore. Furthermore, Navitus Bay DCO evaluation of a converter station site in Mannington did not identify over-transmission as being an issue that could not be overcome by using suitable technology – please see the section in Appendix B to the letter on Navitus Bay. That was the position in 2014 and therefore surely in 2021, technological improvements mean that any asserted issues cannot be said to be unable to be overcome.

26. We have also reviewed Aquind's statements in its ES about the Mannington Site. Please see Appendix D to this letter which sets out our commentary in relation to that.

Yours sincerely



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APPENDIX A

James Stanley Prest and Michael Ian Bowstead Straker (Trustees of the Felin Isaf Trust and Miskin Village Trust) and Sir Brandon Meredith RHYS Williams and Brinley Edmunds v The Secretary of State for Wales v The Welsh Water Authority

Positive/Neutral Judicial Consideration

Court
Court of Appeal (Civil Division)

Judgment Date
1 January 1983

In the Supreme Court of Judicature

Court of Appeal

On Appeal from the High Court of Justice

Queen’s Bench Division

1983 WL 215478

The Master of the Rolls (Lord Denning) Lord Justice Watkins Lord Justice Fox

Friday, 24th September, 1982

Representation

LORD HOOSON Q.C. and MR. J. HOWELL (instructed by Messrs. Roche Hardcastle) appeared on behalf of the Appellants.
MR. SIMON BROWN (instructed by The Treasury Solicitor) appeared on behalf of the Secretary of State.
MR. M. T. PILL Q.C. and KISS A. J. BOOTH (instructed by the Area Solicitor, Welsh Water Authority) appeared on behalf of the Welsh Water Authority.

JUDGMENT

THE MASTER OF THE ROLLS:

Sir Brandon Rhys Williams is a doughty fighter. He is under attack in his own homeland. It is in the Vale of Glamorgan. You pass by it if you go by the main line from Cardiff to Bridgend. Also if you go by car along the new M4 motorway near the Miskin interchange. He and his forebears have been in those parts for over 300 years. They have a considerable estate there which they let out to tenant farmers. Yet now they are under threat. The Welsh Water Authority are about to seize 30 or so acres of their land. It is agricultural land on a site next the railway line. The Welsh Water Authority have made a compulsory purchase order on it: and it has been confirmed by the Minister. It is now under appeal to this court.

The reason for this imminent seizure is to make a new sewage works for the neighbouring towns and villages. It is urgent. The existing sewage works are grossly over-loaded. It is anticipated – and hoped – that the district may be developed for industrial use. So that more facilities are needed for the disposal of sewage.

Sir Brandon and his children's trustees all recognise the need for a *new* sewage works and the urgency of it. They are just as keen as the Welsh Water Authority. But they do not agree to the site seized •0 or about to be seized by that Authority. They offer an alternative site: or rather one of two alternative sites. Each of them is about 30 or 40 acres. Each of them is close by in the same area. One is 60 yards away from the railway line. The other is 160 yards away. Each is very convenient for the new sewage works.

The contest in the case is this: Which of the sites should be used for the new sewage works? Should it be the site proposed by the Authority? or one of the two alternative sites offered by Sir Brandon?

In November and December 1977 there was a long public inquiry as to the comparative merits of the sites. It took twelve days. The long and short of it is that there is nothing to choose *between* the sites – save as to cost. Everything was considered at the inquiry. Such as the means of access, the *interference* with agriculture, the effect on the amenities, the impact of floodtag, and so forth. In no material respect was any one site to be preferred to the others – save as to cost.

Now the cost was the rub. At the inquiry there was much evidence as to the cost of constructing the plant for treating the sewage. The total cost, as at 1976 prices, would be £7,616,900 on the site proposed by the Authority. But as to the alternative sites, *Nos. 1* and 2, offered by Sir Brandon

> "the construction of similar treatment works would cost some £230,000 more on Site 1, and some £320,000 more on Site 2."

Those were of course, only estimates at that time. Like all estimates they are often falsified in execution. They are certainly out of date by this time. Even so, the saving of £230,000 or even £300,000 would seem to be marginal in relation to a figure of nearly £8,000,000.

Yet that saving seems to have *been* the determining factor with the Inspector. *He made his report* on 20th April 1978. It *covered* sixty-four closely-typed pages. He said in it:

> "The cost of development is not normally a factor which enters into the determination of a planning application. But in my opinion this case is peculiar … the applications (by Sir Brandon for sites Nos. 1 and 2) should be refused on the grounds that they represent unnecessary and wasteful expenditure of public funds."

In recent letters the Welsh Water Authority have made it clear that the determining factor has been one of cost. On 23rd April 1982 they said that the proposals of Sir Brandon "impose an unacceptable cost-penalty on its proposed sewage disposal scheme" : and on 14th May 1982 that the alternative site "has been considered and rejected because of the additional cost involved" .

The offer by Sir Brandon

Now I come to the crucial point in the appeal. Both at the inquiry and ever since, Sir Brandon and his children's trustees have offered to convey either of the alternative sites offered by them at "existing use value" . That is, at its value as agricultural land. But if the Welsh Water Authority insist on the site proposed by the Authority itself, then Sir Brandon and his children's trustees will require the Authority to pay its full compensation allowed by law. That is its value, not as agricultural land, but as land with a potential for development for industrial purposes. This will be much higher than the agricultural value. It would far more than outweigh the saving of £230,000 to £300,000 on construction costs.

The point that was omitted

Here is the strangething. The Inspector did not take any account of that offer. He recorded it among his findings in paragraph 264(9), but he did not take it into account in assessing the cost of the whole project. He only took into account the cost of constructing the sewage treatment works. He did not take into account the cost of acquiring the land itself. That is a most significant omission. Both sides agree that it was omitted. Neither side adduced any evidence before the Inspector about it. So *he did* not take it into account.

The letter of 20th October 1978

Whilst the Inspector's report was with the Minister – and before he gave his decision – the trustees and Sir Brandon wrote a letter of 20th October 1978. They asked for the inquiry to be re-opened. They pointed out that the site proposed by the Authority had much potential for industrial purposes: so the cost of acquiring it would be much greater than that of the site offered by Sir Brandon which was being offered at agricultural value. This was clear enough in the somewhat clumsy language of the letter:

> "This obvious potential of the CPO site (the site proposed by the Authority) for industrial purposes if the sewage works were not required to be built on it introduces material questions of relative land costs into the choice of sewage works sites. These issues cannot be resolved until the nature of the industrial development of the area has been decided but are likely to be a material factor which ought to be taken into consideration before the Compulsory Purchase Order is confirmed. This matter was not considered at all during the inquiry."

The planning applications

Whilst all these things were going on, the trustees and Sir Brandon were making planning applications for the development of much of their land in the area for industrial purposes. These were called in by the Minister so that he could determine them himself. They had not been determined at the date of the decision letter in November 1978. A local inquiry was held into them by a different Inspector. He recommended that the applications should be allowed. But, on 7th August, 1980, the Minister turned them down at that stage. He said:

> "While not disputing the Inspector's view that there is a need for industrial land in the general area, the Secretary of State notes that other industrial sites are available and he is not convinced that the industrial need would justify a major intrusion into this attractive part of the Vale of Glamorgan."

Nevertheless, the trustees and Sir Brandon made another application. It was called in by the Minister again for his determination. Another Inspector, Miss Ellis, held another local inquiry. It is believed that she reported in favour of industrial development. In a letter of 12th March 1982 the Minister indicated his willingness to permit industrial development, subject to certain conditions.

It is quite clear, therefore, that by this time it is very probable that (if it were not acquired

compulsorily) the site proposed by the Authority would be developed for industrial purposes and would command a very high price. The cost of the whole project would be far greater than it would be if the Authority accepted the alternative site offered by Sir Brandon.

These findings give rise to several points of law.

The use of compulsory powers

The first is fundamental. To what extent is the Secretary of State entitled to *use* compulsory powers to acquire the land of a private individual? It is clear that no Minister or public authority can acquire any land compulsorily except the power to do so be given by Parliament: and Parliament only grants it, or should only grant it, when it is necessary in the public interest. In any case, there. fore, where the scales are evenly balanced — for or against compulsory acquisition w the decision — by whomsoever it is made — should come down against compulsory acquisition. I regard it as a principle of our constitutional law that no citizen is to be deprived of his land by any public authority against his will, unless it is expressly authorised by Parliament and the public interest decisively so demands: and then only on the condition that proper compensation is paid, see *Attorney-General v. De Keyser's Royal Hotel Ltd. (1920) A.C. 508* . If there is any reasonable doubt on the matter, the balance must be resolved in favour of the citizen. This principle was well applied by Mr. Justice Forbes in Brown v. Secretary of State for the Environment (1978) P. & C.R. 285 , where there were alternative sites available to the local authority, including one owned by them. He said (at page 291):

> "It seems to me that there is a very long and respectable tradition for the view that an authority that *seeks* to dispossess a citizen of his land must do so by showing that it is necessary … If, in fact, the acquiring authority is itself in possession of other suitable land other land that is wholly suitable for that purpose – then it seems to me that no reasonable Secretary of State faced with that fact could come to the conclusion that it was necessary for the authority to acquire other land compulsorily for precisely the same purpose."

The facts to be considered

The second point is this: When a case reaches the courts, is it to be decided on the facts as they appeared to the Minister at the date of his decision? or, can the courts look at subsequent facts? In this very case the Inspector took the view that, at the time of his inquiry, it was a matter for "speculation" whether or not there would be an industrial use of the site proposed by the Authority. But, by the time that the case reached the courts, or at any rate reached this court, it was no longer speculative. It was highly probable that the landowner would get permission for development for industrial purposes. If these had been proceedings in a court of law, this

subsequent evidence would have been regarded as so material that it would have been admitted in the Court of Appeal, *see* Murphy v. Stone-Wallwork (1969) 1 W.L.R. 1025 ; *Mulholland v. Mitchell (1971) A.C. 666* . So here it seems to me that, when the decision of the Minister was under challenge in the courts, it was not final. It was sub judice. So far as I am aware, the acquiring authority does not act on it until the court proceedings are finally disposed of. Rarely indeed would fresh facts be admitted to counteract the decision: but I think that in a proper case they should be. Take this very case. The Welsh Water Authority are not bound to take up the compulsory purchase order. If they exercise it, the price will not *be assessed* at the date of the order. It will *be assessed* at the time when they actually take the land, see *West Midland Baptist (Trust) Association (Inc) v. Birmingham Corporation (1970) A.C. 874* . That would be much higher than at the date of the Inspector's inquiry. If the Authority can wait till after the Court of Appeal order – to see what prices are, it is only fair that the landowner should be able to have his case – against compulsory purchase – also determined at that date.

Test it this way: Take a case where the Minister has confirmed the compulsory purchase order. But after the confirmation the acquiring authority alters its proposals radically, or abandons them, or decides to use the land far a different purpose from that which it originally intended. In that case the cm. pulsory purchase order would no longer be available to it. The court would restrain the acquiring authority from going on with the purchase. That *is* shown by Grice & anr. v. Dudley Corporation (1958) 1 Ch. 329 , where Mr. Justice Upjohn said (at page 344);

> "… what are the corporation doing? They seem to me to be endeavouring to acquire the plaintiffs' property for some purpose other than that for which they were authorised to exercise compulsory powers by the compulsory purchase order … they are going entirely outside the order and, if that be so, then they must be restrained from doing so."

If that can be done by the court – after the order has been confirmed – surely it can be done where there is an application to the court to set aside the order under the statutory powers available. I am aware that this would need fresh evidence over and above that which was before the Inspector and the Minister. But there is power to receive it. Not usually. Only rarely. As I said in *Ashbridge Investments Ltd. v. Minister of Housing & Local Government (1965) 1 W.L.R. 1320* at page 1327:

> "Fresh evidence should not be admitted save in exceptional circumstances."

Those exceptional circumstances need not be closely defined. I would suggest that fresh evidence can and should be admitted on similar grounds to that in the courts of law – in those cases where it has arisen since and would in all probability have an important influence on the

result.

The matters to be taken into account

The third principle asks this question: What matters is the Secretary of State to take into account? Is he limited to those canvassed before the Inspector? or should he go beyond them and consider other matters, if they are relevant?

This was one of the principal points made by the Minister and by the Water Authority. They said that the trustees and Sir Brandon never raised the point about the cost of acquisition of the land, nor did they give any evidence upon it. So they should be shut out from canvassing it now.

To my mind this is a mistake. It treats a public inquiry – and the Minister's decision – as if it were a lis inter partes . That it certainly is not. It is a public inquiry at which the acquiring authority and the objectors are present and put forward their cases – but there is an unseen party who is vitally interested and is not represented. It is the public at large. It is the duty of the Minister to have regard to the public interest. For instance, in order to acquire the land the acquiring authority has to use the taxpayers' money or the ratepayers' money. The Minister ought to see that they are not made to pay too much for the land – especially where there is an alternative site which can be acquired at a much less price. So also with the planning and development of this land. It is the public at large who are concerned. If planning considerations point to the alternative site rather than to the site proposed by the Authority, the Minister should take them into account, cf. *Hanks & ors. v. Minister of Housing & Local Government (1963) 1 Q.B. 999* . The principle was implicit in the decision of the House of Lords in *Board of Education v. Rice (1911) A.C. 179* . It was expressed by Lord Greene, M.R., in a single sentence in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation (1948) 1 K.B. 223* at page 229:

> "He must call his own attention to the matters which he is bound to consider."

This was put a little more fully by Lord Diplock in *Education Secretary v. Tameside (1977) A.C. 1014* at page 1065:

> "Or, put more compendiously, the question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?"

The power of the court

The fourth principle is the power of the court to intervene. Often we are referred to the classic judgment of Lord *Greene*, M.R., in the Wednesbury case (1948) 1 K.B. 223, but I ventured to restate it in my own words in *Ashbridge Investments v. Minister of Housing (1965) 1 W.L.R. 1320* at page 1326, which has been repeatedly applied. This was in relation to the very statutory words applicable here:

> "Seeing that that decision is entrusted to the Minister, we have to consider the power of the court to interfere with his decision. It is given in Schedule 4, para. 2 (of the Housing Act 1957). The court can only interfere on the ground that the Minister has gone outside the powers of the Act or that any requirement of the Act has not been complied with. Under this section it seems to me that the court can interfere with the Minister's decision if he has acted on no evidence; or if he has come to a conclusion to which on the evidence he could not reasonably come; or if he has given a wrong interpretation to the words of the statute; or if he has taken into consideration matters which he ought not to have taken into account, or vice versa; or has otherwise gone wrong in law."

I went on to say that in some cases fresh evidence might be admitted:

> "We have to apply this to the *modern* procedure whereby the inspector makes his report and the Minister gives his letter of decision, and they are made available to the parties. It seems to me that the court should look at the material which the Inspector and the Minister had before them, just as it looks at the material before an inferior court, and see whether on that material the Minister has gone wrong in law … Fresh evidence should not be admitted save in exceptional circumstances."

Conclusion

It remains to apply these principles.

In the first place, we have fresh evidence which shows that the present proposals of the acquiring authority are radically different from those which were considered by the Inspector at the inquiry. The main differences are these:

(i) Modern methods of treating sewage have reduced the whole scale of the project so that the area required for the actual works has been halved in size.

(ii) It is very probable that planning permission be given for the development of the order land for industrial purposes (that is the CPO site): so that it would command a very

considerable "hope" value far in excess of agricultural land, cf. *Camrose (Viscount) & anr. v. Basingstoke Corporation (1966) 1 W.L.R. 1100* .
(iii) The trustees and Sir Brandon have made it clear that they will make the alternative site available at existing use value, that is, its agricultural value.

In view of the fresh evidence it would be quite unreasonable for the acquiring authority to proceed with the compulsory purchase order. Yet on 18th May 1981, they gave notice to treat and have only held their hand pending these proceedings.

In the second place, even if the fresh evidence be disregarded, when the Minister wrote the decision letter confirming the compulsory purchase order, he failed to take into account the cost of acquiring the site proposed by the Authority (the CPO site) as against the cost of acquiring the alternative site offered by Sir Brandon. This was a most relevant consideration. It would probably have made a crucial difference because, even at that date in 1978, there was a potential of development for industrial use which would have given a considerable "hope" value to the order land (the CPO site). The Minister ought to have had regard to this point – in the public interest ≤ even though it was not canvassed by the parties at the inquiry. In any event he ought to have considered it – after receiving the letter of 20th October 1978 – and asked for evidence of values before coming to his decisions. If he had considered its the only reasonable conclusion would be that the compulsory purchase order would not have been confirmed.

I would, therefore, allow the appeal and set aside the compulsory purchase order. Everyone must regret the long delay in making the new sewage works. But I think that the responsibility must rest primarily with the Welsh Water Authority. All could have *been* avoided if they had not insisted on their own site, but had accepted the offer made by Sir Brandon and his children's trustees long ago. If they had done so, the sewage works could have been completed by this time – at much less cost than they will be now. It is, I understand, still open to them to accept the offer. They should do so and get on with the work at once. I would allow the appeal accordingly.

LORD JUSTICE WATKINS:

The attempted acquisition of land by compulsory purchase is when strongly resisted by the owners of it, likely to give rise to a protracted and sometimes bitter contest fought in the forum of public inquiry and thereafter in the courts. Seldom, however, can there have been such a long drawn out struggle to preserve for himself and his family a part of their land at Miskin in the heart of Glamorgan as that waged by Sir Brandon Rhys Williams and the Trustees of the family Trusts.

Sir Brandon's family have lived in Miskin Manor for a century. They have been associated with the lands thereabouts for three centuries or more. He has set ideas of his own as to how his land should be developed in the interests of good and profitable estate management. He has not for

many years been averse to selling some part of his land, at agricultural value, initially to the Local Authority and later on to the Welsh Water Authority when this was created in 1944 so that a sewage disposal plant could be constructed upon it and a suitable access road provided to that.

But he insists upon making available for this purpose a site which in extent and in every other way is, in his estimation, suitable for this purpose and he will not, in any circumstance, treat with the Welsh Water Authority in respect of another part of his land, which is their considered choice for the construction of a plant which is to be provided for the benefit of the inhabitants of Miskin, Llantrisant and other villages nearby.

But the construction of this is, after a decade of strife concerning its location, still not imminent. Indeed, local inhabitants could be excused for thinking that it never will be, seeing that the Welsh Water Authority is, it could be said, inexcusably obdurate in pursuing its objective and Sir Brandon is at least equally determined and resourceful in thwarting them.

There have been from time to time substantial changes in the schemes or proposals put before the Secretary of State for Wales by both sides. The Welsh Water Authority has made fundamental changes in its conception of the kind of plant designed to be constructed, which has meant, among other things, that the amount of land sought to be acquired has diminished in size and Sir Brandon has changed the location of the alternative site he is willing voluntarily to sell at agricultural value to accommodate the plant.

A sensible and reasonably expeditious resolution to this dispute has also been affected by other factors outside the control of both the Welsh Water Authority and Sir Brandon. Notable among these has been the planning and construction of the M4 motorway, which passes through the Miskin Estate, and various proposals, some of which have been the subject of planning applications, for industrial development of this part of Glamorgan which lies immediately to the south of the Rhondda Valley, wherein coal mining has been for years a declining industry – just as in other valleys in Glamorgan and Gwent has the manufacture of steel. These two heavy industries were the economic bedrock of South Wales.

For many years now, since the end of the second world war especially, the local industrial scene has gradually moved from the valleys to the agricultural coastal plain where lie the ports and through which run the railway line and now the motorway. New industries hitherto alien to this part of Wales have been placed near or not very far away from these essential facilities for transporting people and material.

Some of the land around Llantrisant has already been used for this purpose. During the last 15 years a much more extensive industrial development there has been envisaged by planners, including Professor Buchanan, in a specially commissioned report. These proposals have included, among other things, the creation of a new town. Today the approach to development there is much less grandiose, but the determination to bring some new industry to the area

appears to be in some quarters as firm as ever.

Accordingly, it can with justification, so it is argued, be said that the area has a potential for industrial use. The Welsh Land Authority, which is answerable to the Secretary of State, has been and seemingly remains very conscious of this. Various provisions of the Community Land Act 1975 remain available to this Authority. Armed with these it seeks to acquire land for industrial use near Llantrisant, including a part of the Miskin Estate. It has not yet succeeded in obtaining the requisite consents with which to implement its proposals for land acquisition, but there is no sign that its resolve to acquire a reserve of land in this neighbourhood is weakening.

Furthermore, the Local and County Authorities, which themselves have under. gone convulsive changes in recent times, have advanced proposals for development so as to bring in new industry.

So the long endured pressures imposed upon the Secretary of State for Wales and his predecessors to grant planning permissions and approve the purchase of land by compulsory acquisition have been many and various.

It would not be in the least surprising, therefore, if the Secretary of State and those who advise him, in a mood of desperation if not exasperation, resolved to put an end to the battle over the siting of the sewage plant by as he has done, giving the Welsh Water Authority the powers of land acquisition it seeks accompanied by planning permission to construct the plant which he stipulated was to begin by 30th November 1983.

In the decisive decision letter of 14th November 1978, after describing out. standing applications for planning permission for industrial use by Sir Brandon and the Welsh Land Authority, it was stated:

> "Whilst it would not be for the Secretary of State to prejudge the issue regarding the siting of industry south east of the Miskin Interchange, he is satisfied on the evidence that the construction of a sewage disposal works on the site proposed by the Authority or on either of the two sites advanced by Sir Brandon Rhys Williams would not jeopardise the development of an industrial estate in the area. Accordingly, he considers he would not be justified in with.≥ holding his decisions in relation to the sewage disposal works".

It was contended on behalf of the appellants that in this passage the Secretary of State revealed that he had reached a decision in advance of detailed appraisals of the planning applications which, if successful, would inevitably have seriously affected the cost of compulsory acquisition of the Welsh Water Authority site. The decision to confirm the order was swayed against Sir Brandon solely by the costs factor, a full and proper appreciation of which could not be gained

without regard to the user present or prospective of adjoining parts of his lands.

As subsequent events have shown, so it is argued, this cost factor viewed in that way will involve the Welsh Water Authority in a sum for the acquisition of the site which is the subject of the compulsory purchase order, which will not be based on agricultural value but upon a valuation which takes account of at least the hope of planning permission being granted for use for industrial purposes of the site and of adjoining lands as a composite whole or for adjoining lands excluding the site. In this context, it is of interest to learn of the Secretary of State's recent indication that he is quite likely to regard favourably a recommendation made by an inspector in 1981 that conditional planning permission be granted to Sir Brandon and the trustees upon their applications therefor for the use for industrial purposes of a very considerable area of land which includes the compulsory purchase order site.

In her report following the enquiry into the applications, the inspector somewhat significantly concluded, upon the need for land for industrial use, that, if it was necessary urgently to attract large prestige firms with exacting require.+ ments which can serve the Rhondda, then Miskin was the only site she was shown which meets the criteria of accessibility, availability and attractiveness.

In March 1982 the Secretary of State informed Sir Brandon and the Trustees that the existence of an acceptable agreement with the local planning authority under the provisions of section 52 of the Town and Country Planning Act 1971 – apparently such an agreement is in being – would be an important factor in his con.. sideration of the applications. And he enquired whether, in view of the areas of land covered by the agreement, account could be taken of any possible requirements which might arise for alternative sites for a sewage disposal works.

What is one to make of all that, save, it seems inevitable, that a large part of the Miskin lands, the CPO site included, will soon be the subject of plan. ning permission for industrial *use.* And the cost of acquisition of the CPO site, if the order is to remain confirmed, will not be based on agricultural land value but upon the much higher value attributed to land used for industrial purposes.

This is obviously in the public interest a very important consideration, especially when it is borne *in* mind that, in the present case, land can still be acquired by the Welsh Water Authority without the use of compulsory powers at agricultural value which is, so it is submitted by Lord Hooson, as suitable as the compulsory purchase order site for the construction of a sewage plant.

Looking at the whole situation as it appears now, that is, I think, a valid and powerful argument. Despite attempts made on behalf of the Secretary of State and the Welsh Water Authority to demonstrate that his decision to confirm the compulsory purchase order was not exclusively founded on the difference between the cost of construction of the CPO site and the alternative site, I am persuaded, for reasons which I shall later explain and which arise out of the contents

of the several reports and decision letters which are summarised in the decision letter of 14th November 1978, that this was the sole factor which caused the Secretary of State to prefer the CPO site.

Accordingly, seeing nothing has happened to change the character of either of the two sites during the last three-and-a-half years, if it were permissible to regard the situation as it appears now for the purpose of fairly disposing of the appeal, I would unhesitatingly allow the appeal. The cost factor is altogether different now. Land values are a powerful, if not overwhelming, ingredient of it, whereas it *was* absent from the Secretary of State's consideration in the autumn of 1978.

But is it lawful and otherwise proper to look at the Secretary of State's decision taking account of subsequent events so as with hindsight, to adjudge it right or wrong? It is very tempting to do so, especially when what is at stake is the right of a man to retain his land or to dispose of it when and how and to whom he chooses. There are instances in recent times when this court has, notably in claims for personal injury, looked at an event or events subsequent to judgment in order to decide whether a plaintiff or a defendant has been justly treated, but I regard them as an exception to the general rule, which is that a decision appealed against can only be regarded within the circumstances from which it was derived. Generally to conduct the appellate process otherwise would *be* to introduce into it an undesirable combination of re-hearing and fresh evidence which would put at peril the imperative need for judgments or orders or decisions to be final unless they are wrong in law or because, for example, the principles explained in the well-known Wednesbury case have not been followed.

I did not understand Lord Hooson to invite us to resolve this appeal other-wise than in the conventional way. This I propose to do, firmly believing it to be wrong to proceed differently. The most he asks of us with regard to the post decision history is to pay regard to it as an unfolding of events, the main effect of which the Secretary of State could reasonably have anticipated as likely to occur sometime soon in the future when he made his decision in November 1978. In other words, it demonstrates what it was the Secretary of State might have anticipated if he had given thought to it, namely that there was hope value in the CPO site and adjoining lands which inevitably would markedly affect the cost of acquisition under the CPO and, therefore, the cost factor which he acted upon.

So regarded, reception of evidence of that kind is, I think, unobjectionable but otherwise it must be ignored. Even when acted upon in that context it may prove to be of little or no value. This is especially so in long drawn out planning disputes during which time all manner of conditions and needs may change so as radically to alter a pre-existing situation.

In the present appeal I do not find the subsequent events helpful, having regard to the vast bulk of the past history, every detail of which must have been known to the Welsh office and, therefore, to the Secretary of State if he had wished to acquaint himself of it. His role in making

planning decisions and confirming or otherwise compulsory purchase orders is, if not inquisitorial, which Mr. Simon Brown submits that it is not, surely investigatory, especially when he is given notice of a relevant matter which might affect his decision by a person likely to be affected by it. He must acquaint himself,from the formidable amount of assistance available to him in his department and from public inquiry, with all the information which is indispensable to the making of a just and equitable decision in the making of which he *is* entrusted with a broad discretionary power. The proper use of a discretionary power is in peril if less than the information essential for its exercise is available to him. If proper use involves him *in* "routing around" – *see* *Rhodes v. Minister of Housing and Local Government (1963) 1 W.L.R. 208* at 213 – relied upon by Mr. Pill – he must either cause that to be done or resolve the issue in favour of the land owner.

So long as all those persons who are going to be affected by his decision are aware of the information he expects to take account of, so that they are given full opportunity to make representations to him about it at public inquiry or through correspondence either before or after public inquiry, he is not restricted in his sources of gathering relevant information. A public inquiry is the best known, most used and most useful means at his disposal to ensure that he is fully equipped to decide the matter in hand.

There are times, however, when a vital point, as it *seems* to him later has either been insufficiently ventilated or not touched upon at all at an inquiry. In either of these circumstances, if he is going to allow the point to affect him, he must cause enquiries to be made into it even to the extent of re-opening the public inquiry. Lord Greene M.R. in *Associated Provincial Picture Houses Limited v. Wednesbury Corporation (1948) 1 K.B. 223* at page 229 said:

> "He must call his own attention to the matters which he is bound to consider."

What he may not do is to proceed to exercise his discretion and allow it to be swayed by a factor which is inadequately presented to him. It matters not, so it seems to me, that he could reasonably have expected an objector or a supporter of his ultimate decision to have fully exposed for him that factor in all its facets at public inquiry or in some other way. He conducts a process of administrative decision which is quite unlike that conducted by courts and some, if not all, tribunals. Nevertheless, it is a process which is governed by disciplines vital to the public interest.

In *Secretary of State for Education and Science v. Tameside Metropolitan Borough Council (1977) A.C. 1014* at page 1065 Lord Diplock said:

> "Or, put more compendiously, the question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant

> information to enable him to answer it correctly?"

It could be said that the Secretary of State did ask himself the right question, although Lord Hooson submits to the contrary in the circumstances, namely whether the financial implications alone could allow him to confirm the compulsory purchase order. But whether, as on any view he should have done, he acquainted himself with all the relevant information or, I would add, all the relevant considerations indispensable to correctly *answer* the question, has not to my mind been established by anything we have read or heard in this court.

In this regard he cannot, contrary to a submission made to us, in my opinion, invoke, nor can anyone else who seeks to support his decision here invoke, the doctrine of estoppel against an appellant who challenges that decision, no matter that that person could have a thought of doing so, ventilated at public inquiry what may turn out to be a crucial facet of the factor upon which the decision is hinged. To allow a legal principle or doctrine of that kind to intrude into an administrative process such as this would, in my opinion, be both inappropriate and unjust. Moreover, in the circumstances under review here, even if the issue of estoppel was validly to be raised, it should not, in my opinion, be determined in favour of either the Secretary of State or the *Welsh* Water Authority. It is clear, I think, that he gave his consent to the compulsory acquisition of Sir Brandon's land solely because of the financial implications arising out of the use of that land. If, as in my view he did, he considered those implications, leaving out of account a fact vital to a proper appraisal of them, Sir Brandon cannot possibly be estopped from inviting this court to examine the effect of that omission.

The inspector whose conclusions and recommendations he accepted made it abundantly plain, as I read his report, that he was in favour of recommending the CPO site upon a financial implication only having, so it would seem, recognised that, upon all other relevant considerations, there was nothing of consequence to cause him to prefer the CPO site to Sir Brandon's alternative. In other words, there was nothing to choose between them. In order to substantiate this appreciation of his views, it is necessary, I regret in the interests of brevity, to record in detail the contents of the following paragraphs of his report:

> "(xix) Sir Brandon is right again to insist that costs are not the whole story, and that other factors are also important and need to be placed in the balance. The question which therefore arises is whether those other factors, either individually or collectively, weigh so heavily against the CPO site that the considerable additional expenditure likely to prove necessary at Sites 1 or 2 should be accepted in the wider public interest. Having carefully considered the origins of the dispute, the FFB Report, and the evidence of the inquiries relating to all those matters, I am convinced that they do not. I therefore propose to make a favourable recommendation in respect of a modified CPO site.

"(xx) As to Sir Brandon's applications, nothing in the evidence concerning appearance, agriculture, flooding, the Nant Coslech or possible future industry suggests to me that planning permissions for Sites 1 and 2 need be withheld. The evidence concerning the Ancient Monument and the Site of Special Scientific Interest shows that Sites 1 and 2 have 'negative' advantages (in the sense that damage elsewhere would be avoided or reduced), although in my view these are marginal and are far outweighed by the prospect of heavy operational traffic being thrown on to the local road network.

"(xxi) The cost of development is not normally a factor which enters into the determination of a planning application. But in my opinion this case is peculiar, in the *sense* that the sole object of Sir Brandon submitting his applications has been to force thorough and proper consideration of the alternative sites. There is no question of Sir Brandon ever implementing a permission(s) for the con.struction of a sewage treatment works, and there can be no doubt that the WNWDA (i.e. the public) would foot the bill.

"(xxii) The machinery of physical planning control does not, and should not, operate in a financial vacuum, divorced from the harsh realities of everyday economics. Rather, I believe that wisely used it should seek to channel public investment into the right places at the right time. Thus, having concluded that the development of Sites 1 and 2 is likely to incur substantial and unnecessary penalties in the shape of scarce public resources, it would be wholly illogical for me to recommend that permission be granted in respect of those sites, unless it had been demonstrated that they possess other overriding advantages compared with the Authority's preferred scheme. I am convinced that they possess no such advantages, and conclude that the applications should be refused on the grounds that they represent unnecessary and wasteful expenditure of public funds."

If the inspector had thought there were other grounds including, for example, agricultural, environmental, access and highway considerations, he would have undoubtedly, in my view, expressly so stated. Thus, although these considerations are mentioned in paragraph (v) of the decision letter, it cannot be supposed, having regard to the inspector's detailed assessment of them, that they influenced the Secretary of State into confirming the CPO.

Paragraph (v) reads as follows: "Apart from the specific issues referred to in paragraphs 11(i) – (iv) above the Secretary of State has also carefully con.. sidered and accepts his inspector's general conclusions in relation to the agricultural, environmental, access and highway implications. He also accepts the inspector's assessment of the financial implications, contained in the conclusions to the report of the second re-opened inquiry, concerning the Water Authority's proposed redevelopment and the cost comparisons with the sites advanced by Sir Brandon Rhys Williams" .

In the following paragraph – (vi) – the Secretary of State said he had also considered written representations submitted to him by Sir Brandon. These were contained in his solicitor's letter of 20th October 1978 wherein this paragraph appears:

> "This obvious potential of the CPO site for industrial purposes if the sewage works were not required to be built on it introduces material questions of relative land costs into the choice of sewage works sites. These issues cannot be resolved until the nature of the industrial development of the area has been decided but are likely to be a material factor which ought to be taken into consideration before the Compulsory Purchase Order is confirmed. This matter was not considered at all during the enquiry".

Regardless of the main purpose of the letter this paragraph clearly alerted, or should have done I think, the Secretary of State to the likelihood that a decision based upon financial implications without consideration of relative land costs would be ill founded and, therefore, unjust to Sir Brandon. The raising of the matter of land costs is nowhere, as I understand the decision letter, answered by it directly or, by implication, within it. The assumption must be, therefore, that the Secretary of State, in refusing to re-open the inquiry or to delay his decision, regarded the financial implication from the standpoint of construction costs and no other.

It was submitted to us that the foregoing paragraph of the solicitor's letter could not possibly have indicated to the Secretary of State that Sir Brandon was suggesting that hope value inter alia was being referred to by the words "material questions of relative land costs" . As already indicated, I do not agree. The Secretary of State has the benefit of advice from senior civil servants well versed in such matters as compulsory purchase and planning. I am not persuaded that they,knowing, of course, that there were material unresolved planning applications before them, did not appreciate that it was being suggested that hope value should be taken account of.

In any event, I do not think it required this paragraph to introduce this financial factor into the mind of the Secretary of State. He was so concerned about the financial implications as to found his decision upon them. That being so, how could he neglect to consider something so fundamental as the cost of the acquisition of land upon which the sewage plant was to be constructed? If this kind of decision were being taken in the commercial world I venture to think that the cost of land would have been very high on the agenda. If the Secretary of State did have it on his agenda – he has failed to prove that – he may have come to the same decision as that which is being challenged, but there is no evidence whatsoever that he gave it so much as a passing thought.

Paragraph (vii) of the decision letter is noteworthy in this connection. He therein contended that all submissions made to him after the close of the enquiries was sufficiently covered by evidence already before him. The plain fact undoubtedly is that no evidence of comparative land

costs was before him. This I take to be a clear indication of his neglect to take account of them.

Does the Secretary of State's failure to enquire into and to consider the full implications of the cost of land acquisition invalidate his decision, bearing in mind the planning and all other relevant considerations? Lord Hooson submits his failure to do so is fatal to the decision – cost of land acquisition was overwhelmingly the main factor to be considered if financial considerations governed the decision. He goes further, and asserts that it was wrong in principle in the exclusive context of finance to prefer the CPO site unless there were overwhelming reasons for this, e.g., a gross disparity in costs which the difference involved in the construction of the plant could not properly be said to amount to.

For the Secretary of State and the Welsh Water Authority it is submitted that he was not called upon to enquire into the cost of the acquisition of land, and that it was reasonable for him and therefore a proper exercise of his discretion to determine the matter as he did.

Mr. Simon Brown conceded, however, that,if there was a glaring lacuna in the evidence and the considerations required to properly found a decision which is capable of being clarified without delaying the decision, the Secretary of State may be "Wednesbury" unreasonable if he does not make enquiries. In other words, he must be shown to have acted perversely.

In the sphere of compulsory land acquisition, the onus of showing that a CPO has been properly confirmed rests squarely on the acquiring authority ands if he seeks to support his own decision, on the Secretary of State. The taking of a person's land against his will is a serious invasion of his proprietary rights. The use of statutory authority for the destruction of those rights requires to be most carefully scrutinised. The courts must be vigilant to see to it that that authority is not abused. It must not be used unless it is clear that the Secretary of State has allowed those rights to be violated by a decision based upon the right legal principles, adequate evidence and proper consideration of the factor which sways his mind into confirmation of the order sought.

I have come to the conclusion that his decision should not be upheld. A vital consideration was not enquired into, in my view. It was, therefore, left out of account in the exercise of the Secretary of State's discretion. The hope value of parts of the Miskin lands should not have been disregarded as it was, especially seeing that there was evidence of its possible existence. An enquiry into it would not, it seems to me, have delayed the decision by much time, if any. To fail to make that enquiry was a glaring omission going to a fundamental consideration.

For these reasons I, too, would allow this appeal.

LORD JUSTICE FOX:

I approach this case on the basis that the propriety of the Secretary of State's decision must be

determined by reference to the facts as they existed at the date when he gave the decision. No argument to the contrary was addressed to us. Indeed, Lord Hooson, as I understood him, accepted that basis as correct. That concession was, in my view, rightly made. I see no ground upon which the propriety of the Secretary of State's decision in November 1978 can be determined by reference to an event occurring over three years later (i.e., the Secretary of State's letter of 12th March 1982 indicating that he was prepared to permit industrial development subject to conditions).

The principal matter raised by the appeal is what attitude the Secretary of State should have taken to the question of comparative acquisition costs. The matter was not considered at all at the public inquiry where the investigation of comparative costs was directed to the costs of construction. The Inspector records, however, in paragraph 263(a) of his Report: "All these lands are in the ownership of Sir Brandon or his children's Trustees. Gwern-y-Gedrych is no longer being actively farmed and such land as the Authority might require is "on offer" at existing use value." Gwern-y-Gedrych is the alternative site offered by Sir Brandon. Are the appellants now estopped from raising the point? At the date when the Secretary of State gave his decision there had already been three public inquiries. The opponents of the Order were not lacking in professional advice or, I think, in determination in their resistance to the confirmation of the Order. They had every opportunity and incentive to raise the matter. In my view, how. ever, there is no question of estoppel here. The Secretary of State's duty was to review the position in the light of all relevant considerations. He had a duty to direct his mind to the material questions and to take reasonable steps to inform himself. If the Secretary of State fails to discharge that duty I do not think that the landowner is precluded from complaining merely because he failed to see the point at an earlier stage. The Inquiry is not litigation, it is merely an aid to the ascertainment of the material facts and issues. It may well be that, in determining whether the Secretary of State has directed his mind to the right questions and has taken reasonable steps to inform himself, the court should have regard to what was, at the time the Secretary of State made his decision, common ground or unquestioned between the parties. Thus, where if at the Inquiry (a) the question of cost was in issue, (b) Gwern-y-Gedrych was on offer at existing use value, (c) it was then speculative whether the possibility of industrial development would materially increase land values and (d) the cm,. plainants put forward no case that the land values were materially increased by that possibility, it might be said that the Secretary of State could reasonably refer, without further inquiry, that the mere possibility of industrial development being permitted consequent upon the planning applications had no material effect upon land values. But, if that proposition is correct (and, as I mention later, I feel doubt as to what the impact of the applications on value might be), it is not, in fact, the situation which faced the Secretary of State when he made his decision. By that time he had received the letter from Sir Brandon's solicitors dated 20th October 1978. There are a number of passages in that letter to which I should refer. Thus, the letter in its opening paragraph states:

> "We understand that the report of the Inspector following the public inquiry which closed in December 1977 has been submitted to you and the purpose of this letter is to request that

> this inquiry be re-opened before a decision is taken to enable certain matters which arose since the inquiry closed or were not placed before the inquiry to be fully and openly investigated". The matters thus referred to are set out in ten numbered paragraphs.
>
> In paragraph 1, after a reference to the applications for planning permission for industrial development, it is stated: "Your decision on the CPO should not, therefore, we submit with respect, be made until these two applications have been considered."

Paragraph 4 is in the following terms: "This obvious potential of the CPO site for industrial purposes if the sewage works were not required to be built on it introduced material questions of the relative land costs into the choice of sewage works sites. These issues cannot be resolved until the nature of the industrial development of the area has been decided but are likely to be a material factor which ought to be taken into consideration before the Compulsory Purchase Order is confirmed. This matter was not considered at all during the inquiry."

Finally, in paragraph 10, the letter states: "Our client considers that for these and other reasons the conclusions of the Secretary of State following the public hearing into the applications to develop the red and the green land should be available before the crucially relevant question of the choice of site for the sewage works can be determined. … It would, we submit be contrary to natural justice to announce a precipitate decision in favour of the CPO site before the industrial site hearings have taken their proper course and decisions have been taken."

There is no doubt that the main object of this letter was to ask that the Secretary of State re-open the inquiry or defer a decision upon the Compulsory Purchase Order until the planning applications had been determined. The Secretary of State considered that request and he rejected it. He was perfectly entitled to do so.

Whilst I think that the main object of the letter was as I have indicated, the provisions of paragraph 4 are, I think, of wider effect and are important. The paragraph asserts that the potential of the CPO site for industrial purposes introduced material questions of comparative land costs which had not previously been considered. It is true that the paragraph also states that "these issues cannot be resolved until the nature of the industrial development of the area has been decided" , but it also states that those issues "are likely to be a material factor which ought to be taken into consideration before the Compulsory Purchase Order is confirmed" . In my view, paragraph 4 must be read as bringing to the attention of the Secretary of State the contention that the possibility of industrial use now introduced material factors of comparative land costs which should be taken into consideration before the Order was confirmed. That condition replaced the attitude adopted by Sir Brandon at the Inquiry.

The Secretary of State, in confirming the Order, accepted, in general, the conclusions and

recommendations of the Inspector. In paragraph 11(v), the Secretary of State says:

> "Apart from the specific issues referred to in paragraphs 11 (i)–(iv) above the Secretary of State has also carefully considered and accepts his Inspector's general conclusions in relation to the agricultural, environmental, access and highway implications. He also accepts the Inspector's assessment of the financial implications contained in the conclusions to the Report of the second reopened Inquiry concerning the Water Authority's proposed development and the cost comparison with the sites advanced by Sir Brandon Rhys Williams."

The Inspector had reported (see paragraph (xviii) of the Decision Letter:

> "(xviii) Mr. Shiell's assessment of the engineering *evidence* accompanies this report and is wholly accepted by me. It is to be expected that however hard promoters of different schemes may attempt to take a disinterested view they will tend s perhaps subconsciously, to maximise the difficulties of the rival site and minimise the problems of the one they favour. The truth often lies somewhere between. The manner in which Mr. Shiell has picked a scrupulous path through the various elements of the alternative schemes strikes me as being fair, rational and comprehensive. The result of that impartial *analysis* suggests that, compared with the CPO site, the construction of similar treatment works would cost some £230,000 more on Site 1, and some £320,000 more on Site 2.
>
> "(xix) Sir Brandon is right again to insist that costs are not the whole story, and that other factors are also important and need to be placed in the balance. The question which therefore arises is whether those other factors, either individually or collectively, weigh so heavily against the CPO site that the considerable additional expenditure likely to prove necessary at Sites 1 or 2 should be accepted in the wider public interest. Having carefully considered the origins of the dispute, the FFB Report, and the evidence of the inquiries relating to all those matters, I am convinced that they do not. I therefore propose to make a favourable recommendation in respect of a modified CPO site."

It appears, therefore, that the Inspector regarded construction cost as the determining factor and that the Secretary of State accepted that. But, if the increased cost of construction on the alternative site was a determining factor on the figures available to the Inspector, that was a circumstance which could be altered if in fact the cost of acquisition of the alternative site was much lower by reason of the beneficial offer made by Sir Brandon to sell the alternative site at existing use value coupled with the possibility of a large increase in value of the Compulsory Purchase Order site consequent upon the likelihood of industrial development.

So the position is this. The Secretary of State decided in favour of the Compulsory Purchase Order on the basis of the increased construction costs if the alternative site were used. The letter of 20th October 1978, however, asserted that a new factor was introduced into the equation, namely comparative acquisition costs. The Secretary of State was bound to consider that. In paragraph 11(viii) of the Decision letter he states:

> "All representations received after the close of the Inquiries have been carefully considered. It has been concluded, however, that there is nothing contained therein which is not sufficiently covered by evidence already before the Secretary of State."

That statement does not *answer* the present problem. We have no reason to suppose that the Secretary of State ever had any evidence of comparative land costs in front of him. He does not appear to have received any at the Inquiries and there is nothing to suggest that he obtained any from any other source. I do not think it is sufficient to say that nobody suggested at the Inquiry that the difference in value was significant and that the making of the planning application in 1978 left the position as to industrial user as speculative as it was before the planning applications were made. So far as the Inquiry is concerned, the portance of the letter of 20th October 1978 is that it raised a new contention which, as the letter itself stated, was not considered at all during the Inquiry. That being so, I do not think that the fact that no point was taken at the Inquiry can be a reliable guide to the question of value at the time of the Inquiry. If it was not, then the fact that the planning position remained uncertain still does not give a reliable guide to value. I am not, in any event, satisfied on any evidence before us whether the making of the applications might not have affected value. Dealers in land might be influenced by applications made by major local landowners and the Land Authority for Wales.

I can only conclude that, in a case where the Secretary of State decided to confirm the Compulsory Purchase Order primarily on considerations of cost, and where shortly before his decision he was asked to take account of land acquisition costs, he confirmed the Order without material as to what the latter costs were. Accordingly, I do not think that he can have given the proper degree of consideration to the overall question of cost. The onus of establishing that a Compulsory Purchase Order has been properly made must be on the acquiring authority. The question of cost was a material issue. One of the elements in the total cost was land acquisition cost. I am not satisfied that the Secretary of State had adequate material to judge the latter cost when he made his decision. I would allow the appeal.

THE MASTER OF THE ROLLS:

The judgment is the appeal is allowed; the order is quashed accordingly.

MR. HOWELL: May I respectfully invite your Lordships to allow the respondents their costs here and below and that the costs of Mr. Prest and Mr. Straker be taxed on a trustee basis?

THE MASTER OF THE ROLLS: You are asking for the costs against both the Welsh Water Authority and the Secretary of State?

MR. HOWELL: My Lord, yes.

LORD JUSTICE FOX:

Should they get their costs on a trustee basis? No doubt they can get any costs they do not recover out of the fund, but I think, so far as any other costs are concerned, it is just ordinary litigation.

THE MASTER OF THE ROLLS:

It is just ordinary litigation; it should not be anything special. When a case is ordinary litigation they get ordinary costs, do they not?

LORD JUSTICE FOX:

They can only indemnify themselves out of the fund

MR. HOWELL: It is certainly not a case about administration of the trust.

LORD JUSTICE FOX: As trustees, if they engage in proper activities to preserve the trust property, any expenses in respect of that can be recovered from the trust fund.

MR. HOWELL: My Lord, certainly.

THE MASTER OF THE ROLLS:

Let us hope you will get all your costs without bothering the fund about it. If they are properly taxed it seems to me that all the expenditure which you have incurred, if it is proper and reasonable – therefore, you ought to get your costs from the other side. Mr. Brown, is there any question about that?

MR. BROWN: My Lord, none at all, provided, of course, the court does not make any special order as to costs to reflect the status as trustees of certain of the applicants. I gather the court is not minded to make such special order, so as to that I say nothing.

THE MASTER OF THE ROLLS: Have you anything to say about that, Miss Booth?

MISS BOOTH: My Lord, no. We chose to be separately represented on the last occasion and I cannot resist that application.

MR. BROWN: My Lord, I am instructed to make application to your Lordships to grant leave to appeal to the House of Lords.

THE MASTER OF THE ROLLS: More and more delay: it is about time these sewage works were constructed.

MR. BROWN: My Lord, certainly. It is obviously an important decision in many respects and, indeed, no doubt the Secretary of State for Wales and other depart. ments of the Crown wish to consider certain matters. I am particularly concerned with some aspects of the judgments of this court which are of a wider and more general application than merely to the instant appeal. My Lords, the two particular matters are the nature and extent of the Secretary of State's investigatory function – I use, I hope, the language of my Lord, Lord Justice Watkins – and, secondly, the correct approach to the question whether or not to confirm a compulsory purchase order, to what extent the balance must fall down decisively in favour of acquisition. There is the other question as to fresh evidence but, as I understand the judgments of this court, your Lordship is in a minority on that and perhaps, even in your Lordship's judgment, it is an obiter dictum expression of view. That is the application I am instructed to make.

THE MASTER OF THE ROLLS: What do you say about it, Mr. Howell?

MR. HOWELL: My Lord, obviously the question of the duty of the Secretary of State to make investigations is a point of general application. All that I would say is that all three of your Lordships' judgments

THE MASTER OF THE ROLLS: What seems to me at the moment is the urgency of the work being got on with. If this case goes to the House of Lords, goodness knows how long it will take. Nothing will be done and there it is.

MR. HOWELL: My Lord, it certainly will not be in the public interest that the construction of the sewage works be further delayed.

THE MASTER OF THE ROLLS: We refuse leave. So the appeal will be allowed with costs here and below.

I can only conclude that, in a case where the Secretary of State decided to confirm the Compulsory Purchase Order primarily on considerations of cost, and where shortly before his decision he was asked to take account of land acquisition costs, he confirmed the Order without material as to what the latter costs were. Accordingly, I do not think that he can have given the proper degree of consideration to the overall question of cost. The onus of establishing that a Compulsory Purchase Order has been properly made must be on the acquiring authority. The question of cost was a material issue. One of the elements in the total cost was land acquisition cost. I am not satisfied that the Secretary of State had adequate material to judge the latter cost when he made his decision. I would allow the appeal.

Order: Appeal allowed with costs here and below. Leave to appeal to the House of Lords refused.

A

Supreme Court

Regina (Sainsbury's Supermarkets Ltd) *v* Wolverhampton City Council

[2010] UKSC 20

B

2010 Feb 1, 2; May 12

Lord Phillips of Worth Matravers PSC, Lord Hope of Craighead DPSC, Lord Walker of Gestingthorpe, Baroness Hale of Richmond, Lord Brown of Eaton-under-Heywood, Lord Mance, Lord Collins of Mapesbury JJSC

Compulsory purchase — Development — Competing proposals — Planning authority determining how to exercise compulsory purchase powers — Whether entitled when considering benefits of rival schemes to have regard to benefits accruing to site not within proposed development area — Town and Country Planning Act 1990 (c 8) (as amended by Planning and Compulsory Purchase Act 2004 (c 5), s 99, Sch 9), ss 226(1)(a)(1A), 233

C

The claimant supermarket company owned or controlled 86% of site A and another supermarket company, T Ltd, owned or controlled most of the remainder of the site. Both companies wished to develop site A but, unless the defendant local authority used its compulsory purchase powers in respect of that site, neither of the proposed developments could take place. T Ltd also owned site B, about 850 metres away, which contained a number of listed buildings which were in poor condition. For many years it had been an objective of the local authority to secure the regeneration of site B. T Ltd, who considered that it was not financially viable to develop site B on its own, offered to link its scheme for site A with the redevelopment of site B on the basis that that would amount to a subsidy at least equal to the loss it would sustain in carrying out the development of site B. The local authority approved in principle the making of a compulsory purchase order under section 226(1)(a) of the Town and Country Planning Act 1990[1] in respect of the claimant's land at site A to facilitate a development of the site by T Ltd. In resolving to make that order, the local authority took into account T Ltd's commitment to develop site B. The claimant sought judicial review of the local authority's decision on the ground that it was illegitimate for the local authority, in resolving to make the compulsory purchase order, to have regard to the regeneration of site B. The judge dismissed the claim. On the claimant's appeal, the Court of Appeal held that section 226(1)(a) required the local authority to be satisfied that the compulsory purchase order would facilitate the redevelopment of site A but that section 226(1A) required it to consider whether and to what extent the redevelopment of site A would bring well-being benefits to a wider area and that, if a redevelopment was likely to act as a catalyst for the redevelopment of some other site, such catalytic effects were capable of falling within the scope of section 226(1A) and it dismissed the appeal.

D E F G

On the claimant's appeal—

Held, (1) that the principles which applied to the determination of planning applications could apply, by analogy, to compulsory acquisition for development purposes, provided that (per Lord Walker of Gestingthorpe, Baroness Hale of Richmond, Lord Mance and Lord Collins of Mapesbury JJSC) because of the serious invasion of proprietary rights involved in compulsory acquisition, a strict approach to the application of those principles was adopted; that, therefore, a local authority

H

[1] Town and Country Planning Act 1990, as amended, ss 226(1)(a)(1A), 233: see post, para 108.

could take into account off-site benefits of a proposed development provided that such benefits were related to or connected with the development for which the compulsory acquisition was made; and that (per Lord Phillips of Worth Matravers PSC, Lord Walker of Gestingthorpe, Baroness Hale of Richmond, Lord Mance and Lord Collins of Mapesbury JJSC) such a connection had to be a real rather than a fanciful or remote one and (Lord Brown of Eaton-under Heywood JSC dissenting) in the absence of any other connection a cross-subsidy from the acquisition site to another site would not suffice (post, paras 70, 71–72, 80, 82, 83, 84, 89, 90, 97, 98, 120, 127–128, 134–135, 137–138, 151, 168, 173, 181).

(2) That (per Lord Walker of Gestingthorpe, Baroness Hale of Richmond, Lord Mance and Lord Collins of Mapesbury JJSC) the power of compulsory acquisition had to be capable of being exercised under section 226(1)(a) of the 1990 Act before the limitation in section 226(1A) applied; that (Lord Brown of Eaton-under-Heywood JSC dissenting) the claimed financial connection between the two developments did not amount to a relevant matter for the purposes of section 226(1)(a); and that (Lord Phillips of Worth Matravers PSC and Lord Hope of Craighead DPSC dissenting) no different result was required by the fact that T Ltd and the claimant co-owned and were in competition for site A and the council was proposing to dispose of the land to T Ltd under section 233 (post, paras 74, 75, 76, 80, 83, 90, 91, 96, 97, 100, 106, 151).

(3) Allowing the appeal (Lord Phillips of Worth Matravers PSC, Lord Hope of Craighead DPSC and Lord Brown of Eaton-under Heywood JSC dissenting), that, accordingly, there should be a declaration that the opportunity for redevelopment of site B was not a lawful consideration in deciding whether to make a compulsory purchase order in relation to site A (post, paras 79, 80, 89, 90, 97, 106).

R v Westminster City Council, Ex p Monahan [1990] 1 QB 87, CA, *R v Plymouth City Council, Ex p Plymouth and South Devon Co-operative Society Ltd* (1993) 67 P & CR 78, CA, *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, HL(E) and *Standard Commercial Property Securities Ltd v Glasgow City Council (No 2)* 2007 SC (HL) 33, HL(Sc) considered.

Decision of the Court of Appeal [2009] EWCA Civ 835; [2009] 3 EGLR 94 reversed.

The following cases are referred to in the judgments:

Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223; [1947] 2 All ER 680, CA

Bradford (City of) Metropolitan Council v Secretary of State for the Environment (1986) 53 P & CR 55, CA

Brighton Borough Council v Secretary of State for the Environment (1978) 39 P & CR 46

Chesterfield Properties plc v Secretary of State for the Environment (1997) 76 P & CR 117

Clunies-Ross v Commonwealth of Australia (1984) 155 CLR 193

Galloway v Mayor and Commonalty of London (1866) LR 1 HL 34, HL(E)

Grampian Regional Council v Secretary of State for Scotland 1984 SC (HL) 58, HL(Sc)

Hall & Co Ltd v Shoreham-by-Sea Urban District Council [1964] 1 WLR 240; [1964] 1 All ER 1, CA

Hanks v Minister of Housing and Local Government [1963] 1 QB 999; [1962] 3 WLR 1482; [1963] 1 All ER 47

Kelo v City of New London, Connecticut (2005) 554 US 469

Municipal Council of Sydney v Campbell [1925] AC 338, PC

Newbury District Council v Secretary of State for the Environment [1981] AC 578; [1980] 2 WLR 379; [1980] 1 All ER 731, HL(E)

Prest v Secretary of State for Wales (1982) 81 LGR 193, CA

Pyx Granite Co Ltd v Ministry of Housing and Local Government [1958] 1 QB 554; [1958] 2 WLR 371; [1958] 1 All ER 625, CA
R v Plymouth City Council, Ex p Plymouth and South Devon Co-operative Society Ltd (1993) 67 P & CR 78; [1993] JPL 538, CA
R v Secretary of State for Transport, Ex p de Rothschild [1989] 1 All ER 933; 87 LGR 511; sub nom *de Rothschild v Secretary of State for Transport* 57 P & CR 330, CA
R v Westminster City Council, Ex p Monahan [1990] 1 QB 87; [1989] 3 WLR 408; [1989] 2 All ER 74, CA
R & R Fazzolari Pty Ltd v Parramatta City Council [2009] HCA 12; 237 CLR 603
Rugby Joint Water Board v Shaw-Fox [1973] AC 202; [1972] 2 WLR 757; [1972] 1 All ER 1057, HL(E)
Simpsons Motor Sales (London) Ltd v Hendon Corpn [1964] AC 1088; [1963] 2 WLR 1187; [1963] 2 All ER 484, HL(E)
Sosmo Trust Ltd v Secretary of State for the Environment [1983] JPL 806
Sovmots Investments Ltd v Secretary of State for the Environment [1977] QB 411; [1976] 2 WLR 73; [1976] 1 All ER 178; [1977] QB 411; [1976] 3 WLR 597; [1976] 3 All ER 720, CA; [1979] AC 144; [1977] 2 WLR 951; [1977] 2 All ER 385, HL(E)
Standard Commercial Property Securities Ltd v Glasgow City Council (No 2) 2005 SLT 144; [2006] UKHL 50; 2007 SC (HL) 33, HL(Sc)
Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR 759; [1995] 2 All ER 636, HL(E)
Waters v Welsh Development Agency [2004] UKHL 19; [2004] 1 WLR 1304; [2004] 2 All ER 915, HL(E)
Westminster Renslade Ltd v Secretary of State for the Environment (1983) 48 P & CR 255

The following additional case was cited in argument:

Belfields Ltd v Secretary of State for Communities and Local Government [2007] EWHC 3040 (Admin); [2008] JPL 954

APPEAL from the Court of Appeal

The claimant, Sainsbury's Supermarkets Ltd, appealed, with permission of the Supreme Court (Lord Walker of Gestingthorpe, Lord Mance and Lord Collins of Mapesbury JJSC) granted on 5 November 2009, from a decision of the Court of Appeal (Ward, Mummery, Sullivan LJJ) [2009] 3 EGLR 94 given on 31 July 2009, dismissing its appeal against a decision of Elias J [2009] EWHC 134 (Admin) given on 3 February 2009 whereby he had dismissed its claim for judicial review of the decision of the defendant local authority, Wolverhampton City Council, given on 30 January 2008 to give approval in principle to the making of a compulsory purchase order under section 226(1)(a) of the Town and Country Planning Act 1990 in respect of land owned by the claimant. Tesco Stores Ltd was an interested party

The facts are stated in the judgment of Lord Collins of Mapesbury JSC.

Christopher Lockhart-Mummery QC, *Eian Caws* and *Charles Banner* (instructed by *CMS Cameron McKenna LLP*) for the claimant.

Compulsory purchase powers should only be exercised as a last resort, where the interference with property rights is necessary to achieve the relevant objectives. The court must carefully scrutinise the exercise of compulsory purchase powers to ensure that the statutory authority has been properly exercised: see *Prest v Secretary of State for Wales* (1982) 81 LGR 193, 198, 211. In deciding whether, and how, to exercise

compulsory purchase powers in relation to a site under section 226 of the Town and Country Planning Act 1990, as amended, a local authority may only lawfully take into account those factors relevant to the achievement of the statutory purpose. A proposal to cross-subsidise development elsewhere is entirely unrelated to the achievement of the statutory purpose and, in making its decision by reference to that factor, the local authority was pursuing a purpose outside the statutory scheme and/or was taking into account an immaterial consideration.

The Court of Appeal's construction of section 226(1A) was fundamentally flawed because it treated the terms of subsection (1A) as an enlargement, rather than as a restriction, of the powers under subsection (1)(a). The power under subsection (1)(a) may be exercised by a local authority if it thinks that the acquisition will facilitate, inter alia, the carrying out of redevelopment on the land to be acquired. However, by virtue of subsection (1A), it may only proceed to exercise that power if it thinks that the redevelopment is likely to contribute to one of the specified well-being objects. Subsection (1A) does not, therefore, confer any power on the local authority to acquire a site under subsection (1)(a) *because* such acquisition is likely to contribute to the well-being objects, but it prevents such acquisition if those benefits are not considered likely to arise as a result of the acquisition: see *Belfields Ltd v Secretary of State for Communities and Local Government* [2008] JPL 954. The exercise of the power of acquisition is rooted in subsection (1)(a) and requires the authority to decide that the acquisition will facilitate the redevelopment of the land that it proposes to acquire rather than some other unrelated land in a wholly different location. The Court of Appeal wrongly treated the limitation on the exercise of the power provided by subsection (1A) as providing a new class of material considerations which may be taken into account by a local authority in deciding whether to exercise its power compulsorily to acquire land under section 226. The ministerial advice in ODPM Circular 06/2004, *Compulsory Purchase and the Crichel Down Rules*, gives no support to the Court of Appeal's approach to the construction of subsection (1A). The claimant's approach to section 226 reflects the approach adopted by Parliament in section 3 of the Local Government Act 2000, under which the power to promote well-being in section 2 of that Act is curtailed by any prohibition, restriction or limitation imposed by another statute. In the field of compulsory purchase, subsections (1)(a) and (1A) of section 226 of the 1990 Act set such constraints on a local authority's powers of acquisition.

Irrespective of the provisions of section 226(1A), an acquiring authority, when making a compulsory purchase order of a site under section 226(1)(a), and the Secretary of State when authorising that order, may not have regard to a commitment to secure through cross-subsidy the development of an unrelated site, thereby seeking to achieve well-being benefits from such development. The lawfulness of the exercise of a statutory discretion is to be determined by looking at the relevant legislation and its scope and object in order to assess whether irrelevant considerations have motivated or influenced the decision. It is also fundamental to the exercise of discretionary powers that decision-makers must not pursue collateral purposes or ends which are outside the objects and purposes of the statute. Where compulsory purchase is concerned, the courts have consistently confined the exercise of such powers strictly to the stated statutory purpose:

see *Galloway v Mayor and Commonalty of London* (1866) LR 1 HL 34, 43. Where a plurality of purposes is pursued, but one purpose is unauthorised by the statute, the power will have been invalidly exercised. Subsection (1)(a) does not authorise the acquisition of land in order to facilitate the development of some other, unrelated land: see *Chesterfield Properties plc v Secretary of State for the Environment* (1997) 76 P & CR 117, 125. The contentions of the local authority and the interested party are contrary to the intention of Parliament as expressed in the clear language of section 226. Parliament has provided that the power of subsection (1)(a) is not to be exercised unless the authority thinks that well-being will result from the carrying out of development on the site to be acquired. If Parliament had contemplated that the achievement of the wider well-being of the local authority's area was to be a relevant factor in the overall discretion arising under section 226(1)(a), it would have expressed subsection (1A) differently. A local authority cannot use its powers for an ulterior object, however desirable that object may seem to it to be in the public interest: see *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1958] 1 QB 554, 572 and *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, 772.

In the context of planning permission, an offered planning obligation which has nothing to do with the proposed development, apart from the fact that it is offered by the developer, is not a material consideration and is regarded as an attempt to buy planning permission: see the *Tesco Stores* case, at p 770. Benefits which are embellishments of the development itself or by way of appropriate mitigation to offset the impacts arising from the development can lawfully be taken into account: see *R v Plymouth City Council, Ex p Plymouth and South Devon Co-operative Society Ltd* [1993] JPL 538. The possibility of one development cross-subsidising another highly desirable development is capable of being a material consideration under section 70(2) of the 1990 Act if the two developments form part of one composite development project: see *R v Westminster City Council, Ex p Monahan* [1990] 1 QB 87. Whilst there is not an exact parallel between the scope of the material considerations under section 70(2) and those under section 226, there is no proper basis for distinguishing the approach taken in the planning cases from that involving the exercise of compulsory powers of acquisition. The Court of Appeal's suggestion that, unlike section 70(2), section 226(1A) imposes an express obligation to have regard to off-site benefits, is incorrect. The effect of section 226(1A) is to require consideration of the well-being benefits resulting from the physical development of the site to be acquired, which may in some cases also be experienced off-site, but not to have regard to benefits that might flow from the development of another unrelated site, purely because the prospective developer of the acquired site has chosen to create a financial link between the two developments. The Court of Appeal also erred in attaching weight to the fact that the financial viability of an application for planning permission is unlikely to be a material consideration for the purposes of determining an application under section 70(2) but that it was a highly material factor in the consideration by the Secretary of State of the merits of authorising compulsory acquisition. A distinction has to be made between the viability of the development for which the compulsory purchase order is being acquired and the viability of the development of some other unrelated

land. The former is a material consideration but that does not support the proposition that the latter is also material. The Court of Appeal also wrongly attached significance to the distinction between the scrutiny given to a compulsory purchase order compared with that given to a grant of planning permission. The scope of the power under section 226 cannot be affected by the fact that its purported exercise may be subject to subsequent scrutiny. The courts have defined the legitimacy of off-site benefits by reference to their direct relationship to the development in question in order to avoid a regime whereby planning permission can be granted to the highest bidder. There is an equal need to draw the same dividing line in the case of compulsory purchase, if not a greater need in view of its consequences. A comparison of the statutory language supports that position. The courts have carved out of the phrase "material considerations" in section 70(2) the principle of benefits related to the development. The far more specific language of subsections (1)(a) and (1A) of section 226 compels the same conclusion. There is no discernible justification or logic for treating as material in the context of a compulsory acquisition brought under the 1990 Act a consideration to which it would be unlawful for a planning authority to have regard when deciding whether to grant planning permission for the development which the compulsory purchase order is to facilitate. *Standard Commercial Property Securities Ltd v Glasgow City Council (No 2)* 2005 SLT 144; 2007 SC (HL) 33 concerns a different statutory provision and can be distinguished.

Neil King QC and *Guy Williams* (instructed by *Wragge & Co LLP, Birmingham*) for the local authority.

In order lawfully to exercise its powers of compulsory acquisition under section 226(1)(a) of the 1990 Act a local authority must think that (i) the acquisition will facilitate the carrying out of development, redevelopment or improvement on or in relation to the land; and (ii) the development is likely to contribute to the achievement of the promotion or improvement of the economic, social and/or environmental well-being of their area. Thus, subsection (1)(a) is concerned with the purpose for which land may be compulsorily acquired and subsection (1A) is concerned with the consequences, in terms of achieving specific objects, which may flow from the acquisition; but the requirements of both provisions must be met before a compulsory purchase order can be made. The purpose of the acquisition of the claimant's land falls squarely within section 226(1)(a). The development which will be facilitated by the acquisition will then, via a cross-subsidy to the related development, also result in well-being benefits within section 226(1A). ODPM Circular 06/2004 correctly advises that the statutory concept of well-being extends to the whole of the relevant local authority area: see Appendix A, para 6.

The words of section 226(1A) should be given their ordinary meaning. If Parliament had wished to confine consideration to the economic, social and environmental well-being of only the land being acquired, it would have done so, although that would have made little sense. Section 226(1A) requires an acquiring authority to satisfy itself that the proposed acquisition will have beneficial consequences in terms of the well-being of its area. The nature of those consequences will vary widely depending on the circumstances; but there is no reason why bringing forward the beneficial

development of other land in its area is incapable, as a matter of law, of constituting such a consequence. The claimant's argument ignores the requirements of subsection (1A), by virtue of which the authority must think that the proposed development "is likely to contribute to the achievement of" the well-being objects of its area, and it is inconsistent with Government policy as set out in ODPM Circular 06/2004 that the benefit to be derived from exercising the power is not restricted to the area subject to the order, as the concept is applied to the well-being of the whole, or any part, of the acquiring authority's area. The words "contribute to" are wide. As a matter of ordinary language the proposed development will contribute to well-being objectives through the economic, social and environmental benefits which will result from the development of both sites. There is no difference in principle, in terms of the requirements of section 226(1A), between the benefits resulting from the proposed development itself and the benefits resulting from the related development. Section 226 is drafted in broad terms to encompass wide ranging well-being benefits. The necessary connection between the well-being benefit in question and the development of the compulsory purchase order land is clearly set out within subsection (1A). There is no reason to restrict the ordinary meaning of those words. Without the cross-subsidy which the related development will provide, the development of the compulsory purchase order site is unlikely to happen. Thus the development of the compulsory purchase order site is likely to contribute to the objects set out in section 226(1A) through both the development of that site and the consequential development of the other site. Accordingly, the benefits of the related development may lawfully be taken into account by the local authority by reference to section 226(1A) in exercising its powers under section 226(1)(a).

It is not appropriate to carry across dicta in cases which are concerned with the lawfulness of planning conditions and section 106 agreements directly and without any modification to the power to make compulsory purchase orders under section 226. The reasoning of the Court of Appeal, in drawing a distinction between the considerations material to the grant of planning permission under section 70(2) and the approach to the compulsory acquisition of land under section 226, is endorsed. The relevance of the well-being benefits which will be secured through the cross-subsidy which one development will provide for the other is not a matter of law but of weight for the decision-maker. The lawfulness of the considerations taken into account by the local authority should be resolved by reference to the plain wording of section 226 without more.

However, if it is appropriate to apply, in some way, the principles established in relation to section 70(2), it must be done in such a way as properly to reflect the different context and statutory purpose of compulsory acquisition, namely to facilitate development and to promote the well-being of the authority's area. *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759 does not address, nor does it therefore seek to prescribe, what matters may, or may not, be taken into account by a local authority when deciding whether to exercise its powers of compulsory acquisition in order to facilitate the carrying out of one or other of two, or more, rival schemes of development on a site. In deciding whether to make a compulsory purchase order in such circumstances, there can be no reason in principle why the local authority should be precluded as a matter of law

from taking into account all the benefits to its area which will result from the making of the order: see *Standard Commercial Property Securities Ltd v Glasgow City Council (No 2)* 2007 SC (HL) 33, paras 39, 70. The authority is deciding whether to use its powers of compulsory acquisition in order to facilitate development which would not take place without intervention and so bring about well-being benefits to its area as a whole. Regard must be had to the statutory obligation to take wider well-being benefits into account, and the significance of viability and well-being. [Reference was also made to *R v Plymouth City Council, Ex p Plymouth and South Devon Co-operative Society Ltd* [1993] JPL 538.]

The weight to be attributed to the cross-subsidy is a matter for the authority, subject to a challenge for unreasonableness: see *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223. The potential materiality of cross-subsidy and financial considerations in the planning permission context is established by *R v Westminster City Council, Ex p Monahan* [1990] 1 QB 87: see also *Brighton Borough Council v Secretary of State for the Environment* (1978) 39 P & CR 46; *Sosmo Trust Ltd v Secretary of State for the Environment* [1983] JPL 806 and *Sovmots Investments Ltd v Secretary of State for the Environment* [1977] QB 411.

Even if the well-being benefits which would result from the related development could not lawfully be taken into consideration under section 226(1A), in choosing between the two development proposals in the context of deciding which one, if either, to facilitate through the exercise of its powers of compulsory acquisition, the authority was entitled to take account of the overall benefits to its area which each scheme would provide. Such an approach does not enable a developer to buy the exercise of compulsory purchase powers, rather it means that the authority may take all material considerations into account in determining whether, and in whose favour, to exercise powers of compulsory acquisition.

Christopher Katkowski QC and *Scott Lyness* (instructed by *Ashurst LLP*) for the interested party.

The arguments of the local authority are adopted.

Under section 226(1A) the question is not whether the development is *likely to contribute* to the achievement of any one or more of the specified objects but whether the local authority *think that* it is likely to so contribute. The decision-maker is the local authority and it is then for the Secretary of State, if objection is made, to decide whether the development is likely to contribute to the achievement of one or more of the specified objects. A discretion is therefore given to the decision-maker and there are no clear grounds for interfering with it in this case.

In any event, the statutory purpose is not to be determined from subsection (1)(a) exclusively but from subsections (1)(a) and (1A) together. Even if the benefits of the related development do not fall within subsection (1A), where there is a competition between two rival contenders there is no public law reason not to allow additional benefits put forward by one contender to be taken into account.

Lockhart-Mummery QC replied.

The court took time for consideration.

12 May 2010. The following judgments were handed down.

LORD COLLINS OF MAPESBURY JSC

Introduction

1 This appeal is about compulsory acquisition of private property by local authorities under the Town and Country Planning Act 1990 in connection with the development or redevelopment of land. It raises for the first time, in the context of compulsory acquisition, a number of controversial issues which have arisen in the context of planning permission, including these: how far a local authority may go in finding a solution to problems caused by the deterioration of listed buildings; to what extent a local authority may take into account off-site benefits offered by a developer; and what offers (if any) made by a developer infringe the principle or policy that planning permissions may not be bought or sold.

2 The Raglan Street site is a semi-derelict site situated immediately to the west of, and just outside, the Wolverhampton Ring Road, which encircles the Wolverhampton city centre retail, business and leisure core. Sainsbury's Supermarkets Ltd ("Sainsbury's") owns or controls 86% of the site and Tesco Stores Ltd ("Tesco") controls most of the remainder. Sainsbury's and Tesco each wish to develop the Raglan Street site. Outline planning permission has been granted to Tesco, and the local authority has resolved to grant outline planning permission to Sainsbury's.

3 Tesco controls a site in the Wolverhampton city centre known as the Royal Hospital site, which is about 850 metres away from the Raglan Street site on the other side of the city centre. The Royal Hospital site is a large site with a number of listed buildings which are in poor condition. It has been an objective of Wolverhampton City Council ("the council") over several years to secure the regeneration of the Royal Hospital site. Tesco's position has been that it was not financially viable to develop the Royal Hospital site in accordance with the council's planning requirements and its space requirements on the site for the primary care trust. It offered to link its scheme for the Raglan Street site with the redevelopment of the Royal Hospital site and said that this would amount to a subsidy at least equal to the loss it would sustain in carrying out the Royal Hospital site development.

4 The council accepted that the Royal Hospital site would not be attractive to developers if it were restricted to the council's scheme. Even on optimistic assumptions, there did not appear to be a level of profit available which would make the site an attractive proposition when weighed against the risks. Development was unlikely to take place for the foreseeable future unless Tesco's proposals were brought forward through a cross-subsidy from the Raglan Street site.

5 In January 2008 the council approved in principle the making of a compulsory purchase order ("CPO") under section 226(1)(a) of the 1990 Act in respect of the land owned by Sainsbury's at the Raglan Street site to facilitate a development of the site by Tesco. In resolving to make the CPO, the council took into account Tesco's commitment to develop the Royal Hospital site (and indeed passed a resolution which indicated that one of the purposes of the CPO was to facilitate the carrying out of the Royal Hospital site development).

6 Sainsbury's wishes to develop the Raglan Street site and claims that it is illegitimate for the council, in resolving to make a CPO of the Sainsbury's land on the Raglan Street site, to have regard to the regeneration of the Royal Hospital site to which Tesco will be committed if it is able to develop the Raglan Street site. Elias J dismissed the claim by Sainsbury's for judicial review of the council's decision, and the Court of Appeal [2009] 3 EGLR 94 dismissed an appeal in a judgment of Sullivan LJ, with whom Ward and Mummery LJJ agreed.

Compulsory purchase

7 Section 226 of the 1990 Act, as amended by section 99 of and Schedule 9 to the Planning and Compulsory Purchase Act 2004, provides:

> "(1) A local authority to whom this section applies shall, on being authorised to do so by the Secretary of State, have power to acquire compulsorily any land in their area— (a) if the authority think that the acquisition will facilitate the carrying out of development, redevelopment or improvement on or in relation to the land, or (b) which is required for a purpose which it is necessary to achieve in the interests of the proper planning of an area in which the land is situated.
>
> "(1A) But a local authority must not exercise the power under paragraph (a) of subsection (1) unless they think that the development, redevelopment or improvement is likely to contribute to the achievement of any one or more of the following objects— (a) the promotion or improvement of the economic well-being of their area; (b) the promotion or improvement of the social well-being of their area; (c) the promotion or improvement of the environmental well-being of their area."

8 CPOs made by a local authority under section 226 must be confirmed by the Secretary of State. If the owner of the land which is the subject of a CPO objects to the order, the Secretary of State will appoint an independent inspector to conduct a public inquiry. The inspector's report and recommendation will be considered by the Secretary of State when a decision whether or not to confirm the CPO is taken. Where land has been acquired by a local authority for planning purposes, the authority may dispose of the land to secure the best use of that or other land, or to secure the construction of buildings needed for the proper planning of the area: section 233(1).

9 Compulsory acquisition by public authorities for public purposes has always been in this country entirely a creature of statute: *Rugby Joint Water Board v Shaw-Fox* [1973] AC 202, 214. The courts have been astute to impose a strict construction on statutes expropriating private property, and to ensure that rights of compulsory acquisition granted for a specified purpose may not be used for a different or collateral purpose: see Taggart, "Expropriation, Public Purpose and the Constitution", in *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade*, (1998) ed Forsyth & Hare, p 91.

10 In *Prest v Secretary of State for Wales* (1982) 81 LGR 193, 198 Lord Denning MR said:

> "I regard it as a principle of our constitutional law that no citizen is to be deprived of his land by any public authority against his will, unless it is

A expressly authorised by Parliament and the public interest decisively so demands . . ."

and Watkins LJ said, at pp 211–212:

"The taking of a person's land against his will is a serious invasion of his proprietary rights. The use of statutory authority for the destruction of those rights requires to be most carefully scrutinised. The courts must B be vigilant to see to it that that authority is not abused. It must not be used unless it is clear that the Secretary of State has allowed those rights to be violated by a decision based upon the right legal principles, adequate evidence and proper consideration of the factor which sways his mind into confirmation of the order sought."

C **11** Recently, in the High Court of Australia, French CJ said in *R & R Fazzolari Pty Ltd v Parramatta City Council* [2009] HCA 12, paras 40, 42, 43:

"40. Private property rights, although subject to compulsory acquisition by statute, have long been hedged about by the common law with protections. These protections are not absolute but take the form of interpretative approaches where statutes are said to affect such rights."

D "42. The attribution by Blackstone, of caution to the legislature in exercising its power over private property, is reflected in what has been called a presumption, in the interpretation of statutes, against an intention to interfere with vested property rights . . .

"43. The terminology of 'presumption' is linked to that of 'legislative intention'. As a practical matter it means that, where a statute is capable E of more than one construction, that construction will be chosen which interferes least with private property rights."

The facts

12 It was originally envisaged by Tesco that the Royal Hospital site would be a suitable location for a scheme which made provision for a F superstore whilst retaining and restoring much of the fabric of the former Royal Hospital buildings.

13 In January 2001, Sainsbury's applied for outline planning permission to redevelop the Raglan Street site for a mixed use development comprising retail uses, residential, leisure, parking and associated highway and access works. The application was called in by the Secretary of State and, following a public inquiry, planning permission was granted on G 12 November 2002.

14 In early 2005 Sainsbury's informed the council that it no longer intended to develop the Raglan Street site, because it had agreed to sell its interests in the Raglan Street site to Tesco, which was developing a revised scheme. Sale documentation was agreed and engrossments circulated for execution. In addition, Tesco acquired interests in the Raglan Street site owned by third parties.

H **15** On 28 June 2005 the council's cabinet (resources) panel reported on the proposed Tesco scheme, and said that the grant of permission would be linked to obligations relating to the Royal Hospital site. The panel approved in principle the use of compulsory purchase powers to assemble the Raglan Street site should the need arise. This was on the then understanding that the

interests of Sainsbury's would be transferred to Tesco by agreement and that any CPO would be required only to acquire minor interests within the site.

16 On 3 November 2005 Tesco entered into a conditional sale agreement with the council, which provided for the sale of the council's interest in the Raglan Street site to Tesco and for the council to use its compulsory purchase powers, if necessary, to facilitate the acquisition of outstanding interests in the site. The agreement also imposed an obligation on Tesco to carry out and complete works of demolition and repairs at the Royal Hospital site before the commencement of works at the Raglan Street site. This agreement was replaced in July 2009 by a conditional agreement for lease.

17 Following exchange of the agreement with the council and its acquisition of third party interests in the Raglan Street site, Tesco sought an exchange of its agreement with Sainsbury's. This did not happen because Sainsbury's decided that it did in fact wish to redevelop the Raglan Street site, and to submit a fresh planning application for redevelopment of the site.

18 In accordance with its obligations in the agreement with the council, Tesco submitted planning applications to the council for the development of both the Royal Hospital site (in April 2006) and the Raglan Street site (in July 2006). In October 2006, Sainsbury's submitted a planning application for a new scheme for redevelopment of the Raglan Street site. Both applications for the redevelopment of the Raglan Street site proposed a supermarket with parking and a petrol filling station, private flats, sheltered housing and small commercial units. The main differences between the schemes were that the Tesco supermarket was more than 50% larger than Sainsbury's, and the Sainsbury's scheme proposed retail warehouses and a leisure centre. Outline planning permission was recommended for both schemes.

19 On 6 December 2006 the council's cabinet noted that Tesco and Sainsbury's were unable to agree on how the site should be developed and resolved to approve in principle the use of CPO powers in relation to the Raglan Street site if necessary, subject to a further report to cabinet setting out all relevant factors including the criteria for selecting the preferred redevelopment scheme.

20 Each of the applications by Sainsbury's and Tesco for development of the Raglan Street site came before the council's planning committee on 13 March 2007 when it was resolved to grant both applications subject to various requirements. In the report to committee concerning the application by Tesco, the case officer said:

> "Initially Tesco indicated that they wished the development of the Royal Hospital site to be linked to the grant of permission for the development of Raglan Street. However, when their agents were asked how such a linkage could legitimately be made, they were unable to make a suggestion. There is therefore no such linkage for committee to consider."

21 Tesco's application for planning permission for development of the Raglan Street site was therefore considered without reference to the benefits of redevelopment of the Royal Hospital site. Planning permission for the Tesco proposal at the Raglan Street site was granted on 22 July 2009, which was also the date of a new conditional agreement for lease between the council and Tesco replacing the conditional agreement for sale of

3 November 2005. The agreement gives the council an option to purchase Tesco's interest in the Royal Hospital building. One of the terms is that, once certain works have been carried out by Tesco, then Tesco will make a balancing payment to the council which is to be used solely in connection with the completion of the Royal Hospital building works: schedule 1.

22 On 27 June 2007, in order to decide whose land to acquire compulsorily to facilitate the development of the Raglan Street site, the council's cabinet resolved to invite both Sainsbury's and Tesco to demonstrate the extent to which their respective development proposals met the council's objectives for the Raglan Street area. It also resolved that Sainsbury's and Tesco be advised that the council's preferred outcome remained that the parties would negotiate with each other to resolve the impasse.

23 On 30 January 2008 a report was presented to the council's cabinet which, having set out the statutory background and relevant advice in ODPM Circular 06/2004, *Compulsory Purchase and the Crichel Down Rules*, stated:

> "The remaining sections of this report consider the two schemes against the legal and policy tests set out in the Act and the circular and compare them with each other. There is no doubt that both the Tesco and Sainsbury's schemes would fulfil the statutory purpose of 'facilitating the carrying out of development, redevelopment or improvement on or in relation to the land'."

24 The report noted that both schemes for the Raglan Street site were acceptable in planning terms. The report went on to describe the circumstances relating to the development of the Royal Hospital site by Tesco. Tesco was no longer seeking planning permission for a retail store on the site. The council had promoted a proposal by Tesco for a mixed use development comprising housing, offices, primary care centre and administrative offices, retail, financial services and professional offices and food and drink uses, together with associated parking. It would provide accommodation for a primary care centre and offices for the primary care trust.

25 The report said that Tesco's position was that a Royal Hospital site development in accordance with the council's aspirations was not viable and that the return to a developer in a scheme according with the council's aspirations (including 20% affordable housing content) would involve a substantial loss, which would mainly be caused by the refurbishment of the listed building element for the primary care trust. The scheme would be viable only through a cross-subsidy from the development of the Raglan Street site.

26 The report went on to say that whilst there was disagreement between Tesco and Sainsbury's about the viability of the Royal Hospital site development, it was clear that Tesco was unlikely to carry out its scheme unless it was selected as the operator of the store at Raglan Street and were thus able to cross-subsidise the Royal Hospital site development.

27 The report concluded:

> "both schemes would bring appreciable planning benefits and would promote and improve the economic, social and environmental well-being

of the city. However, the Tesco scheme enjoys a decisive advantage in that it will enable the development of the RHS to be brought forward in a manner that is consistent with the council's planning objectives for that site. Making a CPO for the Tesco scheme will therefore result in a significantly greater contribution to the economic, social and environmental well-being of the council's area than would making a CPO for the Sainsbury's scheme. On this basis, and subject to the satisfactory resolution of the matters identified in the recommendations set out at the beginning of this report, there is a compelling case in the public interest to make a CPO to enable the Tesco scheme to proceed."

28 In accordance with the recommendation made in the report, the council's cabinet resolved to approve the principle of the making of a CPO of land owned by Sainsbury's to facilitate the carrying out of (i) Tesco's development proposals for the Raglan Street site and (ii) a mixed use retail, office and residential development of the Royal Hospital site, subject to, amongst other matters, Tesco producing satisfactory evidence of a commitment to the carrying out of the development of the Royal Hospital site before consideration be given to a resolution to authorise the making of the CPO. The cabinet decision of 30 January 2008 was referred to the council's scrutiny board and on 19 February 2008 the board resolved that the report be received and noted.

The issues

29 In the absence of agreement between Sainsbury's and Tesco, the only way in which the Raglan Street site can come forward for redevelopment is through the exercise of compulsory purchase powers. Section 226(1)(a) provides that the local authority has power to acquire compulsorily any land in its area if it thinks "that the acquisition will facilitate the carrying out of development, redevelopment or improvement on or in relation to the land". A local authority may use its powers of compulsory purchase to assemble a site for development by a preferred developer: *Standard Commercial Property Securities Ltd v Glasgow City Council (No 2)* 2007 SC (HL) 33, para 6. It is common ground that the compulsory acquisition of the outstanding interests in the Raglan Street site would facilitate the carrying out of development, redevelopment or improvement on the land under either the Tesco scheme or the Sainsbury's scheme such that the test in section 226(1)(a) is met.

30 So also it is common ground that both schemes of redevelopment on the Raglan Street site would promote and improve the economic, social and environmental well-being of the city and therefore satisfy the requirement in section 226(1A) that a local authority must not exercise the power unless it thinks that "the development, redevelopment or improvement is likely to contribute to the achievement" of the well-being objects set out in the subsection. It is also agreed that the redevelopment of the Royal Hospital site as proposed would bring well-being benefits to the council's area, but Sainsbury's says that, contrary to the approach of the Court of Appeal, those well-being objects are not within section 226(1A), because they do not flow from the proposed redevelopment of the Raglan Street site.

31 The issues on this appeal are these. (1) Whether, on a proper construction of section 226(1A), the council was entitled to take into

account, in discharging its duty under that subsection, a commitment by the developer of a site part of which was to be the subject of a CPO to secure (by way of cross-subsidy) the development, redevelopment or improvement of another (unconnected) site and so achieve further well-being benefits for the area. (2) Whether the council was entitled, in deciding whether and how to exercise its powers under section 226(1)(a), to take into account such a commitment by a developer.

32 On the first issue, relating to the interpretation and application of section 226(1A), the Court of Appeal, differing from Elias J, found in favour of the council and Tesco. On the second issue, relating to section 226(1)(a), Elias J found in favour of the council and Tesco, but the Court of Appeal did not find it necessary to decide the point because of its conclusion on section 226(1A).

The judgments of Elias J and the Court of Appeal

Section 226(1A)

33 Elias J decided that, contrary to the argument of the council and Tesco, on a proper construction of section 226(1A), the Royal Hospital site benefits did not fall within its ambit. They would have been well-being benefits in relation to a CPO of that site, but in order to fall within section 226(1A) in relation to the development of the Raglan Street site, the benefits must flow from the development of the Raglan Street site alone, since that was the site covered by the CPO. The fact that a link between the two developments could be achieved by an agreement under section 106 of the 1990 Act did not entitle the council to treat what were in reality well-being benefits resulting from development of the Royal Hospital site as if they were generated by development of the Raglan Street site.

34 The Court of Appeal held that the council was entitled to take the Royal Hospital site benefits into account because they fell within section 226(1A). Whilst section 226(1)(a) focused the local authority's attention on what was proposed to take place on the CPO site itself and required the authority to be satisfied that the CPO would facilitate the redevelopment of the CPO site, section 226(1A) required it to look beyond the benefits that would accrue on the CPO site and to consider whether and to what extent the redevelopment of the CPO site would bring well-being benefits to a wider area. If the carrying out of the redevelopment of a CPO site was likely to act as a catalyst for the development or redevelopment of some other site or sites, then such catalytic effects were capable of falling within the scope of section 226(1A).

35 The financial viability of a proposed redevelopment scheme would be a highly material factor, and the proposed redevelopment of a CPO site might have to be cross-subsidised. It would be surprising if the potential financial implications of redeveloping the CPO site, including the possibility of cross-subsidy as a result of facilitating its redevelopment, were immaterial for the purposes of any consideration of the extent to which the carrying out of the redevelopment would be likely to contribute to wider "well-being" benefits.

36 The possibility of one development cross-subsidising another highly desirable development was capable of being a material consideration in the determination of a planning application under section 70(2) of the 1990 Act:

R v Westminster City Council, Ex p Monahan [1990] 1 QB 87. The proposed cross-subsidy was a material consideration in the light of the council's obligation under section 226(1A) to take wider, off-site "well-being" benefits into account and in the light of the significance of financial viability and economic well-being in the CPO context.

Section 226(1)(a)

37 Elias J held that for the purposes of section 226(1)(a), when choosing between two developments either of which would in principle be facilitated by a CPO, the council was entitled to have regard to all the benefits which would flow from the development when determining in whose favour the CPO should be exercised, including any off-site benefits achieved by means of an agreement linking the development of the Raglan Street site to development of the Royal Hospital site. The Court of Appeal decided that it was not necessary to rule on the alternative submission by the council and Tesco that the Royal Hospital site benefits were material considerations under section 226(1)(a) in any event.

The CPO context

38 There is no doubt that where a body has a power of compulsory acquisition which is expressed or limited by reference to a particular purpose, then it is not legitimate for the body to seek to use the power for a different or collateral purpose: *Simpsons Motor Sales (London) Ltd v Hendon Corpn* [1964] AC 1088, 1118, per Lord Evershed. In *Galloway v Mayor and Commonalty of London* (1866) LR 1 HL 34, 43, Lord Cranworth LC said that persons authorised to take the land of others "cannot be allowed to exercise the powers conferred on them for any collateral object; that is, for any purposes except those for which the legislature has invested them with extraordinary powers". In *Clunies-Ross v Commonwealth of Australia* (1984) 155 CLR 193, 199 the High Court of Australia said that the statutory power to acquire land for a public purpose could not be used to "advance or achieve some more remote public purpose, however laudable". See also *Municipal Council of Sydney v Campbell* [1925] AC 338, 343.

39 So also the familiar rules on the judicial control of the exercise of legislative powers apply in the CPO context as elsewhere: see e g, among many others, *Hanks v Minister of Housing and Local Government* [1963] 1 QB 999 (Megaw J); *Prest v Secretary of State for Wales* (1982) 81 LGR 193 (as explained in *de Rothschild v Secretary of State for Transport* (1988) 57 P & CR 330; *Chesterfield Properties plc v Secretary of State for the Environment* (1997) 76 P & CR 117 (Laws J)).

40 Nor can it be doubted that off-site benefits may be taken into account in making a CPO. *Standard Commercial Property Securities Ltd v Glasgow City Council (No 2)* 2007 SC (HL) 33 was a decision on the Scottish compulsory purchase provisions in the Town and Country Planning (Scotland) Act 1997, which are similar to, but not identical with, the equivalent provisions in the 1990 Act. Section 191 provided in substance that where land is acquired or appropriated by a planning authority for planning purposes, the authority might dispose of such land to any person to secure the best use of the land, and that the land could not be disposed of

A otherwise than at the best price or on the best terms that could reasonably be obtained. The property in question was in a run down part of Bath Street and Buchanan Street, Glasgow. Proposals for redevelopment of the site by the developer contained a strong element of planning gain. The issue was whether the planning authority, exercising its compulsory purchase powers to redevelop a site, had acted ultra vires by entering into a back-to-back agreement with the developer in which the council had agreed to transfer the B land to the developer in return for the developer indemnifying the council for the money expended in assembling the site and making it available. In effect the developer was to be put in the same position as if it had itself exercised the power of compulsory acquisition: para 14. It was held that the words "best terms" permitted disposal for a consideration which was not the "best price", and so terms that would produce planning benefits and gains of C value to the authority could be taken into account as well as terms resulting in cash benefits. It was accepted that the local authority could use its powers to assemble the site for development by a preferred developer: para 6. Lord Hope of Craighead (at para 39) and Lord Brown of Eaton-under-Heywood (at para 70) also accepted that account could be taken by a planning authority of the wider, off-site planning gains which would result from the exercise of its compulsory purchase powers. But these were benefits directly D related to the site, and directly flowing from the development, and the decision does not help in the solution of the present appeal.

Other contexts

41 All parties, especially Sainsbury's, relied on authorities relating to planning applications, and in particular on those relating to the extent to E which conditions attached to a planning permission must relate to the development; and the extent to which off-site benefits (whether under a section 106 agreement or not) are "other material considerations" to which the authority must have regard under section 70(2) of the 1990 Act in deciding whether to grant or refuse planning permission (or to impose conditions). In the Court of Appeal Sullivan LJ did not think that a "read-F across" from the limitations on the exercise of the section 70(2) power was appropriate in the context of section 226.

42 In summary, Sainsbury's position was (a) the cases on the legitimate scope of planning conditions were relevant, from which it followed that the only off-site benefits which could be taken into account were those which fairly and reasonably related to the development in relation to which the CPO power was being exercised, that is the Raglan Street development; G (b) the cases on section 70(2) also proceeded on the basis that there had to be a connection between the benefits and the permitted development; (c) a potential cross-subsidy was relevant only where there was a composite development. The position of the council and Tesco was that the Court of Appeal was right to say that there should not be a read-across from the planning permission cases to CPO cases, but in any event the authorities showed that financial considerations, including off-site benefits through H cross-subsidies, were relevant, and were essentially a matter for evaluation by the planning authority.

43 It is necessary to note, at the outset, the relevant legal differences between this case and the cases in which similar questions have previously arisen. The first is that there is a difference between the exercise of powers of

compulsory acquisition and the exercise of powers to control development and grant planning permission, which is rooted in the deep-seated respect for private property reflected in the decisions cited above. The second is that both compulsory acquisition and planning control are solely creatures of statute, and that while the provisions which are relevant on this appeal are contained in one statute, the 1990 Act, the statutory provisions are different. The relevant provisions of section 226 have been set out above, and it is only necessary to repeat that section 226(1)(a) gives the local authority power to acquire compulsorily if "the authority think that the acquisition will facilitate the carrying out of development, redevelopment or improvement on or in relation to the land" and does not contain, by contrast with section 70(2) on planning applications, any express reference to the authority having regard to "any other material considerations". Nevertheless the policies underlying planning permission and acquisition for development purposes are similar, and considerable assistance can be obtained from the learning in the case law on planning permissions.

"Fairly and reasonably relate" and "material considerations"

44 In *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1958] 1 QB 554 (reversed on other grounds [1960] AC 260) Lord Denning said (at p 572) in relation to what is now section 70(1)(a) of the 1990 Act:

> "Although the planning authorities are given very wide powers to impose 'such conditions as they think fit,' nevertheless the law says that those conditions, to be valid, must fairly and reasonably relate to the permitted development."

Pyx Granite had the right to quarry in two areas of the Malvern Hills. The company required permission to break fresh surface on one of the sites. Conditions attached to the planning permission relating to such matters as the times when machinery for crushing the stone could be used and the control of dust emissions were held valid. The facts do not appear fully in the judgments, but it seems that the equipment was on the part of the land under the control of the company which was not the land in respect of which the application for permission related, but they could properly be regarded (for the purposes of the Town and Country Planning Act 1947, section 14) as "expedient . . . in connection with" the permitted development. Lord Denning said, at p 574: "It would be very different if the Minister sought to impose like conditions about plant or machinery a mile or so away."

45 Lord Denning's formula that "the conditions must [be] fairly and reasonably [related] to the development" was approved in *Newbury District Council v Secretary of State for the Environment* [1981] AC 578, 599 (Viscount Dilhorne), 607 (Lord Fraser of Tullybelton), 618 (Lord Scarman), 627 (Lord Lane). Viscount Dilhorne said, at p 599:

> "It follows that the conditions imposed must be for a planning purpose and not for any ulterior one, and that they must fairly and reasonably relate to the development permitted. Also they must not be so unreasonable that no reasonable planning authority could have imposed them . . ."

A As Lord Hoffmann said in *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, 772, as a general statement this formulation has never been challenged. See eg *Grampian Regional Council v Secretary of State for Scotland* 1984 SC (HL) 58, 66. In the *Newbury* case itself it was held that the Secretary of State was entitled to come to the conclusion that a condition imposed by a local authority requiring the removal of existing substantial buildings was not sufficiently related to a temporary change of use for which permission was granted.

B

46 The effect of the adoption of the *Pyx Granite/Newbury* formula was to put severe limits on the powers of planning authorities: *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, 772–723. Conditions requiring off-site roadway benefits were held to be unreasonable in, for example, *Hall & Co Ltd v Shoreham-by-Sea Urban District Council* [1964] 1 WLR 240 (ancillary road condition held to be *Wednesbury* unreasonable (*Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223)); *City of Bradford Metropolitan Council v Secretary of State for the Environment* (1986) 53 P & CR 55 (where it was suggested that it would make no difference if they were included in a section 106 agreement); cf *Westminster Renslade Ltd v Secretary of State for the Environment* (1983) 48 P & CR 255 (not legitimate to refuse a planning application because it did not contain provisions for the increase of the proportion of car parking space subject to public control: the absence of a benefit not a reason for refusing planning permission where the benefit could not have been lawfully secured by means of a condition).

C

D

47 Section 70(2) of the 1990 Act provides that in dealing with an application for planning permission, the local planning authority "shall have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations".

E

48 There are two decisions of the Court of Appeal, and a decision of the House of Lords, which have a bearing on the questions on this appeal: *R v Westminster City Council, Ex p Monahan* [1990] 1 QB 87; *R v Plymouth City Council, Ex p Plymouth and South Devon Co-operative Society Ltd* (1993) 67 P & CR 78; *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759. They deal with one or more of the following questions: the extent to which financial considerations are "material considerations" in planning decisions; what connection (if any) is required between the development site and off-site benefits for the purpose of material considerations; and the respective roles of the planning authorities and the courts in determining what considerations are relevant and what connection with off-site benefits is necessary.

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49 *R v Westminster City Council, Ex p Monahan* and *R v Plymouth City Council, Ex p Plymouth and South Devon Co-operative Society Ltd* are both cases in which Lord Denning's "fairly and reasonably relate" formula in relation to conditions was extended to, or discussed in connection with, the issue of material considerations under section 70(2). In that context the decisions have been superseded by the decision in the *Tesco* case, but they contain valuable discussion by some distinguished members of the Court of Appeal on questions of some relevance to the determination of this appeal.

H

50 In *Ex p Monahan* Lord Denning's formula was discussed in a case involving enabling development, i e development which is contrary to established planning policy, but which is occasionally permitted because it

brings public benefits which have been demonstrated clearly to outweigh the harm that would be caused. The decision also discusses the question of the extent to which the provision of off-site benefits by the developer may be material. In the *Plymouth* case one of the issues was the extent to which off-site planning benefits promised by a section 106 agreement were material considerations.

R v Westminster City Council, Ex p Monahan

51 In *R v Westminster City Council, Ex p Monahan* [1990] 1 QB 87 the Royal Opera House, Covent Garden Ltd, applied for planning permission and listed building consents to carry out a redevelopment, the central objective of which was to extend and improve the opera house by reconstruction and modernisation to bring it up to international standards, and to develop the surrounding area consistently with that project. Parts of the site were proposed to be used for the erection of office accommodation, which would be a departure from the development plan. The planning authority granted permission for the whole proposed development on the basis that the desirable improvements to the opera house could not be financed unless the offices were permitted. The applicants sought judicial review of that decision on the ground, inter alia, that the fact that a desirable part of a proposed development would not be financially viable unless permission were given for the other part was not capable of being a "material consideration" for the purposes of what is now section 70(2) of the 1990 Act in granting planning permission for the development as a whole.

52 It was held that financial considerations which fairly and reasonably related to the development were capable of being material considerations which could be taken into account in reaching that determination; and that the local planning authority had been entitled, in deciding to grant planning permission for the erection of the offices, to balance the fact that the improvements to the opera house would not be financially viable if the permission for the offices were not granted against the fact that the office development was contrary to the development plan.

53 On this appeal Sainsbury's accepts that in the context of section 70(2) the possibility of one development cross-subsidising another desirable development is capable, in limited circumstances, of being a material consideration, and that *Ex p Monahan* is such a case, where both developments formed part of one composite development. The council and Tesco say that *Ex p Monahan* supports their position because the Court of Appeal held the consequence of the financial viability of the proposed opera house development to be a relevant factor in the planning authority's determination.

54 Kerr LJ's reasoning was essentially this: (1) in composite or related developments (related in the sense that they can and should properly be considered in combination) the realisation of the main objective may depend on the financial implications or consequences of others; (2) provided that the ultimate determination is based on planning grounds and not on some ulterior motive, and that it is not irrational, there would be no basis for holding it to be invalid in law solely on the ground that it has taken account of, and adjusted itself to, the financial realities of the overall situation; (3) financial considerations may be treated as material in appropriate cases: *Brighton Borough Council v Secretary of State for Environment*

(1978) 39 P & CR 46; *Sosmo Trust Ltd v Secretary of State for the Environment* [1983] JPL 806. He concluded, at p 117, by agreeing with Webster J's conclusion at first instance. Webster J had said:

> "It seems to me to be quite beyond doubt [but] that the fact that the finances made available from the commercial development would enable the improvements to be carried out was capable of being a material consideration, that is to say, that it was a consideration which related to the use or development of the land, that it related to a planning purpose and to the character of the use of the land, namely the improvements to the Royal Opera House which I have already described, particularly as the proposed commercial development was on the same site as the Royal Opera House and as the commercial development and the proposed improvements to the Royal Opera House all formed part of one proposal."

55 The "fairly and reasonably related to the development" formula was applied by Kerr LJ (at pp 111–112), and Staughton LJ (at p 122) (who also agreed that there was a composite or related development).

56 There was some discussion in the *Ex p Monahan* decision of the limits of what could be taken into consideration, by reference to two hypothetical examples. The first example (which Kerr LJ said was an extreme example) was the case of the development of an undesirable office block in Victoria which was said to be necessary to generate the finance for a desirable development in Covent Garden. Kerr LJ said that a combination of this nature would be unlikely to be properly entertained as a single planning application or as an application for one composite development, and that such a case would involve considerations of fact and degree rather than of principle: at p 117. Nicholls LJ dealt with this point by saying, at p 121:

> "I am not persuaded by this reductio ad absurdum argument. Circumstances vary so widely that it may be unsatisfactory and unwise to attempt to state a formula which is intended to provide a definitive answer in all types of case. All that need be said to decide this appeal is that the sites of the commercial development approved in principle are sufficiently close to the opera house for it to have been proper for the local planning authority to treat the proposed development of the office sites, in Russell Street and elsewhere, and the proposed improvements to the opera house as forming part of one composite development project. As such it was open to the planning authority to balance the pros and cons of the various features of the scheme. It was open to the authority to treat the consequence, for the opera house works, of granting or withholding permission for offices as a material consideration in considering the part of the application which related to offices."

57 The second hypothetical example, the swimming pool at the other end of the city, was dealt with by Staughton LJ, at p 122:

> "The other extreme arises from the axiom of Lloyd LJ in *City of Bradford Metropolitan Council v Secretary of State for the Environment* [1986] 1 EGLR 199, 202G that planning permission cannot be bought and sold. Suppose that a developer wished to erect an office building at one end of the town A, and offered to build a swimming-pool at the other

end B. It would in my view be wrong for the planning authority to regard the swimming-pool as a material consideration, or to impose a condition that it should be built. That case seems to me little different from the developer who offers the planning authority a cheque so that it can build the swimming-pool for itself—provided he has permission for his office development . . . Where then is the line to be drawn between those extremes? In my judgment the answer lies in the speech of Viscount Dilhorne in *Newbury District Council v Secretary of State for the Environment* [1981] AC 578, 599, which Kerr LJ has quoted. Conditions imposed must 'fairly and reasonably relate to the development permitted', if they are to be valid. So must considerations, if they are to be material."

58 The ratio of the decision in *Ex p Monahan* is that where there are composite or related developments (related in the sense that they can and should properly be considered in combination), the local authority may balance the desirable financial consequences for one part of the scheme against the undesirable aspects of another part. In *R v Plymouth City Council, Ex p Plymouth and South Devon Co-operative Society Ltd* 67 P & CR 78, 88, Hoffmann LJ observed that the *Ex p Monahan* decision concerned what was treated as a single composite development, and held that there was a sufficient nexus between the office development and the opera house improvements to entitle the planning authority to say that the desirability of the latter fairly and reasonably related to the former, because of (1) the financial dependency of the one part of the development on the other and (2) their physical proximity.

59 The *Ex p Monahan* decision demonstrates, if demonstration were necessary, that financial considerations may be relevant in planning decisions. In *Sosmo Trust Ltd v Secretary of State for the Environment* [1983] JPL 806 (cited on this point with approval by Kerr LJ in *Ex p Monahan*, at p 116) Woolf J accepted that the consequences of the financial viability or lack of financial viability of a development were a potentially relevant factor: the true question was not whether a development would be viable but what the planning consequences would be if it were not viable: see at p 807. See also *Sovmots Investments Ltd v Secretary of State for the Environment* [1977] QB 411, 425, per Forbes J (for further proceedings see [1977] QB 411; [1979] AC 144).

R v Plymouth City Council, Ex p Plymouth and South Devon Co-operative Society Ltd

60 The restrictive approach of the courts to conditions was one of the factors which led planning authorities to rely on planning obligations in attempting to secure planning gain. This led directly to the question whether planning authorities were entitled to treat benefits secured by way of a planning obligation as a material consideration in deciding whether to grant planning permission.

61 In *R v Plymouth City Council, Ex p Plymouth and South Devon Co-operative Society Ltd* 67 P & CR 78 it was held that the planning authority could (against the opposition of the Co-op) take into account offers by Tesco and Sainsbury's to enter into section 106 agreements providing for substantial off-site benefits. The off-site benefits included an offer by

A Sainsbury's of a payment of £1m for infrastructure which would enable a separate site to be made available for industrial use, and an offer by Tesco of a park and ride facility on another site. The Co-op's position was that a consideration was only material to the question of whether to grant planning permission, if it was necessary to the grant of permission, i e, overcame some to the proposed development which would otherwise mean that permission could not be granted. It was held that although the benefits had to be
B planning benefits and fairly and reasonably relate to the development, they did not have to be necessary.

62 This is a decision in which there was a connection between the development and the off-site benefits. All members of the court (Russell, Evans and Hoffmann LJJ) accepted (at pp 82, 84, 87–88) that the off-site benefits related to the superstore development applications. The offer of
C £1m by Sainsbury's for infrastructure would help to compensate for the reduction in the pool of resources for employment land. The park and ride facility offered by Tesco would counteract the increase in traffic caused by the superstore development: at pp 82–83; 90–91.

Tesco Stores Ltd v Secretary of State for the Environment

D **63** But, although it has not been expressly overruled and the result would be the same today, the reasoning of the *Plymouth* decision can no longer stand, based as it was on the "fairly and reasonably related to the development" test: see at pp 81–82, 87, 89–90. In *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759 there were rival plans for the development of superstores on different sites in Witney, Oxfordshire, by Tesco and Sainsbury's (in conjunction with Tarmac). At an
E inquiry into proposals to alter the Witney local plan by building a new link road to relieve traffic congestion and a food superstore in the town centre, the inspector approved the proposal for a link road and rejected that for a town centre superstore. Tesco offered to provide full funding for the link road. The Secretary of State allowed the Sainsbury's/Tarmac appeal, and dismissed Tesco's application: the funding offer was not fairly and
F reasonably related in scale to the development; although there was a tenuous relationship between the funding of the link road and the proposed foodstore because of a slight worsening of traffic conditions (a 10% increase) the link was not needed. But if it were to be taken into account, then because of the tenuous nature of the connection, the partial contribution was too limited to affect the ultimate decision.

64 The House of Lords confirmed that the Secretary of State had
G fulfilled his duty by taking the offer into account but according it very little weight. It was held that a planning obligation offered under section 106 of the 1990 Act by a developer was a material consideration for the purposes of section 70(2) of the Act if it was relevant to the development; and that the weight to be given to such an obligation was a matter entirely within the discretion of the decision-maker. Tesco's offer to fund the link road was
H sufficiently related to the proposed development to constitute a material consideration under section 70(2). For the purposes of this appeal, the importance of this decision is the light it throws on the nature of the necessary link between the development and the off-site benefit.

65 The House of Lords held that the *Pyx Granite/Newbury* test for planning conditions was not applicable in the context of the question

whether section 106 obligations were material considerations under section 70(2). Lord Keith of Kinkel said, at pp 764, 770:

> "Sir Thomas Bingham MR in the course of his judgment in this case said that 'material' in [section 70(2)] meant 'relevant,' and in my opinion he was correct in this. It is for the courts, if the matter is brought before them, to decide what is a relevant consideration. If the decision-maker wrongly takes the view that some consideration is not relevant, and therefore has no regard to it, his decision cannot stand and he must be required to think again. But it is entirely for the decision-maker to attribute to the relevant considerations such weight as he thinks fit, and the courts will not interfere unless he has acted unreasonably in the *Wednesbury* sense . . . An offered planning obligation which has nothing to do with the proposed development, apart from the fact that it is offered by the developer, will plainly not be a material consideration and could be regarded only as an attempt to buy planning permission. If it has some connection with the proposed development which is not de minimis, then regard must be had to it. But the extent, if any, to which it should affect the decision is a matter entirely within the discretion of the decision-maker and in exercising that discretion he is entitled to have regard to his established policy."

66 All members of the appellate committee agreed with Lord Keith's opinion, and the ratio of the decision is that for the purposes of section 70(2) any benefit whose connection with the development is more than de minimis will be a material consideration, but that the weight to be given to any particular material consideration is entirely a matter for the decision-maker.

67 It has often been said that planning permissions should not be bought or sold: see *City of Bradford Metropolitan Council v Secretary of State for the Environment* 53 P & CR 55, 64, per Lloyd LJ (on which see the *Plymouth* case, at p 84, per Evans LJ; *Ex p Monahan*, at p 122, per Staughton LJ; the *Tesco* case, at p 765, per Lord Keith, and p 782, per Lord Hoffmann); and accepted as a matter of policy in ODPM Circular 05/2005, *Planning Obligations*, para B6 (reflecting its predecessors):

> "The use of planning obligations must be governed by the fundamental principle that planning permission may not be bought or sold. It is therefore not legitimate for unacceptable development to be permitted because of benefits or inducements offered by a developer which are not necessary to make the development acceptable in planning terms . . ."

68 Responding to the point that the approach in the *Plymouth* decision leads to the prospect of the sale and purchase of planning permissions, Lord Hoffmann contrasted cases in which there was a "sufficient connection" between the development and a planning obligations and those in which they were "quite unconnected". He said [1995] 1 WLR 759, 782:

> "This reluctance of the English courts to enter into questions of planning judgment means that they cannot intervene in cases in which there is sufficient connection between the development and a planning obligation to make it a material consideration but the obligation appears disproportionate to the external costs of the development. *R v Plymouth City Council, Ex p Plymouth and South Devon Co-operative Society Ltd*

A 67 P & CR 78, was such a case, leading to concern among academic writers and Steyn LJ in the present case that the court was condoning the sale of planning permissions to the highest bidder. My Lords, to describe a planning decision as a bargain and sale is a vivid metaphor. But I venture to suggest that such a metaphor (and I could myself have used the more emotive term 'auction' rather than 'competition' to describe the process of decision-making process in the *Plymouth* case) is an uncertain guide to the legality of a grant or refusal of planning permission. It is easy enough to apply in a clear case in which the planning authority has demanded or taken account of benefits which are quite unconnected with the proposed development. But in such a case the phrase merely adds colour to the statutory duty to have regard only to material considerations. In cases in which there is a sufficient connection, the application of the metaphor or its relevance to the legality of the planning decision may be highly debatable. I have already explained how in a case of competition such as the *Plymouth* case, in which it is contemplated that the grant of permission to one developer will be a reason for refusing it to another, it may be perfectly rational to choose the proposal which offers the greatest public benefit in terms of both the development itself and related external benefits . . ."

Conclusions

69 There is no doubt that in the light of the report of 30 January 2008, the council had purportedly resolved in principle to make the CPO for the purpose of facilitating both the development of the Raglan Street site and that of the Royal Hospital site. That would be sufficient to vitiate the resolution. But Elias J and the Court Appeal accepted that there would be no point in quashing the resolution on that ground alone, since a more felicitously worded resolution could be passed if the benefits to be derived from the development of the Royal Hospital site were relevant under section 226(1)(a) or section 226(1A).

70 What can be derived from the decisions in the planning context, and in particular the *Tesco* case, can be stated shortly. First, the question of what is a material (or relevant) consideration is a question of law, but the weight to be given to it is a matter for the decision-maker. Second, financial viability may be material if it relates to the development. Third, financial dependency of part of a composite development on another part may be a relevant consideration, in the sense that the fact that the proposed development will finance other relevant planning benefits may be material. Fourth, off-site benefits which are related to or are connected with the development will be material. These principles provide the answer to the questions raised in *Ex p Monahan* [1990] 1 QB 87 about the development in Victoria or the swimming pool on the other side of the city. They do not, as Kerr LJ thought, raise questions of fact and degree. There must be a real connection between the benefits and the development.

71 Given the similar context, there is no reason why similar principles should not apply to compulsory acquisition for development purposes provided that it is recognised that, because of the serious invasion of proprietary rights involved in compulsory acquisition, a strict approach to the application of these principles is required. There must be a real, rather

than a fanciful or remote, connection between the off-site benefits and the development for which the compulsory acquisition is made.

72 What is the connection in the present case? The expression "cross-subsidy" has been much used by Tesco and the council. The expression bears a special meaning in this case. Its most common use is in the competition field, where it usually connotes improper allocation of costs in different product or geographic markets, which may result in predatory pricing or other anti-competitive activity. Here all it means is that Tesco says that (a) the council's requirements for the Royal Hospital site have the result that Tesco cannot develop it profitably; and (b) Tesco will undertake its development if it can develop the Raglan Street site. Tesco says that the consequence of (a) and (b) is that the Raglan Street site development will "cross-subsidise" the Royal Hospital site development. But the only connections between the proposed Raglan Street site and Royal Hospital site developments are that (a) Tesco says that it will develop the latter if it can develop the former; (b) it has contractually agreed to perform building works on the Royal Hospital site if it acquires the Raglan Street site. The commercial effect will be that the deficiency on the Royal Hospital site will be made up, or "cross-subsidised", by the Raglan Street site development. Nothing in the papers before the court suggests that this will be done by any direct subvention from the income or capital proceeds of the Raglan Street site, but this would not in any event make a difference. It is entirely a matter for Tesco how it funds any loss from, or presents any lower return from, the Royal Hospital site. This is only a connection in the sense that either (a) the council is being tempted to facilitate one development because it wants another development; or (b) Tesco is being tempted to undertake one uncommercial development in order to obtain the development it wants.

73 The crucial question is whether that is a connection which the council is entitled to take into consideration under section 226(1)(a) or section 226(1A). To take the latter first, Elias J was right to hold that section 226(1A) was not the crucial provision for the purposes of this case. It does not answer the prior question of what matters can be taken into consideration.

74 The power of compulsory acquisition must be capable of being exercised under section 226(1)(a) before the limitation in section 226(1A) applies. Once it applies the local authority must think that the development will contribute to the achievement of the well-being benefits. Section 226(1A) does not permit the council to take into account a commitment by the developer of a site part of which was to be the subject of a CPO to secure the development, redevelopment or improvement of another (unconnected) site and so achieve further well-being benefits for the area. The council was entitled to come to the view for the purposes of section 226(1A) that the Raglan Street site development would contribute to well-being in its area, but not on the basis of the benefits which would derive from the Royal Hospital site development. The Raglan Street site development will not, in any legally relevant sense, contribute to the achievement of the well-being benefits flowing from the Royal Hospital site development.

75 But that matters little since the crucial question is whether the council was entitled to take it into account under section 226(1)(a). There can be no doubt that, even if there is no express reference in section 226(1)(a)

A to the local authority taking into account material considerations (by contrast with section 70(2)), only relevant matters may be taken into account. For the reasons given above, the claimed financial connection between the two sites was not such as to amount to a relevant matter. It is true, as Sullivan LJ said (at para 34), that the financial viability of a proposed redevelopment scheme would be a highly material factor, and that a proposed redevelopment of a CPO site might have to be cross-subsidised. B But Sullivan LJ was wrong to conclude that it followed that a cross-subsidy *from* a CPO site to another site was a material consideration. The fact that a conditional agreement for sale linked the obligation to carry out works on the Royal Hospital site was not a relevant connection.

76 Nor do I consider, despite the views of Lord Phillips of Worth Matravers PSC and Lord Hope of Craighead DPSC to the contrary, that a C different result on this appeal is required by the fact that Sainsbury's and Tesco were in competition for the site, and that the council is proposing to dispose of the land to Tesco under section 233. They accept that the council was not entitled to take the benefits from the Royal Hospital site development into account in making the CPO, but consider that the opportunity for redevelopment of the Royal Hospital site would be a relevant matter to be taken into account by the council in exercising the D power of disposal to Tesco under section 233.

77 First, as a matter of principle it is impossible to put into separate compartments the exercise by the council of its power of compulsory purchase of Sainsbury's property, and the exercise of the council's power to dispose of Sainsbury's property to Tesco, and then to conclude that the Royal Hospital site development may not be taken into account for the E former, but can be taken into account for the latter. It is wrong for the council to deprive Sainsbury's of its property because the council will derive from disposal of that property benefits wholly unconnected with the acquisition of the property.

78 Second, although it is plain that the power of compulsory purchase may be used to assemble a site for a preferred developer, there is nothing in *Standard Commercial Property Securities Ltd v Glasgow City Council* F *(No 2)* 2007 SC (HL) 33 which supports the proposition that unconnected benefits may be taken into account by a local authority in deciding whether property should be compulsorily acquired for the purpose of disposing of it to a preferred developer. The background to the appeal was a competition between developers for the right to develop a run down part of Buchanan Street, Glasgow. Two developers in particular were keen to develop the G site, Atlas Investments and Standard Commercial, each of which owned part of the site. The council, when inviting all the owners and occupiers of the land on the site to submit proposals for redevelopment, said that successful submissions should seek a mix of activities and functions which would bring added activity to the area outside normal retailing hours, and encouraged applicants to allocate a budget to the cost of integrating public art into the development and include improvements to the relevant areas of H adjoining streets, and so contribute to the transformation of Glasgow city centre. Those were the wider planning gain benefits to which Lord Hope referred in his opinion: para 39. Similarly Lord Brown of Eaton-under-Heywood (at para 70) referred to the council's desire to obtain economic and social benefits for Glasgow. But it is clear from Lord Hope's opinion

in that decision, as he accepts in his judgment on this appeal, that the benefits which the developers were invited to confer were related to the site, and the immediately adjoining area. There is nothing in the decision to support the conclusion that in this case the promise to develop the Royal Hospital site would have been a material consideration in a disposal under section 233.

79 I would therefore allow the appeal, and make an order declaring that the opportunity for redevelopment of the Royal Hospital site is not a lawful consideration in deciding whether to make a CPO in relation to the Raglan Street site.

LORD WALKER OF GESTINGTHORPE JSC

80 In agreement with Baroness Hale of Richmond, Lord Mance and Lord Collins of Mapesbury JJSC, I would allow this appeal. I agree with the reasons set out in the full judgment of Lord Collins JSC, supported by the shorter judgments of Baroness Hale and Lord Mance JJSC. But in view of the difference of opinion within the court I will try to summarise my reasons in my own words.

81 This appeal is concerned with compulsory acquisition of land *for planning purposes* (that being the general ambit of both paragraphs (a) and (b) in section 226(1) of the Town and Country Planning Act 1990). The land is to end up, not in public ownership and used for public purposes, but in private ownership and used for a variety of purposes, mainly retail and residential. Economic regeneration brought about by urban redevelopment is no doubt a public good, but "private to private" acquisitions by compulsory purchase may also produce large profits for powerful business interests, and courts rightly regard them as particularly sensitive. To the authorities mentioned by Lord Collins JSC in paras 9–11 of his judgment might be added the famous split of the United States Supreme Court in *Kelo v City of New London, Connecticut* (2005) 545 US 469, discussed in *Gray & Gray, Elements of Land Law*, 5th ed (2009), paras 11.2.6 and 11.2.7. *R & R Fazzolari Pty Ltd v Parramatta City Council* [2009] HCA 12 mentioned by Lord Collins JSC was also in substance largely a "private to private" acquisition, although the local authority used a declaration of trust to give the acquisition a better appearance.

82 Where a local authority is considering exercising powers of compulsory purchase for planning purposes, planning considerations must be central to the decision-making process. The public purse is to be protected against improvidence, but the local authority should not be exercising its powers in order to make a commercial profit. In *Standard Commercial Property Securities Ltd v Glasgow City Council (No 2)* 2007 SC (HL) 33, Lord Brown of Eaton-under-Heywood, at para 75, described that proposition as "deeply unattractive". Section 233 of the 1990 Act differs from its Scottish counterpart in that subsection (3) expressly contemplates a disposal "for a consideration less than the best that can reasonably be obtained", though only with the consent of the Secretary of State. But both in Scotland and in England a "back-to-back" arrangement (under which the local authority makes neither a commercial loss nor a commercial gain from its participation, using section 226 powers, in a scheme of comprehensive urban redevelopment) is standard practice. The dominant aim is betterment in planning terms.

A **83** That to my mind is why the issue of what would be material considerations for the purposes of deciding an application for planning permission is also relevant to a decision to exercise powers of compulsory acquisition under section 226. The quality of the proposed redevelopment of the site is of crucial importance. Its larger impact on the authority's area is also an essential element in the decision-making process, because of section 226(1A). In common with all the members of the court I consider B that section 226(1A) has the effect of imposing an extra requirement which is a necessary but not a sufficient condition for the exercise of powers under 226(1). Section 226(1A) does not qualify, still less act as a substitute for, the requirements of the preceding subsection.

84 But the exercise of powers of compulsory acquisition, especially in a "private to private" acquisition, amounts to a serious invasion of the current C owner's proprietary rights. The local authority has a direct financial interest in the matter, and not merely a general interest (as local planning authority) in the betterment and well-being of its area. A stricter approach is therefore called for. As Lord Collins JSC says in his conclusions at para 71 of his judgment, a real (rather than a fanciful or remote) connection must be shown between any off-site benefits and the proposed redevelopment for D which a compulsory purchase order is proposed.

85 Lord Brown JSC has posed a rhetorical question in para 182 of his judgment. After referring to the *Standard Commercial* case he has commented:

> "it is surely implicit in that decision—and, indeed, in the respective legislative requirements in both England and Scotland in effect to get E what I called there (para 68) 'the best overall deal available'—that, by the same token as a cash bidding match would have been possible, so too would have been an offer of other benefits, however extraneous. Why ever not?"

With great respect to Lord Brown JSC I think that he has answered his own question in the passage of his speech in the *Standard Commercial* case, at F para 75:

> "I find deeply unattractive the proposition that, almost inevitably at the expense of some beneficial aspect of the development scheme, the authority should be seeking to make a profit out of the exercise of its statutory powers of acquisition."

G **86** A cash bidding match, or the exaction of extraneous benefits, has superficial attractions as a tie-breaker, especially if there are two contenders, both with very deep pockets, like Tesco and Sainsbury. The merits of their respective schemes are closely matched, as appears from the summary in para 11 of the officers' recommendation document dated 30 January 2008. It is true that the Tesco scheme is said in the summary to offer more jobs, but the Sainsbury scheme might create an unspecified number of extra jobs H through re-use or development of its St George's Parade site: para 6.6. The Tesco scheme would be delivered "by a well resourced operator" but the detailed consideration of delivery (para 7) ranked the two contenders as equally capable. Tesco's only apparently decisive advantage was (para 11.3) the offer of cross-funding for the RHS development.

87 Since their proposals are such that there is little, if anything, to choose between them in planning terms, why should not the local authority look to some substantial extraneous benefit which one contender offers, rather than having to make the difficult choice of a winner between contenders whose proposals are equally satisfactory on planning grounds? The answer is simply that it is not the right way for a local authority to make a decision as to the exercise of its powers of compulsory purchase, any more than it could choose a new chief executive, from a short list of apparently equally well qualified candidates, by holding a closed auction for the office. As Lord Keith of Kinkel said in *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, 770:

> "An offered planning obligation which has nothing to do with the proposed development, apart from the fact that it is offered by the developer, will plainly not be a material consideration and could be regarded only as an attempt to buy planning permission."

88 The fact that an exercise of powers of compulsory acquisition and a "back to back" disposal to a developer are prearranged is unable: see Lord Rodger of Earlsferry in the *Standard Commercial* case, at para 53. But that does not mean that the proper consideration of the exercise of powers of compulsory acquisition under section 226 of the 1990 Act can be telescoped into the exercise of powers of disposal under section 233. On this point I am in full agreement with the judgment of Baroness Hale JSC.

89 For these reasons I would allow this appeal and make the declaration proposed by Lord Collins JSC.

BARONESS HALE OF RICHMOND JSC

90 I agree that this appeal should be allowed, for the reasons given by Lord Collins of Mapesbury JSC, together with the further reasons given by Lord Walker of Gestingthorpe and Lord Mance JJSC. Lord Phillips of Worth Matravers PSC and Lord Hope of Craighead DPSC also agree with the reasoning of Lord Collins JSC, on the points upon which he differs from Lord Brown of Eaton-under-Heywood JSC, but they disagree in the result. As I understand it, they consider that the extraneous benefit offered by Tesco, although it would not normally be a relevant consideration in the compulsory purchase decision, would be a relevant consideration when the council came to dispose of the land under section 233(1) of the Town and Country Planning Act 1990. Accordingly, as in practice the decisions may be taken simultaneously, that consideration can be read back into the decision compulsorily to purchase the Sainsbury land under section 226(1).

91 For the reasons given by Lord Mance JSC, I find it difficult to accept that proposition. It puts the cart before the horse. The council have nothing to dispose of unless they have acquired the land, whether voluntarily or compulsorily. They can only acquire the land compulsorily under section 226(1)(a) "if the authority think that the acquisition will facilitate the carrying out of development, redevelopment or improvement on or in relation to the land". The matters to be taken into account in making that decision have to be relevant to that purpose.

92 I agree, as Lord Mance JSC puts it at para 98 of his judgment, that the considerations admissible in relation to compulsory purchase are "no wider" than those admissible in relation to the grant of planning permission.

A Although the grant of planning permission is a "useful analogy", it is a different exercise. The considerations material to that exercise are also material, but in a rather different way, to the compulsory purchase decision. Thus, under the former version of section 226(1) (quoted by Lord Phillips PSC at para 121 of his judgment), the considerations which would be material to the grant of planning permission for development on the land were also material to whether the land was "suitable for development". B That was a sine qua non for compulsory purchase to "secure" development. This seems obvious. It cannot be proper to deprive a person compulsorily of his land in order to secure something which will not be allowed to take place. Under the new version of section 226(1), the permissibility of *some* development (together with a reasonable prospect of its actually taking place) should be a sine qua non for compulsory acquisition in order to C "facilitate" it. The question does not arise in this case, because we are agreed that the extraneous benefit to the Royal Hospital site would not be relevant to the grant of planning permission for this site, any more than it is relevant to the compulsory purchase decision.

93 Acquiring the whole of the Raglan Street site *would* facilitate the development of *that* site (although it is worth noting that Sainsbury have so much of the site that they could carry out a development, albeit a less D satisfactory one, without further compulsory acquisition). Persuading Tesco to carry out a wholly unrelated development upon another site elsewhere in the city, desirable though that may be for the city and people of Wolverhampton, does nothing to facilitate the development of the Raglan Street site. Rather, it is the other way round.

94 It is difficult to understand why the fact that Sainsbury also wish to E develop the Raglan Street site should make any difference. If it would not be permissible to take into account the extraneous benefit when deciding compulsorily to purchase land from an unwilling owner who did *not* himself wish to develop it, it seems even less permissible to take it into account as against an unwilling owner who *does*. In the former situation, a development which would not otherwise take place would be facilitated; in the latter, it would not be facilitated because the development would take F place in any event. (I might comment that Sainsbury would probably never have found themselves in this mess if they had not twice changed their mind about whether to develop this site.)

95 The case of *Standard Commercial Property Securities Ltd v Glasgow City Council (No 2)* 2007 SC (HL) 33 is entirely consistent with this view. A council can agree to assemble a site for development, using their G compulsory purchase powers if necessary, and to sell it to their chosen developer. It makes sense, but it is not essential, to conduct the two exercises in tandem. But the considerations relevant to the selection of the developer in that case were all relevant to the development of that site. The selection criteria adopted (and carefully graded) by the council were all directly related to the quality of the development of the site and the feasibility of the would-be developers' carrying it out: see Lord Hope of Craighead, at H para 22. There were no subsidiary planning obligations involved, still less any wholly extraneous benefits offered. In any event, the battle was not about the selection criteria, but about whether the proposed terms of disposal were the best obtainable and there was no evidence that they were not. Even if it were permissible to take a wholly extraneous benefit into

account when deciding to whom to sell the land, it does not follow that it is permissible to take that benefit into account when deciding compulsorily to deprive a person of their land.

96 Finally, I agree that section 226(1A) operates as a limitation on the power defined by section 226(1)(a). It is therefore necessary first to consider whether the acquisition will facilitate the development of the land; and only if it will do that, to consider whether the development itself will contribute to the promotion or improvement of the economic, social or environmental well-being of the area.

LORD MANCE JSC

97 I consider that this appeal should be allowed. I agree with the reasons given by Lord Collins of Mapesbury JSC, supplemented by those given by Lord Walker of Gestingthorpe and Baroness Hale of Richmond JJSC, and wish to add only a few comments on one aspect, relating to the basis upon which Lord Phillips of Worth Matravers PSC and Lord Hope of Craighead DPSC (and Lord Brown of Eaton-under-Heywood JSC in an alternative) come in their judgments to an opposite result.

98 Like Lord Phillips PSC (paras 134–135), I agree with Lord Collins JSC's conclusion that a planning authority, when considering a planning application, is only entitled to take into account a planning obligation which the applicant offers if that obligation has some connection with the relevant development, apart from the fact of its offer. I also consider that there is a useful analogy between the grant of planning permission and the exercise of a power of compulsory purchase under section 226(1)(a) of the Town and Country Planning Act 1990, and that the considerations admissible in relation to the latter power are, in the respect mentioned in the previous sentence, no wider than those admissible in relation to the former.

99 In this case, the (decisive) attraction of Tesco's proposal in respect of the Raglan Street site consisted of Tesco's offer to use the profits to subsidise the wholly unconnected development by it of the Royal Hospital site, elsewhere in Wolverhampton, which the city council wished to see take place. Lord Phillips PSC accepts in para 138, for reasons which I have summarised in the previous paragraph, that, had Sainsbury been here "simply an owner who was unwilling to sell his land", it would not have been legitimate for Wolverhampton City Council to take this attraction into account in deciding to exercise its powers of compulsory purchase to facilitate Tesco's scheme in respect of the Raglan Street site. Likewise, he accepts (para 140) that, if Sainsbury and Tesco had been seeking in competition with each other to develop a site in the ownership of a third party, then, too, it would not been admissible for the city council to decide compulsorily to purchase the third party site because of the attraction of Tesco's offer to develop a wholly unconnected site.

100 However, Lord Phillips PSC and Lord Hope DPSC consider that it makes all the difference that, in this case, Sainsbury and Tesco were in competition for the same site (in fact owned or controlled as to 86% by the former and 14% by the latter). I cannot accept that distinction. On its logic, it should make no difference if Sainsbury owned and wanted itself to develop the whole Raglan Street site: Tesco, if it wanted to develop that site, could, by offering to devote part of the profits to the Royal Hospital project, still legitimately induce the city council compulsorily to purchase Sainsbury's

property in order to sell it to Tesco for the Raglan Street development. Lord Phillips DPSC's reference (para 147) to "the fact that the compulsory purchase of land owned by one or the other is involved" as "really peripheral" in a case where there are rival developers goes far towards accepting this conclusion. Alternatively, if some way of avoiding this conclusion exists, the logic must still be that Tesco, by acquiring only one house on the proposed Raglan Street site, could alter fundamentally the considerations admissible in relation to a decision whether compulsorily to purchase Sainsbury's property, rather than Tesco's, in order to facilitate the development of the Raglan Street site. In either case, I do not think it right to describe as "motivated by commercial rivalry" (para 147) the wish of a landowner in Sainsbury's position to develop its own land—or its wish to have any decision to compulsorily purchase its land for the benefit of some other developer made by reference to factors having at least some connection with its land.

101 The error in my view lies in divorcing the exercise of the power of compulsory purchase from the property to which it relates. Two different exercises of that power are here in issue relating to two different pieces of land. When a planning authority exercises compulsory purchase powers to promote a particular development, it does this in relation to specific property and only so far as necessary. In the present case, if Sainsbury's scheme is preferred on its admissible planning merits, then only Tesco's property will be compulsorily purchased, and vice versa. The council's first decision is therefore which development it prefers, and that will determine whose property is compulsorily purchased. The council's decision which development it prefers must be taken having regard to considerations which are admissible in the context of the development for which property is to be compulsorily purchased. Thus, when deciding whether compulsorily to purchase Sainsbury's property, it was not admissible to have regard to Tesco's offer relating to the unconnected development of the Royal Hospital site. If the Raglan Street site had already been in council ownership, and there were two interested developers, the council could of course take into account under section 233 any inducement offered by either—whether in terms of price or some unconnected benefit (such as an undertaking to develop the Royal Hospital site)—as Lord Hope DSPC says in para 155. But that is for the very reason that the only relevant decision would then relate to the disposal of the council's own property. Where the council is deciding whether compulsorily to purchase third party property under section 226(1)(a), the interests of the third party mean that the council must have regard only to considerations which are admissible in the context of the development for which such property is required.

102 *Standard Commercial Property Securities Ltd v Glasgow City Council (No 2)* 2007 SC (HL) 33, to which Lord Phillips PSC and Lord Hope DPSC refer, does not in my view support the conclusion which they reach. It was a case where the Glasgow City Council took its decision which development to prefer on grounds which related scrupulously to the merits of the proposed development, without reference to unconnected factors: see e g paras 21–23, per Lord Hope, para 50, per Lord Rodger of Earlsferry and para 73, per Lord Brown. There was, as Lord Hope DSPC notes in para 155 in his present judgment, a strong element of planning gain involved in the potential development. But it was planning gain related to the development,

not to some entirely unconnected development, so that the case has no analogy with the present.

103 The issue before the House arose because all potential developers were required to provide an indemnity for Glasgow City Council's costs in effecting the compulsory purchase: paras 22, 50 and 73; and it was this feature which the losing developer criticised. There was some discussion of the possibility that the rival developers might have been invited to enter a bidding match in terms of the price to be paid: para 41, per Lord Hope, para 62, per Lord Rodger and paras 72–73, per Lord Brown. In paras 41 and 72, Lord Hope and Lord Brown both expressed their difficulty in understanding how such a bidding match would work.

104 At most, one might read into the discussion in the *Standard Commercial Property* case a tacit assumption that such a bidding match might have been permissible if possible, but that does not make the case authority on a point which was evidently not argued in that case, any more than it was in fact argued on the present appeal. The focus in the *Standard Commercial Property* case was on whether the terms on which the Glasgow City Council was proposing to dispose of the property, once compulsorily acquired, met the requirements of section 191(3) of the Town and Country Planning (Scotland) Act 1997. Section 191(1) provided that any land acquired and held for planning purposes could be disposed of to such person, in such manner and subject to such conditions as might appear expedient to secure purposes mentioned in section 191(2), viz the best use of that or other land, etc. Section 191(3) provided that any land so disposed of should only be disposed of "at the best price or on the best terms that can reasonably be obtained". The requirements of section 191(1) and (2) on the one hand and of section 191(3) on the other were, as Lord Hope said, at para 34, "separate and distinct". The issue before the House was, as Lord Hope made clear throughout paras 31–42, simply whether the proposed terms of disposal fell within section 191(3).

105 It is material to think about the consequences if the *Standard Commercial Property* case were to be treated as any sort of authority that a planning authority may, when deciding whether compulsorily to acquire property belonging to one landowner ("A"), have regard to the price offered for the land by potential developer ("B"). There would seem to be no logical reason to limit these consequences to situations where A and B are in competition, or to situations where the potential development extends beyond A's property and includes some property already owned by B. If, in any situation, B were to offer to repurchase A's property from the planning authority on terms giving the planning authority a profit, once the planning authority acquired it by compulsory purchase from A, why would that be illegitimate? Yet A would have little or no means of countering such an inducement. A could not offer any corresponding profit in respect of land which it already owned. And it could not be legitimate for A to offer the local authority a share in the profit it hoped to make from developing its own land, in order to induce the local authority to refrain from compulsorily purchasing its land for the benefit of B. That would amount to buying a local authority's exercise of its discretion. It might be suggested that if, as here, B owned some land which it was desired to include in an overall development, then A might counter B's offer in respect of A's land, by offering the planning authority a profit on the resale of B's land, if it were

compulsorily to acquire that land rather than A's. Apart from the evident inappropriateness of any such bidding war, B's relevant land holding might (as here) be much smaller in area, and, unless it is supposed that A could legitimately offer a ludicrously high price for B's land, the financial attraction for the planning authority of A's offer could not match that of B's. So far, I have spoken only in terms of a bidding match relating to the price to be paid by the developer for the property to be compulsorily purchased. That was the only situation to which any discussion at all was addressed in the *Standard Commercial Property* case. The present case concerns the further question whether a proposed developer could influence the exercise by a planning authority of a discretion (viz whose property compulsorily to purchase and for the benefit of which of two potential developers) by offering some benefit wholly unconnected with any property the subject of the proposed development. In this context, it seems to me even clearer that the *Standard Commercial Property* case cannot lend support to Tesco's case on this appeal.

106 For these reasons, I do not regard the *Standard Commercial Property* case as justifying a conclusion that, as soon as rival developers are competing to develop a single site, part owned by each, considerations become material which would be immaterial if the whole site had been owned by one of them or by a third party. If the discussion in the judgments in that case lends any support to Tesco's case, the point did not arise for decision and was not argued there, any more than it was on the appeal in the present case. As a matter of principle, in my opinion, there is no basis on which the fact that Sainsbury and Tesco were, in a broad sense, rival developers in respect of the same overall site, can or should alter fundamentally the considerations admissible when the city council came to consider which development it should prefer, and which property it should, therefore, compulsorily acquire to facilitate such development. Any such decision fell to be made by reference, and only by reference, to considerations having some connection with the proposed development, and not by reference to any entirely unconnected inducement which might be held out by one of the rival developers. Like Lord Collins, Lord Walker and Baroness Hale JJSC, I would therefore allow Sainsbury's appeal.

LORD PHILLIPS OF WORTH MATRAVERS PSC

Introduction

107 The facts of this appeal are set out in detail in the judgment of Lord Collins of Mapesbury JSC. In essence they are simple. The issue that they raise is not. As every shopper knows Sainsbury and Tesco are rivals. Each owns a chain of supermarkets. Each is anxious to open a supermarket on a site at Wolverhampton ("the site"). To this end Sainsbury has acquired 86% of the site and Tesco has acquired 14%. These figures ignore, as shall I for it has no materiality, the fact that Wolverhampton City Council ("the council") owns a very small part of the site. Sainsbury and Tesco have each prepared a development plan for the site. The plans are very similar. Tesco has obtained planning permission for its plan and Sainsbury is in a position to do the same. The council is anxious that one or other development plan should be implemented, for it will be likely to contribute to the well-being of the

area. The problem is that neither of the rivals is prepared to give way, and in so doing to sell its portion of the site to the other.

108 To resolve this impasse the council is prepared to use its powers of compulsory purchase to buy the land of one of the rivals and sell it to the other. Those powers are conferred by the following sections of the Town and Country Planning Act 1990, as amended:

> "226 *Compulsory acquisition of land for development and other planning purposes*
>
> "(1) A local authority to whom this section applies shall, on being authorised to do so by the Secretary of State, have power to acquire compulsorily any land in their area— (a) if the authority think that the acquisition will facilitate the carrying out of development, redevelopment or improvement on or in relation to the land or; (b) which is required for a purpose which it is necessary to achieve in the interests of the proper planning of an area in which the land is situated.
>
> "(1A) But a local authority must not exercise the power under paragraph (a) of subsection (1) unless they think that the development, redevelopment or improvement is likely to contribute to the achievement of any one or more of the following objects— (a) the promotion or improvement of the economic well-being of their area; (b) the promotion or improvement of the social well-being of their area; (c) the promotion or improvement of the environmental well-being of their area."
>
> "233 *Disposal by local authorities of land held for planning purposes*
>
> "(1) Where any land has been acquired or appropriated by a local authority for planning purposes and is for the time being held by them for the purposes for which it was so acquired or appropriated, the authority may dispose of the land to such person, in such manner and subject to such conditions as appear to them to be expedient in order— (a) to secure the best use of that or other land and any buildings or works which have been, or are to be, erected, constructed or carried out on it (whether by themselves or by any other person), or (b) to secure the erection, construction or carrying out on it of any buildings or works appearing to them to be needed for the proper planning of the area of the authority . . .
>
> "(3) The consent of the Secretary of State is . . . required where the disposal is to be for a consideration less than the best that can reasonably be obtained . . ."

109 It is common ground, and rightly so, that the statutory requirements of section 226 are satisfied, so that the council has statutory power compulsorily to purchase the land owned by either of the rivals. There is little, if anything, to choose between the rival development plans. The council has, however, decided to prefer Tesco. Its intention is compulsorily to purchase Sainsbury's land and to sell this to Tesco. Its reason for this decision is as follows. Tesco own another site in Wolverhampton, the Royal Hospital site ("RHS"). This is run down and crying out for regeneration. The council wishes Tesco to redevelop this in a way which Tesco contends is uneconomic. Tesco has, however, agreed to enter into an obligation to redevelop the RHS in accordance with the council's wishes provided only that the council prefers Tesco in the competition for the development of the site. This obligation has been described as involving a "cross-subsidy" of the RHS redevelopment from the

A site development. The council has regarded this obligation as decisive in preferring Tesco to Sainsbury in the competition for the development of the site.

110 The issue raised by this appeal is whether Tesco's undertaking to develop the RHS in accordance with the council's wishes is a matter to which the council can properly have regard when deciding upon a scheme for developing the site that involves the compulsory purchase of Sainsbury's land.

B

RHS redevelopment

111 The RHS is about half a mile away from the site, on the other side of the city centre. When Tesco applied for planning permission for the development of the site, it sought initially to link this with the redevelopment of the RHS. It was, however, unable to demonstrate any connection between the two, and ultimately accepted that there was no linkage for the planning committee to consider. The reality is that there is no connection between the development of the site and the RHS development other than Tesco's agreement to proceed with the latter if granted the former.

C

D

The "cross-subsidy"

112 I am puzzled by the nature of the so-called "cross-subsidy". Under what is commonly described as a "back-to-back agreement" Tesco has agreed to indemnify the council in relation to the cost to the council of compulsorily purchasing Sainsbury's 86% of the site. Tesco has further agreed to redevelop the RHS at what Tesco contends will be a commercial loss. Tesco states that it will be able to afford this because of the cross-subsidy that will be available if it is permitted to develop the site. It is thus implicit that Tesco anticipates that development of the site will result in an economic benefit that will enable it to entertain a loss-making venture. That economic benefit should, however, be reflected in the price that Tesco, as a willing buyer, would be prepared to pay to Sainsbury, as a willing seller, if Sainsbury's land were to be sold directly to Tesco in an open market transaction. That, as I understand the position, is precisely the amount to which Sainsbury will be entitled from the council as compensation for the compulsory acquisition of their land: see *Waters v Welsh Development Agency* [2004] 1 WLR 1304, paras 17 and 18. If Tesco has to pay the council this amount under the back-to-back agreement it is not easy to see how there will remain to Tesco any surplus economic benefit to fund a loss-making venture at the RHS. Be this as it may, that is precisely what Tesco has agreed to do. Accordingly I approach this appeal on the basis that the compulsory purchase of Sainsbury's land will procure for the council the benefit, not merely of the development of the site, but of the redevelopment of the RHS under the obligation that Tesco has agreed to assume. I shall describe this, by way of shorthand, as "the RHS benefit".

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G

H

An analysis of the issues

113 The basic issue raised by this appeal is whether the RHS benefit is a legitimate, or material, consideration to which the council can have regard when deciding whether to acquire Sainsbury's land by compulsory purchase

in the particular context of the competition that exists between Sainsbury and Tesco for this development. This basic issue subdivides into two separate questions: (i) Would the RHS benefit be a material consideration in deciding whether compulsorily to purchase Sainsbury's land if Sainsbury was not competing for the development? (ii) Is the RHS benefit a material consideration in deciding whether to award the development to Sainsbury or Tesco? If the first question is answered in the affirmative, the second question must necessarily also be answered in the affirmative. A negative answer to the first question will not, however, necessarily require a negative answer to the second.

Would the RHS benefit be a material consideration in deciding whether compulsorily to purchase Sainsbury's land if Sainsbury were not competing for the development?

114 The statutory power of compulsory purchase can only lawfully be used for the purpose for which the power has been conferred. In *Galloway v Mayor and Commonalty of London* (1866) LR 1 HL 34, 43 Lord Cranworth LC said:

> "The principle is this, that when persons embarking in great undertakings, for the accomplishment of which those engaged in them have received authority from the legislature to take compulsorily the lands of others, making to the latter proper compensation, the persons so authorised cannot be allowed to exercise the powers conferred on them for any collateral object; that is, for any purposes except those for which the legislature has invested them with extraordinary powers."

115 Section 226(1)(a) and 226(1A) confers the power compulsorily to purchase land, but to justify the exercise of that power the council must be able to show that this is clearly in the public interest: "I regard it as a principle of our constitutional law that no citizen is to be deprived of his land by any public authority against his will, unless it is expressly authorised by Parliament *and the public interest decisively so demands*" (my emphasis), per Lord Denning MR in *Prest v Secretary of State for Wales* (1982) 81 LGR 193, 198. In this case it is common ground that the requirements of section 226 are satisfied and that if (i) there was no competing scheme and (ii) Tesco was not prepared to provide the RHS benefit, the public interest would none the less justify the compulsory purchase of Sainsbury's land in order to enable Tesco to carry out the development. If, however, this were not the case, would the offer by Tesco of the RHS benefit be a material consideration to which the council could have regard when deciding whether the exercise of their power of compulsory purchase was justified?

The ambit of section 226(1A)

116 Section 226(1A) of the Act sets out preconditions to the exercise of the power of compulsory purchase. The development facilitated by the compulsory purchase must be likely to contribute to the improvement of the economic, social or environmental well-being of the area. The Court of Appeal held that because the compulsory purchase of Sainsbury's land would result in the RHS benefit which, in its turn, would contribute to the economic, social or well-being of the area, this, of itself, satisfied section 226(1A).

A It necessarily followed that the RHS benefit was a material consideration to which the council could have regard when considering the compulsory purchase of Sainsbury's land.

117 This finding differed from that of Elias J at first instance. I consider that Elias J was correct and the Court of Appeal wrong. The reasoning of the Court of Appeal appears from the following passages of the only reasoned judgment, which was delivered by Sullivan LJ [2009] 3 EGLR 94, B paras 26–29:

> "26. Though convoluted, subsection 226(1A) is expressed in deliberately broad terms: 'likely to contribute to the achievement of . . . [the well-being] . . . objects'. It is not prescriptive as to the manner in which the carrying out of redevelopment upon a CPO site might make a C contribution to such wider benefits. Mr Lockhart-Mummery accepted that one of the more obvious ways in which the carrying out of redevelopment on a CPO site might, at least in principle, be capable of bringing economic/social/environmental benefits to a wider area would be if the redevelopment was likely to act as the catalyst for the development or redevelopment of some other site or sites within the authority's area.
>
> D "27. Such a catalytic effect might be direct, e g because redeveloping the CPO site would be likely to enable the occupier of another, run down site in the authority's area to relocate onto the CPO site, thus enabling the run down site to be redeveloped. Or it might be indirect, e g because the increased attractiveness after redevelopment of a hitherto run down CPO site was likely to make other sites in the area more attractive for development or redevelopment. It was common ground that such catalytic E effects were capable of falling within the scope of section 226(1A).
>
> "28. In the present case the report makes it plain that the defendant was satisfied that facilitating the carrying out of the interested party's scheme for the redevelopment of the Raglan Street site would, by reason of the proposed cross-subsidy, act as the catalyst for the redevelopment of the RHS site in a manner which would contribute to the economic social F and environmental well-being of its area . . .
>
> "29. In my judgment subsection 226(1A) is concerned with all of the consequences that are likely to flow from the process of the carrying out of redevelopment on the CPO site, and these are not confined to what might be described as the impact of there being new 'bricks and mortar' on the redeveloped site. Thus, disturbance during the redevelopment process and the need to relocate existing occupiers on the one hand, and G the job opportunities that would be created during the carrying out of the redevelopment on the other, would both be capable of being relevant (the one negative, the other positive) for the purposes of section 226(1A)."

118 In these passages Sullivan LJ equates "the development" in section 226 (1A) with "the process of the carrying out of redevelopment". I think that this is questionable. He describes the site development as acting H "as a catalyst" for the RHS redevelopment, by reason of the cross-subsidy. This is a misuse of language. Section 226(1A) focuses primarily, if not exclusively, on whether the development will be likely to enhance the economic, social or environmental well-being of the area once it is completed. The subsection cannot be satisfied by an agreement by a

developer to fund a second development that has no physical, geographical or other connection with the development that the compulsory purchase is designed to facilitate.

119 This conclusion gives effect to the natural meaning of the language of section 226(1A). In the Court of Appeal Mr Lockhart-Mummery QC for Sainsbury submitted that the same conclusion should be reached by applying, by analogy, decisions on what constitute "material considerations" in the context of planning applications. Sullivan LJ held that these decisions could not be so applied, at least directly, and Mr King QC for the council and Mr Katkowski QC for Tesco have supported his approach. Both Lord Brown of Eaton-under-Heywood and Lord Collins of Mapesbury JJSC have relied on decisions in relation to planning applications in reaching their conclusions, albeit that they have differed as to their effect. Is the analogy between compulsory purchase and planning permission in the present context a fair one?

The analogy between compulsory purchase and planning permission

120 I agree with Lord Brown and Lord Collins JJSC that it is appropriate in this case to draw an analogy, when considering whether the RHS benefit is a material consideration, with certain decisions relating to the grant of planning permission. The issue in this case is whether it is legitimate, when considering the benefits that will flow from a development that is the object of compulsory purchase, to have regard to a particular benefit offered by the developer. The relevant planning cases deal with the question of when it is legitimate, when considering a planning application, to have regard to benefits offered by the developer. Each case raises the question of what can legitimately be considered when assessing how the public interest is affected by the development of land. The analogy is obvious. There is a further point.

121 Section 226 of the Act was amended by section 99 of and Schedule 9 to the Planning and Compulsory Purchase Act 2004, which inserted subsection (1A). In its previous form it included, by section 226(2)(c), a requirement that a local authority, when considering whether land was suitable for development, redevelopment or improvement, should have regard to "any other considerations which would be material for the purpose of determining an application for planning permission for development on the land". While this provision was deleted by the 2004 Act it none the less illustrates the fact that the test of materiality in relation to planning permission can also be relevant in the context of compulsory purchase.

122 The planning obligation offered by Tesco in the present case is the RHS benefit. Could that have constituted a material consideration on Tesco's application for planning permission, notwithstanding that it had no other connection with the proposed development of the site?

Considerations that are material to the grant of planning permission

123 The history of planning permission shows an ambivalence on the part of the legislature, the executive and the judiciary in respect of the extent to which it is legitimate for a local authority to exact planning gain from a developer as a condition of the grant of planning permission. Lord Hoffmann traced this history in some detail at pp 771–777 of his speech in

Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR 759. I shall attempt a rather shorter summary, at least in relation to the earlier part of the history.

124 At the beginning of the 20th century, apart from some public health legislation, there were no planning controls over the use that an individual could make of his own land. A comprehensive system of planning control over the use of land was first introduced by the Town and Country Planning Act 1947. Since then there have been a series of legislative changes seeking, inter alia, to balance the private rights of owners of land against the public interest in the control of the environment, culminating with the Planning Act 2008, which allows for a new Community Infrastructure Levy. A particular problem has been the extent to which it is legitimate to require developers to take responsibility for the "off-site" consequences of their developments.

125 For present purposes, the most significant provision in force is section 70 of the Town and Country Planning Act 1990. This provides:

> "*Determination of applications: general considerations*
>
> "(1) Where an application is made to a local planning authority for planning permission— (a) subject to sections 91 and 92, they may grant planning permission, either unconditionally or subject to such conditions as they think fit; or (b) they may refuse planning permission.
>
> "(2) In dealing with such an application the authority shall have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations."

126 Some of the relevant authorities deal with the criteria of the "material considerations" to which subsection (2) requires the local authority to have regard. Others relate to the scope of the power to impose conditions. In relation to each of these, the following observations of Lord Denning in *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1958] 1 QB 554, 572 are relevant:

> "The principles to be applied are not, I think, in doubt. Although the planning authorities are given very wide powers to impose 'such conditions as they think fit,' nevertheless the law says that those conditions, to be valid, must fairly and reasonably relate to the permitted development. The planning authority are not at liberty to use their powers for an ulterior object, however desirable that object may seem to them to be in the public interest."

As Lord Hoffmann observed in the *Tesco* case, at p 772, "As a general statement, this formulation has never been challenged".

127 A decision that is particularly relevant in relation to "material considerations" is *R v Westminster City Council, Ex p Monahan* [1990] 1 QB 87. The facts of that case have been set out and analysed by Lord Collins JSC at paras 51–59 of his judgment. In short the Court of Appeal held that it was a material consideration, when considering a composite development, that one part of it, which was undesirable having regard to relevant planning considerations, would provide a necessary cross-subsidy for the development of the other part, which was highly desirable. Lord Collins JSC in his analysis at para 58, identifies the fact that the case concerned "composite or related developments" as a relevant part of the

Court of Appeal's reasoning. At para 70 he identifies the need for such a connection or relationship as being a requirement of law. Lord Brown JSC, in para 176 of his judgment, disagrees. He comments that it was expressly recognised that no discernable legal principle would have supported the need for such a connection.

128 I align myself with Lord Collins JSC's analysis. The passage from the judgment of Nicholls LJ, quoted by Lord Brown and Lord Collins JJSC at paras 169 and 56 of their respective judgments, and the passage from the judgment of Staughton LJ quoted by Lord Collins JSC at para 57, demonstrate that each of those judges saw the need for a relationship between the undesirable and the desirable developments other than the simple fact that the one would subsidise the other. The suggestion by Kerr LJ, at p 117, that the significance of the distance between developments involved "considerations of fact and degree rather than of principle" does not withstand analysis. If the distance matters, then the reason why it matters must be a matter of principle. The relevant principle appears to me to be that a cross-subsidy between two developments cannot be considered unless there is some independent reason for considering the two developments together.

129 Whether that is a rational principle is another matter. If it is acceptable that an undesirable development should be permitted in order to subsidise a desirable development it is not easy to see why there should be an inflexible requirement that one should be in proximity to, or have some other nexus with, the other.

130 A close nexus between the subject matter of a planning condition and the development in relation to which it is imposed has been required by the courts. Lord Hoffmann in the *Tesco* case [1995] 1 WLR 759, 772 referred to the triple requirement for a valid planning condition laid down by the House of Lords in *Newbury District Council v Secretary of State for the Environment* [1981] AC 578: (i) it must be for a planning purpose and not for any ulterior one; (ii) it must fairly and reasonably relate to the permitted development; (iii) it must not be *Wednesbury* unreasonable: [1948] 1 KB 233. Lord Hoffmann went on to refer to *Hall & Co Ltd v Shoreham-by-Sea Urban District Council* [1964] 1 WLR 240 as illustrating the very strict way that the courts gave effect to these requirements, so that conditions requiring contribution to the "external costs" generated by a development were not permitted. As Lord Hoffmann explained, this gave rise to the introduction of "planning agreements", which were replaced in their turn by "planning obligations".

131 Section 106 of the Act, as substituted by section 12(1) of the Planning and Compensation Act 1991, provides:

> "*Planning obligations*
>
> "(1) Any person interested in land in the area of a local planning authority may, by agreement or otherwise, enter into an obligation (referred to in this section and sections 106A and 106B as 'a planning obligation'), enforceable to the extent mentioned in subsection (3)—
> (a) restricting the development or use of the land in any specified way; (b) requiring specified operations or activities to be carried out in, on, under or over the land; (c) requiring the land to be used in any specified way; or (d) requiring a sum or sums to be paid to the authority . . ."

A This section is in very general terms and, in particular, no express restriction or qualification is placed on the undertaking to pay money to the authority. In these circumstances two separate questions arise. The first is whether, and if so what, implicit restrictions exist as to the nature of planning obligations that can lawfully be incurred. The second is the extent to which planning obligations that have been undertaken are material considerations
B to which the authority must have regard under section 70 of the Act. There are two relevant decisions that relate to the latter question.

132 The first is *R v Plymouth City Council, Ex p Plymouth and South Devon Co-operative Society Ltd* (1993) 67 P & CR 78. Lord Brown JSC has set out the facts of this case at para 170 of his judgment. The issue was whether generous planning obligations ("benefits") offered by Tesco and Sainsbury, there as here rival applicants for a development, were material
C considerations to which the planning authority could have regard, notwithstanding that they went well beyond anything that the authority would have been able properly to require by way of planning conditions as being "necessary". The Court of Appeal applied the *Newbury* triple requirement, but held that there was no requirement that the benefits should be necessary, albeit that they had, fairly and reasonably, to relate to the
D development. As to that requirement, this was satisfied in the case of financial contributions to works off-site designed to accommodate demands generated by the development.

133 In that case Lord Hoffmann remarked, at p 90:

> "Materiality is an entirely different matter, because there is a public interest in not allowing planning permissions to be sold in exchange for
E benefits which are not planning considerations or do not relate to the proposed development."

He was subsequently in the *Tesco* case [1995] 1 WLR 759, 778 to say that the parallel between the *Newbury* triple requirement and the materiality of planning obligations was "by no means exact".

134 This brings me to the *Tesco* case, which is the most important
F decision in the context of this appeal. Once again the material facts have been summarised by Lord Brown and Lord Collins JJSC at paras 173 and 63–66 of their respective judgments. What the *Tesco* case established was that the second test in the *Newbury* case does not apply to planning obligations. These, to constitute material considerations, do not have "fairly and reasonably" to relate to the relevant development. It is enough if
G they have a connection to it that is not de minimis. The requirement for such a connection none the less remains. Lord Brown JSC has concluded, at para 174 of his judgment, that this connection is satisfied by an offer to cross-subsidise another development that is otherwise unconnected with the development for which planning permission is sought. He comments that such an offer could not sensibly be regarded as "an attempt to buy planning permission", a phrase he takes from the judgment of Lord Keith of Kinkel,
H at p 770. Lord Brown JSC differs from Lord Collins JSC, who concludes at para 70 that the authorities, and the *Tesco* case in particular, establish that there "must be a real connection" between benefits undertaken by a planning obligation and the development to which the planning application relates.

135 Here I align myself once again with Lord Collins JSC. Lord Brown JSC's conclusions are at odds with the passage in Lord Keith's judgment from which he has borrowed a phrase. The full passage reads:

> "An offered planning obligation which has nothing to do with the proposed development, *apart from the fact that it is offered by the developer*, will plainly not be a material consideration and could be regarded only as an attempt to buy planning permission." (Emphasis mine.)

All members of the committee agreed with the judgment of Lord Keith.

136 Lord Brown JSC has quoted a passage from the judgment of Lord Hoffmann, at p 779C–D, in which he says that section 106 does not require that the planning obligation should relate to any particular development, and Lord Keith made a similar observation, at p 769B. These observations related, however, to the legality, not the materiality, of planning obligations.

137 My conclusion in relation to the effect of the authorities is as follows. When considering the merits of an application for planning permission for a development it is material for the planning authority to consider the impact on the community and the environment of every aspect of the development and of any benefits that have some relevance to that impact that is not de minimis that the developer is prepared to provide. An offer of benefits that have no relation to or connection with the development is not material, for it is no more than an attempt to buy planning permission, which is able in principle. Tesco was right, on its application for planning permission, to drop any attempt to link the development of the site with the RHS development.

138 These principles can properly be applied, by analogy, to a simple case where a local authority is considering whether the public interest justifies the compulsory purchase of land for the purpose of facilitating a development. The development itself must be justified in the public interest and it would be wrong in principle for the local authority to be influenced by the offer by the chosen developer to provide some collateral benefit that has no connection of any kind with the development in question. Thus if, in this case, Sainsbury was not a rival seeking to develop the site but simply an owner who was unwilling to sell his land, it would not be right to treat Tesco's offer of the RHS benefit as a consideration that was material to the decision of whether or not to purchase Sainsbury's land.

Is the RHS benefit a material consideration in deciding whether to award the development to Sainsbury or Tesco?

139 The principle that permits a planning authority to have regard to planning gain that has some connection with a proposed development, but not to planning gain that has no such connection, is not entirely rational. It becomes less rational in a situation where two developers are competing for the grant of planning permission in circumstances where the grant to one or the other is justifiable, but not to both. That was believed to be the position in the *Plymouth* case 67 P & CR 78, although ultimately planning permission was granted to both the rivals, being once again Sainsbury and Tesco. In the *Plymouth* case each of the rivals was anxious to be permitted to build a supermarket. In competing for planning permission each offered to embellish its development with an array of expensive "add-ons",

described by Lord Brown JSC at para 170 of his judgment. These no doubt enhanced the attraction of each of the rival schemes from the viewpoint of the public and the local authority. But the possibility must exist that the cost of these embellishments might have been spent to better advantage in providing alternative planning gain in the local authority's area that had no connection with the proposed development. The reality is that the rivals were, to use a description adopted by Lord Hoffmann in the *Tesco* case [1995] 1 WLR 759, 782, competing for the development as in an auction. If an auction is to be permissible there might be something to be said for permitting the local authority to identify, for consideration by the rival bidders, its most urgent planning needs, whether or not connected with the development. I make this observation only by way of a stepping stone to considering the more complicated issue raised by the facts of this case.

140 The council's decision involves the exercise of two statutory powers. The first is the power of compulsory purchase conferred by section 226 of the Act. The second is the power to sell the land compulsorily purchased, which is conferred by section 233. The purposes of the sale of the land described in section 233 differ from the purposes of the purchase described in section 226. Had the site been in the ownership of a third party who was unwilling to sell it, and had Tesco and Sainsbury been competing to develop it, the council would have had two separate decisions to make. First whether compulsorily to purchase the land. Secondly to which of the two rivals to sell it for the purpose of the development. The law that I have analysed suggests that, when making the first decision under section 226, the council would have been bound to disregard benefits that might be obtainable from either of the developers that were unconnected to the development. But in choosing to which of the two rivals to sell the land for development under section 233 the council would have been entitled, and perhaps bound, to negotiate the best deal available. The terms of section 233 would seem wide enough to have permitted the council to treat as material Tesco's offer to throw into the bargain the RHS benefit.

141 These conclusions receive some support from *Standard Commercial Property Securities Ltd v Glasgow City Council (No 2)* 2007 SC (HL) 33. Lord Collins JSC has set out some of the complicated facts of this case at para 40 of his judgment. That case had these features in common with the present. Glasgow City Council wished to develop a run down area of the city, parts of which were owned by rival developers. The council had decided compulsorily to purchase the entire site and to sell it on back-to-back terms to one of the rival developers. The other developer challenged the deal on the basis that back-to-back terms did not represent the best deal. This the council were bound to achieve under section 191 of the Scottish Act, which closely resembles section 233 of the Act. Lord Collins JSC rightly remarks that there was in that case no offer of benefits unconnected to the development, but I do not think that this robs it of all relevance. Of significance is that in that case, as in this, the council first decided in principle that the facts justified the use of its powers of compulsory purchase, before turning to choose between the rival developers. It is also significant that the House of Lords held that, at the stage of choosing the developer, the council was not simply concerned with achieving the object of the compulsory purchase, but was also entitled to have regard to purely commercial considerations. Lord Hope of Craighead described the position as follows, at para 34:

"section 191 seeks to do two things. On the one hand it seeks to regulate those aspects of the transaction which are intended to secure the purposes set out in subsection (2). These purposes are to secure the best use of the land and the proper planning of the area. On the other it seeks in addition to protect the public purse in the manner indicated by subsection (3). These are separate and distinct requirements, although they must both be read in the light of what section 191 seeks to achieve. The prohibition in subsection (3) directs attention to one issue, and to one issue only. This is the commercial implications of the transaction for the planning authority. It is to the best commercial terms for the disposal of the land, not to what is best designed to achieve the overall planning purpose, that the authority must direct its attention at this stage. But the words 'best terms' permit disposal for a consideration which is not the 'best price'. So terms that will produce planning benefits and gains of value to the authority can be taken into account as well as terms resulting in cash benefits."

142 I can summarise the position as follows. (1) In deciding whether to exercise its powers of compulsory purchase for the purpose of development the council is not permitted to have regard to unconnected benefit that it may derive from the carrying out of the development, but (2) in deciding who shall carry out the development and, thus, to whom the land will be sold for that purpose, the council is entitled, and perhaps bound, to have regard to unconnected benefit offered by the developer. The problem is how to have regard to these principles in a case such as the present where the rival developers each owns part of the site needed for the development.

143 I have concluded that the proper approach should be as follows. The council should first decide, in the case of each of the rivals, whether compulsory purchase of his land would be approved to enable the development to proceed, disregarding any unconnected benefit that might accrue and on the premise that he was simply an unwilling seller rather than a rival developer. In the result of an affirmative answer being given in each case, the council should then decide which developer to prefer having regard to all considerations material to that choice, including the amount of the site already owned by each developer and any benefits offered by either developer, whether or not connected to the development. The fact that this may, in effect, involve an auction between the two developers for the benefit of the community does not seem to me to be inherently able.

144 In the present case this is what the council did. The council was not influenced by the RHS benefit when deciding in principle to use its power of compulsory purchase. In deciding to purchase whatever land was necessary for the development of the site the council had regard only to the proper objects of compulsory purchase. The choice of developers necessarily also determined which land would be compulsorily purchased, but the decision had already been taken to purchase whatever land would be necessary having regard to the choice of developer.

145 To summarise, the RHS benefit was not a consideration that was material to the decision to use the power of compulsory purchase, but it was very material to the decision which developer to select, and this in its turn determined whose land was to be compulsorily purchased. In these circumstances I have reached the conclusion that the RHS benefit was a

consideration that was material to the decision that determined simultaneously the developer and the land to be purchased. It cannot be said that the decision compulsorily to purchase Sainsbury's land was influenced by a consideration that was not material.

146 The decision that I have reached at laborious length was felicitously stated by Elias J in a single paragraph (para 38) and I propose to conclude my judgment by quoting this:

> "In my judgment when deciding which development should receive their support, the council could have regard to all the benefits accruing from the proposed development, including any off-site benefits achieved by way of a section 106 agreement. It seems to me that there are really two stages in the process. First, can a CPO lawfully be made in favour of a particular development? That must be determined by focusing solely on the benefits flowing from the development itself and the RHS benefits could not be taken into account at that stage. Second, if the power can lawfully be exercised, but there is more than one potential party in whose favour it could be exercised, to which development should the council lend its support? At that stage I can see no reason why the council should not have regard to its wider interests. It has established that there is in principle a proper basis in law for interfering with the rights of either of two (or more) owners of land on the site by compulsorily purchasing their interests; I see no reason why it should not select which landowner should be so affected by considering the overall benefits to the council which the respective developments would provide."

147 The reality in this case is that the real issue is which developer should be preferred by the council, which is in the position of being able to choose between the two. The fact that the compulsory purchase of land owned by one or the other is involved is really peripheral. Each purchased its land in the hope of being able to use it for the purpose of the development. Each shares the intention that its land should be used for the development. In resisting the compulsory purchase of its land each is motivated by commercial rivalry, not by any to the land being used for the proposed development. It would be unfortunate if the rigid application by analogy or principles of planning law were to rob the local community of the additional benefit of the redevelopment of the RHS. I have not found it necessary to reach such a result.

148 For these reasons I would dismiss this appeal.

LORD HOPE OF CRAIGHEAD DPSC

149 Reduced to its essentials, this case is about two decisions that the council took to facilitate the development at Raglan Street. The first was whether they should exercise their powers of compulsory acquisition to enable the development. The second was as to the choice of developer. The first decision was taken in the exercise of the powers conferred on the council by section 226 of the Town and Country Planning Act 1990, as amended. The second, as Lord Phillips of Worth Matravers PSC has said (see para 140, above), was about the exercise of two statutory powers. I put it in this way, as I think Lord Phillips PSC does too, simply to indicate the context in which each of these powers was being exercised. The cart and the

horse—if I may adopt Baroness Hale of Richmond JSC's analogy (see para 91)—go together, like a horse and carriage, at this stage of the exercise.

150 The site was not in the sole ownership, or under the sole control, of either developer. They were in competition with each other for its development, so the exercise of compulsory powers to acquire the interest in the land vested in one or other of them was inevitable. Just as inevitable is the fact that the purpose of the exercise of those powers was to enable the council to dispose of the interest that was to be acquired to the preferred developer. Section 226 is concerned with the acquisition of the interest in the land, not its disposal. The power to dispose of land that has been acquired or appropriated is set out in section 233 of the 1990 Act.

151 The compulsory acquisition of land can only be permitted if it is within the powers of the statute. Great care must be taken to see that those powers are not resorted to unless the statute permits this and that the acquisition is necessary for the purpose that the statute contemplates. The issue on this part of the case is whether the council were entitled to take into account, in discharging their duty under section 226(1A) to consider the well-being benefits for the area, Tesco's commitment to secure by way of cross-subsidy the development of the Royal Hospital site. For the reasons that Lord Phillips PSC and Lord Collins JSC give, I would hold that they were not entitled to do so. Section 226(1)(a) provides that the authority have power to acquire land compulsorily if they think that it will facilitate the carrying out of development, redevelopment or improvement on or in relation to the land. The reference to "the land" in this paragraph is to the land which is to be the subject of the compulsory purchase order. Section 226(1A) places a limitation on the exercise of the power under section 226(1)(a). These two provisions must be read together. The contribution by the development, redevelopment or improvement that section 226(1A) refers to must be on the land that the authority is proposing to acquire compulsorily.

152 The situation in this case is that there was no physical connection of any kind between the two sites. Development of the Royal Hospital site could not contribute anything to the carrying out of development on the Raglan Street site in any real sense at all. They were not part of the same land. There is no doubt that the development of the Royal Hospital site would bring well-being benefits to the council's area of the kind that section 226(1A) refers to. But to fall within that subsection they had to be benefits that flowed from the Raglan Street development, not anywhere else. It follows that the council were not entitled to conclude that the work which Tesco were willing to undertake on the Royal Hospital site would contribute to the well-being of the area resulting from its development of the site at Raglan Street for the purposes of section 226(1A).

153 At first sight that might seem to be the end of the case. The report which was presented to the council's cabinet on 30 January 2008 stated that the Tesco and Sainsbury's schemes for the Raglan Street site would both fulfil the purpose referred to in section 226(1)(a). Addressing itself to the choice that had to be made between the two schemes, it went on to describe the circumstances relating to the development of the Royal Hospital site by Tesco and to refer to the decisive advantage which Tesco enjoyed over Sainsbury's if the development of that site was taken into account. It concluded by recommending that there was a compelling case in the public interest to make a compulsory purchase order to enable the Tesco scheme to go ahead.

As regards the exercise of the power to acquire the land compulsorily, if looked at in isolation, this was to stray into forbidden territory.

154 In my opinion however it would be unrealistic to stop there. The legality of the use of compulsory powers to enable the Raglan Street development to proceed has not been called into question. As the report said, both schemes satisfied the requirements of section 226(1)(a), and it has never been doubted that the carrying out of either of them on that site would contribute to the achievement of the well-being of the area. If the land had been in the ownership of a third party, there would have been no need to say more. The reason why the report went further was the council had to make a choice between the two developers. Although the report did not say so in terms, it is plain that the assumption on which it was proceeding was that, having acquired the land, the council would dispose of it to the preferred developer. The surrounding circumstances show that it was never the council's intention to develop the land themselves or to retain it in their ownership. This part of the report was as much concerned with the exercise of the power to dispose of the land as with the exercise of the power to acquire it.

155 The power of disposal under section 233 confers a wide discretion on the local authority. They may dispose of the land to such person, in such manner and subject to such conditions as appear to them to be expedient to secure the best use of that or other land or the proper planning of their area. Like section 191 of the Town and Country Planning (Scotland) Act 1997 which is in very similar terms, that is its primary objective: see *Standard Commercial Property Securities Ltd v Glasgow City Council (No 2)* 2007 SC (HL) 33, para 32. It was held in that case that the council, when considering whether to use compulsory powers in conjunction with a sale of the land under a back-to-back agreement to the preferred developer, were entitled to have regard to the wider benefits that were expected to flow from the contribution that the preferred developer would make to the redevelopment, the proposals for which were to contain a strong element of planning gain. There was to be a requirement to include improvements to other areas of the urban block within which the site to be acquired compulsorily was situated: see paras 38, 39. The value of the planning gain was something that the council was entitled to take into account in its assessment of whether the disposal was achieved on the best commercial terms.

156 The focus in that case was on the terms on which the council proposed to make the assembled site available to the preferred developer. Its facts differ from those in the present case, so I am not to be taken as suggesting that it provides direct authority for the view which I take here. But it does illustrate the extent of the power of disposal that is conferred by this section on the local authority, and it shows how the authority may legitimately have regard to the way the land will be disposed of before it decides to acquire it compulsorily: taking them both together, like the horse and carriage to which I referred earlier. The council decided to use its compulsory powers to purchase the site with a view to its disposal by means of a back-to-back agreement to achieve the development. The site was part of an urban block within which properties owned by the first petitioners and the second respondents were situated. Each had their own interests and their own agendas which were in competition with each other and, as in this case,

their proposals had to be evaluated. The preferred developer was expected to achieve a scheme that would enhance the wider area within which the site itself was situated. Regard was to be had to benefits which it would provide that were extraneous to the site itself, and extraneous too to each of the properties that were to be acquired compulsorily. Among other things, it was to commit itself to supporting an order for regulating traffic on adjacent streets and to provide details of a financial commitment to the area's environmental enhancement. The whole thing was seen as a single package. The acquisition of the properties and their disposal to a developer who would achieve these benefits were each part of the same exercise: for a more complete account of the facts, see 2005 SLT 144, paras 1–16.

157 I would take from that case the proposition that it is legitimate for the acquiring and disposing authority which has to choose between competing proposals for development to have regard to planning benefits that lie outside the perimeter of the site itself. It has not been suggested that it would have been an improper use of the section 233 power for the council to take account of Tesco's commitment to develop the Royal Hospital site in the assessment as to whether a disposal of the land to Tesco was preferable to disposing of it to Sainsbury's. I can see no reason why that should be so if the land was already in the council's ownership and they were faced with a competition between two or more developers who had no interest in the land at all.

158 It was not possible in this case for the council to take these two decisions separately, each without reference to the other. The choice as to whose land to acquire was inevitably linked to the choice of the developer to whom the land was to be disposed of when it was acquired. Section 226 does not concern itself with choices of that kind. To say that it prohibits them would be to read a limitation into the section which is not there. It would unduly inhibit the exercise of the power of compulsory acquisition in a case such as this, where a site that is in need of development is in divided ownership, the owners are in competition with each other for its development and there are sound planning reasons beyond those that section 226(1A) refers to for regarding the proposal of one developer as preferable to that of the other. I would not regard the opportunity that this particular situation gives for achieving planning gain in the wider public interest as transgressing the rule that the power of compulsory purchase can only be used for the purpose for which the power has been conferred. The contrary view risks making it impossible for projects for urban renewal which can only be achieved by using compulsory powers to assemble the site for redevelopment to include measures for improvements in the public interest which lie outside the site's perimeter. As Lord Phillips PSC says (see para 147), it would be unfortunate if a rigid application of the compulsory purchase principles to proposals of that kind were to rob the community of such benefits.

159 For these reasons, and those of Lord Phillips PSC with which I agree and in respectful agreement too with what Elias J said at first instance [2009] EWHC 134 at [38], I would dismiss the appeal.

LORD BROWN OF EATON-UNDER-HEYWOOD JSC

160 Are a local planning authority, when deciding how to exercise their compulsory purchase powers, precluded in all circumstances, as a matter of

A law, from taking into account public planning benefits (however substantial and obvious) which would result, not directly from the development to be facilitated by the proposed land acquisition, but rather from a contractual obligation attaching to that development? That, crucially, is the issue arising on this appeal.

161 Take the facts of this very case, already fully recounted in the judgment of Lord Collins of Mapesbury JSC, but which may conveniently B and sufficiently be summarised as follows. Two rival supermarket chains, Sainsbury's and Tesco, each own part of a site which is ripe for development ("the site"). Each wishes to develop the site as a supermarket and each has (or is about to obtain) planning permission for such development. There is really nothing to choose between their respective proposals. Neither is willing to sell its share of the site to the other. In these circumstances it is C agreed by all that the local planning authority ("Wolverhampton") must inevitably exercise their compulsory purchase powers under section 226 of the Town and Country Planning Act 1990 (as amended). The question then becomes: who should be chosen to carry out the development of the site and whose land, therefore, should be compulsorily acquired for the purpose? Should Sainsbury's land be acquired so that Tesco may develop the site or vice versa? The issue more particularly arising is whether, in deciding to D choose Tesco as the developer, Wolverhampton acted unlawfully in taking into account Tesco's commitment, if chosen, to redevelop the Royal Hospital site, another site in Wolverhampton's area some half a mile away ("the RHS"), redevelopment which Wolverhampton are anxious to promote but which Tesco would not be prepared to undertake save by way of cross-subsidy?

E **162** It so happens that one of the two rival chains (Sainsbury's) owns 86% of the site, the other (Tesco) 14%. But it is not suggested that this disparity between their respective interests affects the question of law at issue. The same question would arise even if each owned exactly half the site. Plainly the disparity is itself a material consideration and one, indeed, which ultimately could prove decisive in Sainsbury's favour. For present F purposes, however, as Mr Lockhart-Mummery QC for Sainsbury's expressly acknowledged, it can be ignored.

163 Section 226 of the 1990 Act provides so far as material:

> "(1) A local authority to whom this section applies shall, on being authorised to do so by the Secretary of State, have power to acquire compulsorily any land in their area— (a) if the authority think that the G acquisition will facilitate the carrying out of development, redevelopment or improvement on or in relation to the land . . .
>
> "(1A) But a local authority must not exercise the power under paragraph (a) of subsection (1) unless they think that the development, redevelopment or improvement is likely to contribute to the achievement of any one or more of the following objects— (a) the promotion or improvement of the economic well-being of their area; (b) the promotion H or improvement of the social well-being of their area; (c) the promotion or improvement of the environmental well-being of their area."

164 For present purposes the effect of those provisions in combination can be summarised quite simply as follows: A local authority can (subject to confirmation by the Secretary of State) compulsorily acquire land if they

think, first, that this will facilitate its development (section 226(1)(a)) and, secondly, that this development is likely to contribute to the economic and/or social and/or environmental well-being of their area (section 226(1A)).

165 In the present case it seems to me self-evident that both of these pre-conditions are fully satisfied in respect of each proposed development scheme so that Wolverhampton have a discretion to make whichever CPO they regard to be appropriate, whether of Sainsbury's land or of Tesco's land. The question, I repeat, is whether, in choosing whose land to acquire, Wolverhampton can take into account the additional benefit to their area which would result from Tesco's commitment, if they are enabled to develop the site, also to develop the RHS.

166 It was the Court of Appeal's conclusion below that Wolverhampton were indeed legally entitled to take account of the proposed cross-subsidy which would enable (and commit) Tesco to redevelop the RHS and that this entitlement arose directly under section 226(1A). This subsection, the Court of Appeal held [2009] 3 EGLR 94, para 33, imposes on local planning authorities an express obligation to have regard to such "off-site, or 'external' benefits". Elias J at first instance had held to the contrary [2009] EWHC 134 (Admin) at [35] that, to fall within section 226(1A), well-being benefits had to be generated by the development of the site itself, not by some contractually linked external development. In the only reasoned judgment in the Court of Appeal, Sullivan LJ (at paras 42 and 44) agreed with Elias J that,

> "to fall within section 226(1A) the benefits in question must flow from the redevelopment of [the site]. However . . . [t]he likelihood of the redevelopment of a CPO site leading, whether because of cross-subsidy or for any other reason, to the development or redevelopment of other sites in the authority's area is precisely the kind of wider benefit that subsection (1A) requires the authority to consider."
>
> "[Section 226(1A)] ensures that wider 'well-being' benefits are not ignored, but are always treated as material considerations . . ."

167 I have to say that on this particular issue, in common with the majority of this court, I prefer Elias J's view to that of the Court of Appeal. That, however, does not seem to me the real issue in the case. Section 226(1A), I repeat, does no more than specify a precondition (additional to that in section 226(1)(a)) which has to be satisfied before any power of compulsory acquisition can be exercised. No one doubts that it was satisfied here. Wolverhampton accordingly had a discretion under the section. The critical question then arising is whether the further public benefit which Tesco was offering was or was not a material consideration which Wolverhampton could take into account when deciding how to exercise that discretion. Elias J held that it was. The Court of Appeal, having concluded (wrongly as I believe) that this further benefit had to be regarded as material by virtue of section 226(1A), chose not to deal with the question whether the benefit would in any event have been a material consideration, section 226(1A) apart. As to this Sullivan LJ merely observed, at para 44, that section 226(1A) "does not purport to cut down the considerations that are capable of being material under subsection 226(1)(a)". And that at least must be right: to stipulate, as section 226(1A) does, that the authority must

not exercise their compulsory purchase powers unless they think that the development itself is likely to contribute to the well-being of their area (whether because it will act as a catalyst for other development or provide employment or stimulate other beneficial activity in the area or whatever else) is by no means to stipulate that, the condition being satisfied, this exhausts all the considerations to which the authority can have regard and they must shut their mind to all other possible external benefits which the exercise of their compulsory purchase powers would bring.

168 In addressing the question whether such external benefits are capable of being material considerations in the exercise of compulsory purchase powers under section 226(1)(a), it seems to me helpful to begin by examining what the position would be in the broadly analogous situation of a planning authority considering rival applications for planning permission. Suppose that the competition between the rival supermarket chains was not, as here, as to which should be preferred as developers of a single site by reference to the exercise of the authority's powers of compulsory purchase, but rather as to which should be granted planning permission assuming that each owned a suitable site but there was room in the area only for one supermarket—the very situation which arose in *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759 (between, as it happens, the same competing developers as here). Would an offer such as that made here by Tesco to develop the RHS (probably by way of a planning obligation under section 106 of the 1990 Act) be a "material consideration" within the meaning of section 70(2) of the 1990 Act? If it would, then it is difficult to see why it should not be material also for section 226(1)(a) purposes. If, on the other hand, it would not, then the court would need to be persuaded that wider financial benefits are to be regarded as material considerations when exercising compulsory purchase powers than when determining planning applications.

169 Before going to the House of Lords decision in the *Tesco* case itself it is instructive to take note of two earlier Court of Appeal authorities—*R v Westminster City Council, Ex p Monahan* [1990] 1 QB 87 and *R v Plymouth City Council, Ex p Plymouth and South Devon Co-operative Society Ltd* (1993) 67 P & CR 78—the essential backdrop to the speeches in the *Tesco* case. Lord Collins JSC having dealt with these at some length, I content myself with the briefest summary of each. *Ex p Monahan* was the Royal Opera House case in which the planning authority were held entitled to have granted permission for an office development notwithstanding that it involved a major departure from the development plan because that would cross-subsidise the refurbishment of the listed opera house. Nicholls LJ recorded (p 121) that counsel for the planning authority (Mr Sullivan QC)

> "frankly accepted that he could discern no legal principle which distinguished between (a) what happens within one building, (b) what happens on two adjoining sites and (c) what happens on two sites which are miles away from each other"

but continued:

> "All that need be said to decide this appeal is that the sites of the commercial development approved in principle are sufficiently close to

> the opera house for it to have been proper for the local planning authority to treat the proposed development of the office sites . . . and the proposed improvements to the opera house as forming part of one composite development project. As such it was open to the planning authority to balance the pros and cons of the various features of the scheme."

As to what the position would have been had the proposed office block been in Victoria, Kerr LJ similarly suggested, at p 117, that "all such cases would . . . involve considerations of fact and degree rather than of principle".

170 The *Plymouth* case (like the *Tesco* case which followed it) involved competitive planning applications by Sainsbury's and Tesco, the council's original intention having been to allow one store only to be built. Each company was therefore invited to say why it should be preferred and both were told that the council would take into account any community benefits offered (provided they were "justifiable in land use planning terms"—the council's published policy). Sainsbury's offer included the construction of a tourist information centre on the site, an art gallery display facility, a work of art in the car park, a bird-watching hide overlooking the river, an £800,000 contribution to the establishment of a park and ride facility in the neighbourhood, and up to £1m for infrastructure works to make a different site suitable for industrial use. Tesco offered financial contribution to a crèche, a wildlife habitat, a water sculpture, and in addition it offered to sell the council a site for a park and ride facility. Both offers were by way of section 106 agreements. In the event, both applications were granted, doubtless to the satisfaction of Sainsbury's and Tesco but not that of the Co-operative Society who promptly challenged both planning permissions on the ground that the council had taken into account immaterial considerations.

171 The Co-operative Society argued that not merely must a community benefit offered under a section 106 agreement satisfy the three tests laid down by the House of Lords in *Newbury District Council v Secretary of State for the Environment* [1981] AC 578 (following *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1958] 1 QB 554) by which the legality of a section 70 condition is to be judged—namely (i) that it has a planning purpose, (ii) that it fairly and reasonably relates to the permitted development and (iii) that it is not *Wednesbury* unreasonable—but it must also be necessary in the sense of overcoming what would otherwise have been a planning to the development. In the leading judgment rejecting this argument and stating that "the only question is whether [the section 106 agreement] fairly and reasonably related to the development", Hoffmann LJ said (p 90) that the only benefits which gave pause for thought were the two substantial sums offered by Sainsbury's as a contribution to work to be done away from the site. The park and ride facility, however, would tend to reduce both traffic heading for the store and use of Sainsbury's own car park by people not actually shopping there. As for the £1m offer, this "was not simply to pay the council £1 million. It was to contribute up to £1m to the actual cost of infrastructure works undertaken by the council within a period of two years at a specific site": p 91.

172 As we shall shortly see, the supposed requirement that section 106 offers, like imposed section 70 conditions, have to "fairly and reasonably

relate to the permitted development" (a requirement held satisfied in the *Plymouth* case) did not survive the decision of the House of Lords in the *Tesco* case [1995] 1 WLR 759 to which I now come.

173 The *Tesco* case (like the *Plymouth* case at the initial stage) concerned rival applications by Sainsbury's and Tesco to develop their respective sites (Sainsbury's in conjunction with Tarmac), there being room in Witney for one store only. Notwithstanding that Tesco's application included an offer of £6·6m to fund in its entirety a new link road, the Secretary of State (who had to decide which of the two proposals to allow) chose to grant Sainsbury's application. Tesco appealed on the ground that the Secretary of State had failed to take account of a material consideration, namely their £6·6m offer. Albeit the appeal failed, it did so not on the basis that the offer was an immaterial consideration but rather because, although material, the Secretary of State had been entitled to give it little or no weight and to prefer Sainsbury's proposal because the Secretary of State thought its site "marginally more suitable": Lord Hoffmann, p 783. The following features of the *Tesco* case seem to me of particular importance: (1) The £6·6m offer was held to be a material consideration notwithstanding that the Secretary of State shared his inspector's view that the relationship between the proposed new development and the funding of the link road was "tenuous" (the development being likely to result only in "slight worsening of traffic conditions"). (2) The only reasoned speeches were given by Lord Keith of Kinkel (with whom the other members of the committee agreed) and Lord Hoffmann. Both of them recognised that, contrary to the Court of Appeal's assumption in the *Plymouth* case, the second *Newbury* test has no application to section 106 agreements. As Lord Hoffmann observed, at p 779:

> "section 70(2) does not apply to planning obligations. The vires of planning obligations depends entirely upon the terms of section 106. This does not require that the planning obligation should relate to any particular development. As the Court of Appeal held in *Good v Epping Forest District Council* [1994] 1 WLR 376, the only tests for the validity of a planning obligation outside the express terms of section 106 are that it must be for a planning purpose and not *Wednesbury* unreasonable."

Nevertheless, for a planning obligation to be a material consideration which can legitimately be taken into account in granting planning permission, it has to have "some connection with the proposed development which is not de minimis" (Lord Keith, p 770B); it cannot be "quite unconnected with the proposed development": Lord Hoffmann, p 782D. (3) Were it otherwise, said Lord Keith (p 770A), it "could be regarded only as an attempt to buy planning permission". Lord Hoffmann put it rather differently: p 782C–E. The metaphor of "bargain and sale", he suggested, although "vivid":

> "is an uncertain guide to the legality of a grant or refusal of planning permission. It is easy enough to apply in a clear case in which the planning authority has demanded or taken account of benefits which are quite unconnected with the proposed development. But in such a case the phrase merely adds colour to the statutory duty to have regard only to material considerations. In cases in which there is a sufficient connection, the application of the metaphor or its relevance to the legality of the

planning decision may be highly debatable. I have already explained how in a case of competition such as the *Plymouth* case, in which it is contemplated that the grant of permission to one developer will be a reason for refusing it to another, it may be perfectly rational to choose the proposal which offers the greatest public benefit in terms of both the development itself and related external benefits."

(4) In the *Tesco* case itself, Lord Hoffmann then observed, (p 782G–H), the Secretary of State had in substance accepted the argument that Tesco's "offer to pay for the whole road was wholly disproportionate and it would be quite unfair if [Sainsbury's] was disadvantaged because it was unwilling to match this offer". That, said Lord Hoffmann, "is obviously defensible on the ground that although it may not maximise the benefit for Witney, it does produce fairness between developers". However, Lord Hoffmann continued (p 783), so too was Tesco's argument (that only if they offered the whole cost of the link road would it be constructed) a perfectly respectable one. Importantly, he then said:

"the choice between a policy which emphasises the presumption in favour of development and fairness between developers, such as guided the Secretary of State in this case, and a policy of attempting to obtain the maximum legitimate public benefit, which was pursued by the local planning authority in the *Plymouth* case, lies within the area of discretion which Parliament has entrusted to planning authorities. It is not a choice which should be imposed upon them by the courts."

(5) Lord Hoffmann had earlier (p 780) emphasised the distinction to be made between materiality and weight:

"The law has always made a clear distinction between the question of whether something is a material consideration and the weight which it should be given. The former is a question of law and the latter is a question of planning judgment, which is entirely a matter for the planning authority. Provided that the planning authority has regard to all material considerations, it is at liberty (provided that it does not lapse into *Wednesbury* irrationality) to give them whatever weight the planning authority thinks fit or no weight at all. The fact that the law regards something as a material consideration therefore involves no view about the part, if any, which it should play in the decision-making process."

174 Let me in the light of those authorities return to the question I posed at para 168: would an offer such as Tesco made to Wolverhampton, had it been made in a planning context have been, as a matter of law, a material consideration? To my mind the correct answer to that question should be yes, although plainly the weight (if any) to be given to it would be entirely for the planning authority. And the reason the answer should be yes is quite simply because such an offer could not sensibly have been regarded as "an attempt to buy planning permission" (Lord Keith, at p 770A); on the contrary, it would in my view have had "a sufficient connection" with the proposed development (Lord Hoffmann, at p 782D), "not de minimis": Lord Keith, at p 770A.

175 The proposition that planning consent cannot be bought or sold, although stated nearly a quarter of a century ago to be "axiomatic"

(by Lloyd LJ in *City of Bradford Metropolitan Council v Secretary of State for the Environment* (1986) 53 P & CR 55, 64), needs to be understood for what it is, essentially a prohibition against the grant of a planning permission for what would otherwise be unacceptable development induced by the offer of some entirely unrelated benefit. What it is *not* is a prohibition against, for example, the grant of permission for a development which is contrary to local planning policy on the basis that it needs to be economically viable to ensure that the site does not remain derelict—see *Sosmo Trust Ltd v Secretary of State for the Environment* [1983] JPL 806, where, indeed, Woolf J held that no Secretary of State could reasonably have regarded the economic factor in that case as irrelevant. Nor, of course, did the principle prevent office development being permitted in *Ex p Monahan* [1990] 1 QB 87 essentially because the proposed refurbishment of the opera house was financially dependant upon it.

176 *Ex p Monahan*, it must be noted, is *not* authority for the proposition that, but for the development there "forming part of one composite development project" (p 121), the office building would not have been permitted. As was expressly recognised, no discernible legal principle would have supported such a view. In any event *Ex p Monahan* is not binding on this court. That aside, the *Tesco* case [1995] 1 WLR 759 later established that offers such as that in *Ex p Monahan* to refurbish the opera house do not have to "fairly and reasonably relate to the permitted development" (as at the time of *Ex p Monahan* would have been supposed). Had Tesco in the present case offered (uneconomically) to redevelop the RHS to the benefit of the public in consideration of some planning advantage elsewhere in Wolverhampton's area, it is difficult to see why Wolverhampton would have been legally obliged to refuse.

177 Still less does the principle prevent rival developers, in competitive situations such as arose in the *Plymouth* and *Tesco* cases, seeking to outbid each other as to the external benefits their proposals would bring with them—as both those cases amply demonstrate. It is surely one thing to say that you cannot buy a planning permission (itself, as I have sought to show, only in a narrow sense an absolute principle); quite another to say that in deciding as between two competing developers, each of whose proposals is entirely acceptable on planning grounds, you must completely ignore other planning benefits on offer in your area.

178 Let it be assumed, however, contrary to my view but as I understand every other member of this court to have concluded, that, had the present issue arisen in the context of rival applications for planning permission, Tesco's offered redevelopment of the RHS would have had to be characterised as a wholly unconnected planning benefit and so not a material consideration under section 70. That majority view, as Lord Phillips of Worth Matravers PSC himself points out, at para 139, is "not entirely rational" even in a non-competitive planning context; "less rational" still "where two developers are competing for the grant of planning permission in circumstances where the grant to one or the other is justifiable, but not to both".

179 Is that approach none the less to apply equally in the present context or, as I contemplated at para 168, is the position that "wider financial benefits are to be regarded as material considerations when exercising compulsory purchase powers than when determining planning applications"?

180 The Court of Appeal thought that the case for regarding Tesco's RHS offer as a material consideration was stronger in the CPO context than had it been made in a planning context. They thought this, first, because of the wide (to my mind over-wide) construction they put upon section 226(1A) itself (para 33); secondly, because they regarded financial viability as yet more important in the CPO context than in the planning context (paras 34–40); and, thirdly, because, whereas planning authorities (subject only to the Secretary of State's call-in powers) are free to grant any planning permissions they wish, CPOs must be confirmed by the Secretary of State (who can therefore prevent any misuse of the local authority's compulsory acquisition powers): para 41. Whilst I have difficulty with that reasoning, I nevertheless agree with Lord Phillips PSC and Lord Hope of Craighead DPSC that, even assuming that Tesco's RHS offer would not have been a material consideration had Wolverhampton been determining a planning application, it was none the less material in the context of the decisions the council were in fact required to take here. These were, first, whether Wolverhampton should compulsorily acquire land to facilitate the development of the site (for which both rival developers had the requisite planning permission) and, if so, second, whose land should be acquired—should it be Tesco's land to enable Sainsburys to develop the site or vice versa (i e who should be the preferred developer)?

181 I understand all of us to agree that Wolverhampton were amply entitled to exercise their section 226 power of compulsory acquisition here: as I noted at paras 164 and 165 above, self-evidently both the section 226(1)(a) and the section 226(1A) conditions were satisfied and the development of the site was only going to take place if Wolverhampton did indeed exercise this power. As Lord Hope DPSC observes, however, this power could not be exercised until Wolverhampton had also decided the second question before them: which of the two developers to choose. There seems to me no basis in authority or reason for holding that in reaching this second decision Wolverhampton were required to ignore the off-site benefit (unconnected though I am now assuming it to be) on offer from Tesco. I would on the contrary hold it to be a material consideration for the purposes of deciding which of the rival developers to prefer and whose land, therefore, should be the subject of compulsory purchase under section 226. That is precisely what was held at first instance here and I can but echo Lord Phillips PSC's plaudits for the passage in Elias J's judgment which he quotes in full at para 146.

182 It is essentially on this basis, rather than by reference to Wolverhampton's power of disposal of acquired land under section 233, that for my part I would hold Tesco's offer to have been a material consideration (even assuming that it would not have been so in the planning context). I think it difficult for Tesco to invoke section 233 here. True, section 233 would to my mind plainly entitle a planning authority to have regard to an off-site benefit such as Tesco offered here in deciding how to exercise their section 233 power. (Although, as Baroness Hale of Richmond and Lord Mance JJSC point out, no wholly extraneous benefits were offered or considered in *Standard Commercial Property Securities Ltd v Glasgow City Council (No 2)* 2007 SC (HL) 33, it is surely implicit in that decision—and, indeed, in the respective legislative requirements in both England and Scotland in effect to get what I called there (para 68) "the best overall deal available"—that, by the same token as a cash bidding match would have been

possible, so too would have been an offer of other benefits, however extraneous. Why ever not? I do not regard this as inconsistent with what I said at para 75 of my judgment in the *Standard Commercial* case—quoted by Lord Walker of Gestingthorpe JSC at para 85: my quarrel there was with the disappointed developer's submission that the planning authority should itself have initiated a bidding war. It is quite another thing to say that they are precluded by law from accepting offers of money or other extraneous benefits when they come to dispose of a compulsorily acquired development site.)

183 My difficulty with section 233, however, is, as Baroness Hale JSC points out, that it puts the cart before the horse. Unless and until the Secretary of State confirms a section 226 compulsory purchase order, the local authority has no land to dispose of. I do not see the council here, therefore, as entitled to have regard to their section 233 powers when exercising their section 226 powers. I would be concerned also that on this approach the council might be statutorily *obliged* to accept Tesco's offer in order to obtain "the best overall deal available"—instead of merely being required to regard it as a material consideration, it being a matter for the council (and, in subsequent confirmation proceedings, the Secretary of State) to give it such weight, if any, as they thought right. (Indeed, as I observed earlier (at para 162), it might be that the Secretary of State, unlike Wolverhampton, will regard Sainsbury's substantial larger interest in the site as the determining factor here—rather as the Secretary of State in the *Tesco* case [1995] 1 WLR 759, thought it only fair to Sainsbury's to give no weight to Tesco's "wholly disproportionate" £6·6m offer to fund the link road: see para 173(4) above. That, however, in this case as in that, would be entirely a matter for the planning authorities, not for this court.)

184 All that said, I do not regard section 233 as central to either Lord Phillips PSC's or Lord Hope DPSC's reasoning in this case. Still less did it colour Elias J's approach; indeed, section 233 finds no mention whatever in his judgment.

185 Really what it all comes to is this. It is irrational and unsatisfactory that (in the view of the majority) Tesco's offer here would have had to be ignored in a competitive planning context. It is quite unnecessary and (as Lord Phillips PSC and Lord Hope DPSC observe) would be unfortunate if this irrationality were carried over into the compulsory purchase context within which the present issue arises.

186 In the result I would answer the question I posed in para 160: no, not even if the benefits are wholly unconnected with the proposed development, and dismiss this appeal. As indicated, I would do so essentially for the reasons given by Elias J at first instance rather than those given by the Court of Appeal.

Appeal allowed.
Declaration accordingly.

JILL SUTHERLAND, Barrister

APPENDIX B

NAVITUS BAY WIND FARM DCO – MANNINGTON SITE

The extracts below is evidence of evaluation by a different entity of Mannigton as a site for a converter station. It is also therefore evidence of a suitable alternative site for Aquind. The case of Prest bites on that alternative to be resolved in favour of Carpenters, which results in that the Minister is required not to confirm CPO powers because the below is evidence of another alternative site. The consequence of this is that the DCO also cannot be granted in light of recent correspondence and the Stonehenge case addressing this further.

1.1. Paragraphs 20 and 21 of the Secretary of State's Decision Letter and Statement of Reasons for the Navitus Bay Wind Park DCO states:

> *"(ii) landscape and visual impact onshore*
>
> *20. Again, this issue was a key topic for consideration during the Examination of the Application Development and the TAMO. The ExA considered that the proposed undergrounding of the electrical cables would be a substantial part of the moderating impacts of the onshore works during their operation and that the Applicant had sought to minimise any harm and provide reasonable mitigation where possible and appropriate. However, the ExA does note that some of the effects of the onshore works, while relatively short term/temporary, would be significant in some cases. Nevertheless, the ExA indicates that the landscape and visualimpacts of the onshore elements of the project should not attract significant weight in the decision on whether consent should be granted.*
>
> *21. **The ExA accepted that the Applicant's scope for developing the necessary onshore works in alternative locations was limited.** The ExA considered this policy in relation to the proposed siting in a National Park and in land designated as Green Belt where consents for developments can be granted only in exceptional or special circumstances respectively. The ExA concludes that these circumstances would not apply in the current case where it considers that the benefits of the project would not outweigh the significant impacts."*

1.2. Paragraph 4.3 of the Examining Authortiy's Recommendation Report for the Navitus Bay Wind Park DCO states:

> *"ONSHORE ALTERNATIVES*
>
> *The applicant's selection process 4.3.31 ES Volume C Chapter 4 'Onshore Alternatives' [APP-090] provides details of the main alternatives studied by the applicant and the reasons for the choices made in relation to the onshore element (i.e. the Cable Landfall, Onshore Cable Corridor and Onshore Substation) of the Application Project. Nevertheless, the Panel pressed the applicant (at the issue-specific hearing and in the first round of questions) to explain the regard given to the New Forest National Park and the Dorset and Hampshire Green Belt in the site selection process. 4.3.32 The grid connection point is described as a key element of the onshore search process. **Selection of a grid connection point is the responsibility of National Grid Electricity Transmission (NGET). NGET identified three existing substations at Chickerell, Fawley and Mannington***

[REP-2785, Appendix 1]. NGET conducts assessments on the technical and economic feasibility of various options before offering a specific location to a developer. *As there were already substations in the locality with sufficient capacity to accommodate the demand, the applicant chose not to seek a greenfield site to locate a new substation with pylons and associated infrastructure. The applicant carried out further detailed feasibility studies into the three potential connection locations between mid-2010 and March 2011. 4.3.33* ***Of the three substations identified, Mannington (near Three Legged Cross) 20 km inland was selected.*** *The substations at Chickerell and Fawley were discounted for the following reasons:[…]*

4.3.36 Mannington presented the following risks:

- *Consenting of a new onshore substation on Green Belt land.*
- *Part of the cable route passing through the New Forest National Park.*
- *Long onshore cable route with international, national and local environmental designations to overcome.*
- *Restricted landfall options, of which one was considered viable.*

4.3.37 ***The applicant explained that the risks identified were not insurmountable. Impact on the National Park was considered to be less with the Mannington than the Fawley option, as with the latter the entire cable route and the substation would be within the National Park****. The Dorset and Hampshire Green Belt is so extensive in the area that it could not be excluded from the search area. Locating a substation within the Green Belt was considered by the applicant as a significant consenting risk to be weighed against other constraints for the Chickerell and Fawley options.* (our emphasis added)

4.3.38 With regard to choice of landfall, the applicant pointed to the key constraints of the built-up nature of the coast as well as natural features such as Hurst spit and estuaries. Of the five sites initially studied, Southbourne and Highcliffe Castle were discounted early on for engineering and environmental reasons. The possibility at Milford-on-sea was discounted, given the technical difficulties associated with significant bathymetric variation along the offshore export cable route.

4.3.39 The potential to avoid approximately 8-10 km of additional cable route, of which 4 km would be within the National Park, led to the applicant to continue assessing the Chewton Bunny landfall in 2011. The decision to remove the site from consideration was based on the findings that a trenchless installation may be feasible for three circuits but not six. Use of the site would also have had a potentially significant impact on adjacent properties, compared to other sites. Taddiford Gap (Barton-on-sea) was regarded as the most optimal site, for a number of reasons, and identified as the landfall site.

4.3.40 At the outset the applicant committed to undergrounding of the onshore cables. Identifying the route of the Onshore Cable Corridor involved three stages of: identifying a search corridor; defining a cable route and identifying the cable corridor. The ES explained that the cable routes would need to cross the outer edges of the National Park whichever of the three landfalls of Milford, Chewton Bunny and Taddiford Gap were selected. The ES also described the applicant's commitment to measures minimising potential impacts. These include use of trenchless techniques, reinstating lost features and avoiding the New Forest SPA. Similarly, the objectives for siting the cable route is listed - these range from avoiding or minimising harm to designated areas, sensitive habitats and private properties to reducing engineering constraints.

4.3.41 Table 4.7 of the ES Chapter 4 on 'Offshore Alternatives' set out the key routing options considered as well as the rationale for discounting them. These included risks of going through potential mineral extraction sites, engineering difficulties, environmental and residential amenity concerns. The ES explained that

the 40m working width applied for in the Application Project was identified having regard to: the six cable circuits; separation distance between circuits and to allow for a temporary haul road as well as adequate working/storage space during construction. It was said that the width of the cable corridor was comparable with other offshore wind projects and was necessary in the interest of works being carried out in a timely and efficient manner [REP-3313].

[…]

Panel's reasoning and conclusions on onshore alternatives

4.3.44 EN-1 does not contain any general requirement to consider alternatives or to establish whether the proposed project represents the best option, unless there are specific legislative requirements. In addressing this matter the Panel has had due regard to the legal and policy tests applying to developments in the National Park, which include an assessment of: need for the development; the cost and scope of developing outside the designated area or meeting the need in some other way. The matters are considered in detail in subsequent sections of this Report. For present purposes we looked only at the applicant's approach to site selection. In other words, whether the options of avoiding designated areas were adequately explored and whether the reasons for discounting them properly justified.

4.3.45 The siting and location of the main elements of the onshore development are to a large extent dependent on the grid connection point. The applicant has demonstrated to the Panel's satisfaction that feasible and practical alternatives were explored as part of the wide site search. ***The Mannington location was less burdened with technical and engineering difficulties than the Chickerell or Fawley sites. In addition to which, a number of environmental considerations such as the extent to which the cable route and the substation would occupy the National Park and landfall locations affecting designated SPA, SAC, SSSI and dSAC sites collectively weighed against the Fawley and Chickerell options. Focussing the search on existing substations obviated the need to explore greenfield sites, so removing the potential for further environmental incursions.*** (our emphasis added)

4.3.46 There is no other detailed or cogent evidence before the Panel to enable an assessment to be made of the suitability of the discounted sites over the Mannington grid connection point. ***The Mannington option would not preclude environmental intrusions into designated sites. But the final choice of connection is a matter of balancing extent of harm and potential for mitigation against the engineering and economic feasibility of the three options. That has been done against the background of an area where large swathes of land are either intensively developed, lie within the Green Belt or subject to a wide range of other protective legislative and policy designations***. (our emphasis added)

4.3.47 The evidence shows that technical constraints drove the landfall location. These are documented in the ES and summarised above. The validity of IPs' submissions regarding cliff stability at the Taddiford Gap landfall site [REPS-2733, 2905, 3194 & 3849 for instance] is considered in Chapter 5 of this Report. However in Navitus Bay Wind Park Examining Authority's Report of Findings and Conclusions and Recommendation to the Secretary of State 50 itself the issue should not divert attention from the applicant's ES and additional representations [REP-3313] outlining the main alternatives studied and the reasons why the Taddiford Gap site was selected. With regard to the Chewton Bunny landfall option, Table 4.7 of the ES [APP-090] lists a range of reasons besides disruptions to a five star hotel and a railway line for rejecting that option.

4.3.48 The cable route would pass through the New Forest National Park with each of the three most likely landfall options. Whether exceptional circumstances exist,

and matters relating to the need for the development and effect on the environment, landscape and recreational opportunities (EN-1 paragraph 5.9.10) fall to be assessed later in this Report. For the purposes of policy requirements relevant to consideration of alternatives, the Panel accepts that the scope for developing outside the National Park is limited. The applicant's evidence also shows that the route to south west of Burton Common was rejected on the advice of Natural England and for reasons of the potential effect on a SANG4 provided for the Christchurch urban extension [REP-3313].

4.3.49 The Panel finds that the applicant has satisfactorily considered a range of site and route options for the various elements of the onshore aspect of the Navitus Bay project. The task was carried out over a period of time and the level of investigative work exploring the options was proportionate and in accord with policy expectations. The legislative requirements are addressed in the Chapters dealing with flooding, biodiversity and landscape impacts."

1.3. Paragraph 4.2 of the Navitus Bay Wind Park DCO ES – Non Technical Summary – Document 6.3 April 2014 states:

"4.2 Onshore

4.2.1 Onshore site selection and design started in 2011 and was informed by consultation and by engineering and environmental studies together with the ise of the EIA process to refine and revise the design

4.2.2 Connection options were discussed with National Grid that identified potential at existing substation at Chickereall, at Fawley and at Mannington. Following more detailed work on these options, Mannington was selected as the preferred option. ***National Grid made a connection offer at Mannington which was then signed in October 2011."***

1.4. Paragraphs 4.2 and 4.3 of the Navitus Bay Wind Park DCO ES - 6.1.3.4 Volume C Chapter 4 Onshore Alternatives states:

"4.2 Grid connection point

4.2.1 The Project, which a capacity of up to 970 MW, requires connection to the National Grid high voltage (400 kV) electricity transmission network (the National Grid). NBDL consulted with National Grid Electricity Transmission (NGET) who identified the capacity of existing substations in the vicinity of the Project; the following were identified:

- *Chickerell, approximately 5km inland, north of Weymouth;*
- *Fawley, approximately 1km inland, within the extent of the Fawley power station at the wester shore of Southampton water*
- *Mannington, approximately 20 km inland, near Three Legged Cross*

4.2.2 There was also potential to develop a new 400kV substation. However, this was discounted on the basis there were already substations in the vicinity of the Project with sufficient capacity to accommodate the demand. Accordingly, there was no need to seek a greenfield site in order to locate a new substation with pylons and associated infrastructure.

4.2.3 A connection at Chickereall would have required a relatively short onshore cable route (approximately 6 km) but woulkd have resulted in a very long offshore cable route over unfavourable seabed conditions. It was identified that the offshore export cable was highly like to encounter Annex 1 reef habitat which could have been adversely affected by cable installation. From an engineering perspective, due

to the extended length of hard ground conditions associated with this habitat, it was likely that the cables could not have been buried and would have required extensive cable protection measures on the sea bed. The offshore export cable would also have crossed an area with high potential for unexploded ordnance. In addition, it was considered that there was limited flexibility on the cable Landfall location. Onshore, the cable route was significantly constrained by the urban area of Weymouth and therefore the ability to secure a viable route was considered a high risk. Additionally, NGET identified substantial upgrade works to the Chickerell 400 kV substation would have been required for the NBDL connection.

4.2.4 A Fawley connection would have required a short onshore cable route (approximately 5 km), with a long offshore export cable route going up the western Solent. The offshore cable installation between Hurst split and the Isle of Wight was considered a significant engineering risk in terms of seabed conditions and current, with associated health and safety risks associated with constructing within this narrow, heavily used shipping passage. It was considered likely that a temporary closure of the entrance to western Solent would have been required during cable installation, which would have impacted navigation of vessels. In addition, this connection would have required the siting of the onshore cable route and onshore substation entirely within New Forest National Park which was likely to have been in conflict with preserving the special qualities of the National Park. EN-1 states that 'National Parks, the Broads and AONBs have been confirmed […] as having the highest status of protection in relation to landscape and scenic beauty. […] The conservation of the natural beauty of the landscape and countryside should be given substantial weight […] in these areas.'

4.2.5 In comparison, the connection to Mannington offered a relatively short offshore cable route across general more favourable seabed conditions, within the multiple identified landfall options, routing options of the onshore cable corridor and the opportunity to sensitively site the onshore substation outside of national designations.

4.2.6 Therefore, the Mannington connection was assessed in March 2011 as the preferred site for connecting on to the National Grid for the following reasons:

- *Multiple landfall locations identified*
- *Routing options available both offshore and onshore*
- *The lowest cost of energy of all options*
- *Minimal upgrade to the existing 400 kV substation*
- *The consequential lower risk to costs and programme, as a result of these benefits.*

4.2.7 NBDL submitted a grid connection application to NGET, who offer grid connections, once NBDL conclude the Mannington connection was the most suitable connection point. A grid connection offer was subsequently made for Mannington, which NBDL accepted and signed in October 2011.

[…]

4.3.11 – NBDL consulted on the potential siting of an Onshore Substation on Sites 2 and 3a during public exhibitions held in November 2011. Refer to Volume A, Chapter 4 Consultation of this ES for details of the constitution undertaken.

4.3.12 – The following matters were considered in determining the preferred siting of the Onshore Substation, with all other factors considered equal:

- *from the perspective of the public who responded to the consultation, 37 respondents preferred Site 2 and 17 preferred Site 3a;*
- *from an environmental perspective, Site 3a was preferred to Site 2 as the potential impacts on ecology were considered to be lower due to the*

proximity of Site 2 to water meadows and the Moors Brook and the loss of hedgerow; albeit Site 3a required an access through plantation woodland (Nursery SNCI);

- *the potential visual impact would be less at Site 3a due to the presence of existing mature trees in the vicinity of the site, Site 3a would therefore have a lower impact on the South East Dorset Green Belt;*
- *it was considered that noise standards could be complied with at either site, albeit Site 3a was unlikely to result in cumulative impacts with the existing substation;*
- *the development of an Onshore Substation at Site 3a would have less potential disruption to existing footpaths;*
- *further technical design considerations concluded that the electrical infrastructure would need to occupy a larger area than originally identified (i.e. up to 3 ha), therefore Site 3a was preferred as there was the potential for interference with existing overhead lines at Site 2 in light of the larger area of land required;*
- *the access into Site 2 would have required crossing land owned by three landowners and under a 132 kV overhead line, whilst Site 3a required an access road through a forestry plantation.*

*4.3.13 – **For the reasons set out above, Site 3a was selected as the preferred location for an Onshore Substation.** In order to address the public's comments raised in respect of Site 3a the following measures have been adopted by NBDL in the siting and design of an Onshore Substation:*

- *the use of trenchless installation of the cables under the Mill Nursery plantation to minimise the loss of trees which will screen the Onshore Substation, as well as minimising any potential impact on The Nursery Site of Nature Conservation Interest;*
- *the design of a curved access road to eliminate direct views into the site from West Moors Road;*
- *the routing of construction traffic to the Onshore Substation site along Ringwood Road, thereby minimising impacts on West Moors."*

NORTH PORTSEA ISLAND FLOOD DEFENCE SCHEME

We set out below PCC submissions about the scheme which identifies risks to citizens and property if this flood defence scheme is not delivered.

1.5. At paragraph 4 of its response dated 30 September 2021 Portsmouth City Council ("**PCC**") stated:

> *"Matters left unresolved from the Secretary of State's First Questions to the Applicant*
>
> *4.1 PCC notes that the Applicant has chosen not to comment on the issues raised by PCC in respect of the potential effect of the scheme on PCC's flood defence scheme. This is despite the serious flaws that were highlighted in relation to the Environmental Statement in para 3.13 of PCC's response of 12 August 2021.*
>
> *4.2 Further, PCC would take the opportunity to confirm to the Secretary of State that the Applicant has not offered any indication of furthering discussions with the organisers of the Victorious Festival now that this year's festival has concluded."*

1.6. Additionally, at paragraph 3 of its response PCC dated 12 August 2021

"Matters left unaddressed or unresolved at the end of the examination

3.1 As noted in PCC's letter to the Secretary of State of 27 July 2021 it is acknowledged that a number of matters remained unresolved and/or unaddressed at the end of the examination and the information the Secretary of State seeks reflects that.

3.2 PCC has noted that the Secretary of State sought updates from the Applicant on ongoing discussions in relation to agreement of 'protective provisions' under the DCO.

3.3 In addition to ongoing discussion with statutory undertakers regarding protective provisions the Applicant has also continued discussions with PCC as the Lead Local Flood Authority in respect of the potential impact the North Portsea Island (NPI) Coastal Defence Scheme which is currently being built out in phases by PCC and Coastal Partners (CR).

3.4 The full implication of the Aquind works on the NPI scheme only became fully clear shortly before the close of the examination when Aquind published its intended works programme and confirmed that it intended to use some of the NPI related construction compounds at the same time as the NPI works.

3.5 The issue relates to Aquind's intended construction programme, based upon the grant of a DCO in late 2021 and which, as described in the attached report from CP and PCC, in light of the absence of any practical alternatives to the use of certain of the same construction compounds, as required for the NPI works and sought by Aquind, gives rise to fundamental and significant impacts on these important flood defence works. If Aquind insisted on exercising its CA rights over the land identified which covers these same construction compounds, at the point when CP have programmed to use them, this could lead to the displacement of the NPI contractors; the enforced cessation of and delay to the progress of the NPI scheme and ultimately in light of the effect of delay to what is known as Phase 4b there would be a knock on delay to Phase 5 (the last phase).

3.6 It is acknowledged in the attached report that PCC and CP are continuing to seek a proposed co-operation agreement between PCC and the Applicant to overcome the concerns and whilst it was intimated at para [ref] in the Statement of Common Ground between Aquind and PCC at Deadline (Appendix 12 of the PCC Deadline 8 response at section 4.15.4 of that Statement (ref REP8-075) that the parties would seek to address this by means of a cooperation agreement, as explained in the report, no such agreement has been reached and no further Statement of Common Ground has in fact been agreed. A draft Addendum to the SOCG which Aquind has yet to agree is also within the Appendix to this letter.3.7 As with many of the protective provisions, this is a matter that still remains unresolved at this time.

3.8 This matter however presents a significant risk to the NPI and is a matter that PCC considers was not properly raised, addressed or recognised by Aquind as a potential and likely significant cumulative effect within its EIA.

3.9 To be clear, it is accepted that account was taken by the Applicant of the Coastal Defence scheme in its EIA and the potential for there to be impact from Aquind's development however this addressed the potential impact upon the NPI defence works themselves as opposed to the construction compound areas. This is despite the fact that the relevant planning permissions clearly cover the land

required to be used (albeit in the freehold ownership of PCC) by PCC/CP for construction compounds.

3.10 It is also correct that PCC were alive to the possibility of potential impact from Aquind seeking to use the same compounds as noted for example in PCC's Written Representation [REP1-174] and indeed the Local Impact Report [ref REP1-173] which stated in terms ". It is extremely important that the AQUIND scheme should neither compromise nor impede progress of this crucial sea defence scheme for the city".

3.11 As set out in the attached NPI report it was not until February 2021, shortly before the close of the examination at the beginning of March 2021, that Aquind provided its intended construction programme and which then demonstrated that there would be inevitable and potential far reaching implications for the use of the compounds by both parties.

3.12 The attached NPI report, in line with discussions that the Council has had with the Applicant, suggests steps that could be taken should the DCO be approved to mitigate the delay and costs arising from conflicts between these infrastructure schemes. ***As highlighted since 2018 and throughout the Examination the NPI flood defence schemes are essential infrastructure to protect life and health that should not be unnecessarily delayed, which is a significant risk as the programme*** *of the Aquind proposal overlaps with this public infrastructure scheme and there is a high risk that both projects require the same limited compound space at the same time.*

3.13 PCC is therefore seeking to resolve matters, however the Secretary of State needs to be aware that, in the absence of a solution to this matter, he must proceed on the basis that Aquind's Environmental Statement has failed properly to accord with the relevant EIA Regulations and adequately assessed out the potential cumulative impacts of the Aquind scheme. Aquind's ES at Chp 29 Table 29.1 correctly noted the requirements by reference to NPS EN-1 at paragraph 5.10.5 which confirms the ES "should identify existing and proposed land uses near the project, any effects of replacing an existing development or use of the site with the proposed project or preventing a development or use on a neighbouring site from continuing. Applicants should also assess any effects of precluding a new development or use proposed in the development plan." [emphasis added]. The table then asserts that the "cumulative impacts of land use and the effects replacing an existing development or use of the site and the prevention of the development or use on a neighbouring site from continuing have been identified in chapters 25(Socio-economics)and Chapter 17(Soils and Agricultural Land Use)" . None of these sections refers to the impact upon displacing the NPI contractors from their compound and the potential for significant delay as a consequence which arise from the programme of construction Aquind has now chosen.

3.14 The importance of flood defence measures is recognised at a national and Environment Agency level. Delay in the provision of this flood defence scheme or indeed its wholescale prevention in light of the costs implications would be critical and must in PCC's view be avoided. Delay creates real risk to the people of Portsmouth; in the event of a failure or breach of the current defences 1,906 residential properties and 160 commercial properties within the North Portsea flood cell would be at risk from a present-day flood event with a

return period as low as 1 in 20 years (5% AEP). Please see the enclosed appendix."

1.7. At paragraphs 3, 4, 5, 7, 8, 9 and 11 of the Appendix to PCC response dated 12 August 2021 (North Portsea Island Coastal Defence Scheme - Risk Report – Impacts of AQUIND project on the scheme) PCC states:

"3 Why do we need the scheme now?

3.1 In 2014, an asset inspection of the existing coastal defences along the Eastern Road section (Phase 4b) reported the residual life of the current defences estimated to be between 5 and 10years. The height of the defences is too low in places and offers only 1 in 25 years standard of protection.

3.2 North Portsea Island is a densely populated urban area home to a mixture of residential and commercial properties along with several key infrastructure assets. The assets at risk comprise:

- *4,234 residential properties;*
- *490 commercial properties;*
- *2 MoD properties;*
- *2 arterial road access routes on to Portsea Island (leaving only one other route operational to and from the city);*
- *The only rail route onto Portsea Island;*
- *2 scheduled monuments;*
- *89 electrical sub-stations;*
- *Historic landfill sites (with potential to cause localised pollution).*

3.3 The Eastern Road (A2030) is a busy dual carriageway and one of the three roads on and off Portsea Island. This road is currently at flood risk and has previously flooded, forcing road closures and large disruption to traffic flows (see photos below).

3.4 Throughout North Portsea Island many properties have threshold levels below the current coastal defence crest heights. In the event of a failure or breach of the current defences 1,906 residential properties and 160 commercial properties within the North Portsea flood cell would be at risk from a present-day flood event with a return period as low as 1 in 20 years (5% AEP).

3.5 A risk to life assessment has been undertaken for North Portsea Island, in which risk from flooding is of major concern. A further risk to health is flooding of critical infrastructure such as roads (preventing access by emergency services) and sewage works (which could cause sanitation problems).

3.6 In addition to the significant flood risk, much of the coastline around North Portsea Island has been artificially altered through reclamation using waste material. This land is potentially contaminated and could form a risk to the environmentally designated areas with Langstone and Portsmouth Harbours if the defences were to fail.

3.7 The Environment Agency has allocated funds to deliver the NPI Coastal Defence Scheme within their Capital Programme for construction up to and including financial year 2024 - 2025. *Defra sets targets for Outcome Measures for the Flood and coastal erosion risk management (FCRM) capital programme and uses these Outcome Measures to ensure public money is effective at delivering the benefits as expected7. The Outcome Measures for the NPI Coastal Defence Scheme are included in the Defra targets and are programmed to be realised by*

end of financial year 2024 – 2025.

3.8 The full Scheme is broken down into five discreet phases:

- *Phase 1: Anchorage Park. Completed in 2016.*
- *Phase 2: Milton Common. Completed in 2016.*
- *Phase 3: Tipner Lake. Completed in 2019.*
- *Phase 4a: Kendall's Wharf. Completed in 2020.*
- *Phase 4b: Eastern Road. Construction started in 2021*
- *Phase 5: Ports Creek. To commence 2024.*

4. Impact of the Aquind Project

[…]

4.2 In terms of the development and progress of the NPI Coastal Defence Scheme, PCC and Coastal Partners took the Aquind project into account as far as they were able based on the information available at the time. Discussions with Aquind were also held in which Coastal Partners and PCC sought to work collaboratively with Aquind, where possible.

4.3 Of the above five phases, it is now clear that the Aquind scheme will not only affect the completed phases 1, 2 and 4a in terms of needing to avoid or maintaining the existing defences and landscaping but also will potentially affect Phase 4b and thereafter Phase 5 which have yet to be completed.

[…]

4.5 Whilst the provisions of Article 30 were known, PCC and Coastal Partners only became aware of the increasing likelihood of a direct impact of the Aquind upon works upon the NPI Phase 4b and 5 works in January 2021, when it was discussed in more detail at a meeting with Aquind's consultants, WSP. The subsequent meeting in February 2021 was the first time that Aquind formally acknowledged the direct conflict as set out in a Memo presented at the meeting by WSP which confirmed Aquind's intendedprogramme of works and compared it with the information they knew of the NPI related works programmed. The memo acknowledged the potential conflict with the NPI4b scheme (see Appendix 2 for the relevant meeting minutes between CP/PCC and Aquind/WSP, and the memo dated 9th February 2021.). It should be noted that the Memo is a unilateral statement of Aquind's views on the potential conflicts and resolutions - it was shown to Coastal Partners for the first time at that meeting so there had been no opportunity for discussion. Whilst it was informative of Aquind's position, the contents of the Memo, specifically the 'Discussion' column have never been agreed.

4.6 This was shortly before the examination of the Aquind DCO closed. That impact in accordance with Aquind's intended programme of works would mean the physical displacement of the NPI related contractors from the construction compounds, which Aquind wish to use, and which fall within the Order land. This displacement would lead to a direct conflict with the NPI Scheme works and programme. Phase 5 would also potentially be affected as a consequence of delays resulting for Phase 4b.

4.7 It is agreed that the issues relating to Phases 1, 2 and 4a have been effectively recognised and addressed in the evidence submitted to the examining authority by the applicant in respect of the Aquind DCO Application and associated documents (including the Design and Access Statement and Onshore Outline Construction Management Plan). Schedule 2 of the Draft Development Consent Order sets out additional Requirements and those of direct relevance to the NPI scheme include Requirement 6

(detailed design), Requirement 7 (landscaping), Requirement 9 (Biodiversity Management Plan) and Requirement 15 (construction environmental management plan) DCO Requirement 22 requires the Applicant to reinstate land to the condition it was in prior to Aquind commencing the works. It is also noted that a Flood Risk Activity Permit will be required for relevant works.

4.8 ***The securing therefore of measures relevant to coastal flood defences during construction and operation are sufficiently addressed as part of the phases 1, 2 and 4a. There are however none in respect of phase 4b and 5.***

4.9 As noted above, the construction of NPI Coastal Defence Scheme - Phase 4b is the phase which would be most affected by the proposed Aquind work programme and so this is the phase of the scheme to which this report principally relates. Phase 5 is programmed to directly follow the construction of Phase 4b and so any delays to this current scheme will have a knock-on impact to the final phase.

4.10 ***Phase 4b6 is 2km of coastal seawall works being delivered down the Eastern Road and began in April 2021. These works are currently underway, will take 3 summers and are programmed to be complete in September 2023.*** *Phase 5, the final phase, is programmed for construction following the completion of Phase 4, in 2024 and 2025.*

5. Consents

[...]

5.4 ***Seawall construction works commenced in April 2021*** *following the relevant pre commencement conditions being satisfied. One of the key conditions of both the marine licence and the planning consent is a seasonal restriction, where no construction, other than soft-landscaping/planting can be undertaken between October 1st – March 31st.*

[...]

7. Impact of AQUIND interconnector works on the scheme

7.11

To summarise Table 1:

• Compound 1: Used for the main office and staff parking. It has been agreed with WSP during meetings that Coastal Partners are open to the concept of relocating offices and parking within Compound 1 should WSP:

- propose the new adequate layout that accommodates the existing office and staff parking,
- Pay for office/ compound relocation and provisions of utilities to match existing,
- Arrange for relocation to occur prior to working window (before April 2022).

• Compounds 3, 4 & 5: site access, welfare, material and equipment storage. These areas are limited in size/ space which does not allow for the compounds to be shared. Should Aquind insist on occupying these areas during the time NPI expects occupation and seeks to enforce that through its DCO, this will cause inevitable delay to the NPI construction programme which is critical. It is recommended the Aquind re-programme their works to avoid the NPI occupation periods rather than force the NPI works to cease.

• Compound 6: materials and equipment storage. WSP to confirm the access requirements and extent of area needed within Compound 6. A traffic management plan will need to be agreed and approved. Access to Compound 6 is through

Compound 5 with a 'pinch point' between the two. Coastal Partners would need to be satisfied that Aquind accessing Compound 6 would not impact on the works within Compound 5.

7.12 At the time of writing this report, WSP on behalf of Aquind have not agreed to the proposals put forward by Coastal Partners in Table 1. As detailed in Section 9, there have been no effective discussions or solutions put forward to date, should a direct conflict occur on both projects requiring the same compound space at the same time.

8. Cost of programme delays to the NPI Scheme

8.1 Weekly preliminary costs to run the NPI coastal scheme are calculated at £44,200.00 per week (see Appendix 6 for current calculations. Please note, this is an estimation for the scale of costs only. Should p rogramme delays occur, actual costs will be calculated at the time of the event). This calculation reflects the combined costs of running compounds in 2022 and providing the core office team to run the project. Any delay to these works will lead to costs incurred increasing very rapidly.

8.2 Should the Aquind works delay the NPI works beyond the seasonal completion date of September 2023, as well as the weekly preliminary costs identified above, the NPI works would incur additional costs over the winter closure period, plus costs for demobilising and remobilising all plant required to complete the scheme in 2024. Additional labour costs for works in 2024 will also be additional costs.

8.3 An example of costs incurred to programme delays is given below to provide a scale of costs which would arise should Aquind delay the scheme. The NPI project incurred £1.2million in delays to the programme due to the Covid-19 pandemic. Phase 4b was due to start in June 2020, however it was necessary to delay the start of the works to April 2021 to reduce risk to the scheme and its people and to maximise the summer working window. This delay timescale is considered similar to anticipated delays should Aquind take over Compound 4 for 12 weeks and/ or Compound 5 for 17 weeks.

8.4 ***The NPI coastal scheme has been allocated FDGiA funding to the sum of £59,262,000.00.*** *Currently, the total anticipated costs of the whole scheme is £58,200,000.00, leaving only £1M contingency available for all potential risks and additional costs which may arise during the completion of Phases 4 and 5. Should Aquind delay the works and the NPI project incur the costs of programme delay, there is a high risk of exceeding the allocated budget.*

8.5 It is anticipated that the Environment Agency will confirm that they will not allocate further funding to the scheme above the approved amount. The consequence of this will mean the scheme cannot be completed leaving properties and people at risk of flooding. Portsmouth City Council are liaising with the Environment Agency on this matter at the time of this report.

9. Could NPI project bring forward Phase 5 works, pausing Phase 4 works until Aquind project is complete?

9.1 As a potential solution consideration has been given as to whether the Phase 5 works could be brought forward ahead of the remaining Phase 4 works. In short, this could not take place not without incurring substantial sums, which the project does not have the funding for.

9.2 Portsmouth City Council are under contract with its Principal Contractor. Pausing the contract for the duration of the proposed Aquind works is grounds for contract termination. This will attract large penalty charges. This will also mean going back out to tender to complete the works. This is not considered to be a good use of public funds.

9.3 Also, Phase 5 still requires planning permission and agreement with Network Rail to work adjacent to their structure. The planning application and liaison with Network Rail process is currently programmed to start in Summer 2022, ready for starting works in 2024. It is not therefore possible for a solution to be found by having to pause Phase 4 but commence Phase 5 in April 2022 instead due to insufficient time and funds.

[…]

11. Conclusion

11.1 In summary, we have significant concerns that the potential impacts on the NPI Coastal Defence scheme have not been considered sufficiently or acknowledged by Aquind and the Examination. Where there is a conflict that cannot be resolved, for example, where both projects require the same limited space at the same time, the draft Cooperation Agreement as proposed currently is silent, with the future Method Statements being relied upon to resolve all issues. This does not provide sufficient protection for CP and PCC.

11.2 Any delay to or risk of the NPI schemes failing to reach completion gives rise to risk of flood events and the damage associated with such events, both financial and health- related, including potential loss of life. We consider that in the event of there being an insoluble programme conflict, the NPI scheme should, in light of the continuing existing risk to the public which it seeks to address, take precedence. We would want to see a clause within any Cooperation Agreement to this effect.

11.3 Coastal Partners and Portsmouth City Council respectfully ask that the issues raised in this document are brought to the Secretary of State's attention to allow due consideration by him."

APPENDIX C

401000 411000 421000 431000

106000

96000

Three Legged Cross

5 km

West Moors

Ferndown

5 km

Bournemouth International Airport

RINGWOOD

CHRISTCHURCH

BOURNEMOUTH

POOLE

POOLE BAY

CHRISTCHURCH BAY

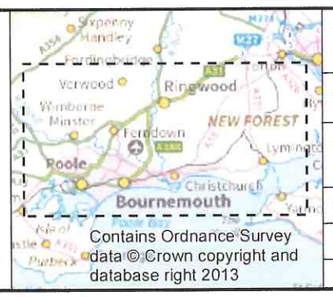
0 3 6 km

Legend

- Onshore Cable Corridor
- Mannington Substation
- Greenbelt
- Assessment Level 2 Substation Sites

Reasons for Site Rejection

- Public Amenity
- Rural Locations
- High Visual Impact
- Significant Flood Risk
- Technical Constraints



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Date: 18/03/2014	**Datum:** OSGB 1936
Ref. No.: 0110140312397/01	**Data Source:** OS Natural England
Fig. No.: Figure 4.3	
Author: CG	
Rv.No.: 01 **Checked:** DB **Approved:** MB	

N

Navitus Bay Development Ltd

Sites Considered at the High Level Assessment Stage

NAVITUSBAY

401000 406000 411000 416000

111000

106000

101000

Site 44, Woodlands:
Visual impact on Dorset Area of Outstanding Natural beauty and open rural location.

Site 10, south of Verwood:
Access not suitable from Verwood Wood and higher visual impact than other sites.

Site 3b, West Moors Nursery:
Removal of a large amount of woodland would be required and the Site is designated as a Site of Nature Conservation Interest.

Site 3a, east of West Moors Road:
Proposed Site

Site 35, Uddens Plantation:
Recreational impact and high flood risk in large areas of the Site.

Site 2, south of Mannington Substation:
Proposed Site

Site 60, Hurn Forest:
New access road would be required through woodland and there would be restrictions on recreation activity during construction.

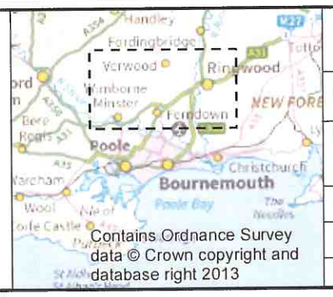
Site 43, near Uddens Plantation:
The topography of the Site makes it unsuitable for construction without removing woodland screening.

Site 88. East Parley Common:
Open views make it difficult to screen and could affect nearby Site of Special Scientific Interest.

0 2 4 km

Legend

- Rejected Substation Locations
- Proposed Substation Locations
- Mannington Substation
- Onshore Cable Corridor



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Date: 18/03/2014	**Datum:** OSGB 1936	
Ref. No.: 0110140312396/01	**Data Source:** OS	
Fig. No.: Figure 4.4		
Author: CG		
Rv.No.: 01	**Checked:** DB	**Approved:** MB

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Navitus Bay Development Ltd

Short Listed Onshore Substation Sites

NAVITUSBAY

APPENDIX D

References to Mannington in document labelled "*AQUIND INTERCONNECTOR Environmental Statement Addendum – Appendix 3 – Supplementary Alternatives Chapter*"

Document Ref: 7.8.1.3 (PINS Ref.: EN020022)

&

Blake Morgan Analysis

1. The document labelled "*AQUIND INTERCONNECTOR Environmental Statement Addendum – Appendix 3 – Supplementary Alternatives Chapter*" (document reference 7.8.1.3) (**Supplementary Alternatives Chapter**) was submitted by Aquind as a supplementary chapter to Chapter 2 of its Environmental Statement.

2. Set out below are quotes from the above-mentioned addendum that refer to the Mannington alternative.

3. Paragraph 4.1.3.5 of the Supplementary Alternatives Chapter states:

   "*To the west of but within this search region, the 970MW Navitus Bay wind farm, off the Isle of Wight, was due to connect into Mannington substation. Further west, the FABLink 1400MW interconnector was due to connect into Exeter substation**. NGET informed that the connection of a new interconnector in this region would have the effect of overloading the transmission lines, due to the power flows travelling from the west to east i.e. heading towards the major load centre of London***."

4. Paragraph 5.1.1.3 of the Supplementary Alternatives Chapter states:

   "*For the initial phase of this feasibility study ten existing substations were evaluated for the proposed connection. The ten substations on the 400kV network that were identified for initial evaluation were as follows:*

   - *Bolney;*
   - *Botley Wood;*
   - *Bramley;*
   - *Chickerell;*
   - *Fleet;*

- *Fawley;*
- *Lovedean;*
- *Marchwood;*
- ***Mannington; and***
- *Nursling."*

5. Paragraph 5.1.1.5 of the Supplementary Alternatives Chapter states:

"*Whilst the position of NGET was that the other substations represented similar connection issues to the sites taken forward, save for Bolney which was excluded because that part of the NETS was already constrained due to existing and planned future connection, the Applicant's preliminary views at the time on the suitability of the remaining substations were as follows:*

- *Botley Wood – the submarine cable would be required to be located through the busy shipping area around the Isle of Wight and the substation being north of Southampton would present significant technical and economic challenges;*
- *Fawley - the submarine cable would be required to be located through the busy shipping area around the Isle of Wight;*
- *Marchwood - the submarine cable would be required to be located through the busy shipping area around the Isle of Wight;*
- *Nursling - the submarine cable would be required to be located through the busy shipping area around the Isle of Wight;*
- ***Mannington – the shared connection point with the 970MW Navitus Bay wind farm raised technical concerns; and***
- *Fleet – located much further inland and as such would require a much longer underground cable (and may in fact not be suitable for an underground cable as a result), with the potential to increase the extent of the environmental impacts as a consequence of construction. It was noted that there was the potential to route through the South Downs National Park, albeit this was not desirable given the constraints this presents for the purposes of construction*. "

6. Paragraph 5.1.1.7 of the Supplementary Alternatives Chapter states:

"*As mentioned above at paragraphs 4.1.3.5 and 5.1.1.5, a connection agreement for the 970MW Navitus Bay offshore wind farm was in place in relation to the Mannington substation when the feasibility study was carried out, and therefore it was not considered to be suitable for the proposed connection. Although that project was later abandoned, the connection agreement remained in place with the developers of Navitus Bay offshore wind farm for some time following the feasibility study, during which significant progress was made advancing the proposals for Proposed Development. As a result it was not reasonable for the Applicant to re-*

consider the potential for a connection at Mannington at that later stage, and this was not considered further."

BLAKE MORGAN COMMENT:

The connection agreement is a contract that is land related and is private. It makes no difference to electricity transmission.

The fact that there is a difference in electricity transmission is not a reason to reject an alternative site. That is an operational issue which will no doubt will be faced at any number of substations that can be overcome with technology and does not relate to suitabilty of the site per se for the location of the converter station.

Wouldn't Aquind has a similar situation in relation to introduction of new power transmission infrastructure into any part of national grid?

As in the Prest case where there are similar sites, Prest requires the Minister to exercise choice in favour of Carpenters as they are having their land taken against their will.

The DCO should be refulsed as CPO powers cannot be confirmed and the Minister can take comfort that the proposal can be situated at a similar site in Mannington.