

## **PLANNING ASSUMPTIONS IN THE LIGHT OF ‘SPIREROSE’**

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#### Introduction

1. This paper takes its title from the recent Court of Appeal decision in *Transport for London v Spirerose Ltd*<sup>1</sup>, which is subject to an appeal to the House of Lords due to be heard in June, and is concerned with the assumptions which should be made when assessing compensation for compulsory purchase as to the existence or future grant of planning permission for development of the land acquired.
2. This introduction explains the need to establish such assumptions in order to value the land acquired and the context in which such assumptions apply. I then go on to explain the statutory provisions relating to planning assumptions as a necessary precursor to understanding the *Spirerose* decision which I eventually reach towards the end of the paper.
3. The measure of compensation for land compulsorily acquired is its “value”<sup>2</sup>. Since 1919<sup>3</sup>, the value of land must be taken to be the amount which a willing seller might be expected to realise for the land if sold in the open market<sup>4</sup>. The price which a purchaser would be willing to pay for land obviously depends upon the use to which he could lawfully put it, or the development which he could lawfully carry out on it. A purchaser needs to know whether planning permission exists or, if not, whether and when it would be granted together with the terms of any conditions or planning obligations before he can decide whether he is willing to pay a price which reflects the prospect of carrying out development and, if so, what price.
4. The need to know about the status of land under the town and country planning legislation is not confined to situations in which there is a prospect of future development. In assessing the value of land, no account may be taken of any value which is attributable to a use which is contrary to law<sup>5</sup>, and a purchaser is unlikely to pay much for building or other works which have been carried out without planning permission and which could, therefore, be the subject of enforcement action. The question whether an existing use is lawful either in consequence of a grant of planning permission or in consequence of immunity from enforcement is governed by the town and country planning legislation and the numerous cases

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<sup>1</sup> [2008] RVR 12 (Lands Tribunal); on appeal to the Court of Appeal sub nom *Spirerose Ltd v Transport for London* [2009] RVR 18.

<sup>2</sup> Compulsory Purchase Act 1965, section 7.

<sup>3</sup> Acquisition of Land Act 1919, section 2.

<sup>4</sup> Rule 2 of section 5 of the Land Compensation Act 1961. That value must be assessed at the date on which the acquiring authority took possession of the land (or the vesting date if the vesting declaration procedure is used), or (if earlier) the date on which the value is assessed, normally referred to as “the valuation date”: section 5A of the Land Compensation Act 1961.

<sup>5</sup> Rule 4 of section 5 of the Land Compensation Act 1961.

decided under it. The rules which define lawfulness of development are outside the scope of this paper because I intend to concentrate upon the assumptions which should be made about the ability to carry out development in future, that is, after the valuation date. These assumptions, which derive partly from statute and partly from case law, continue to give rise to considerable difficulties.

5. The Law Commission<sup>6</sup> recommended changes to this (and other) aspects of the compensation code, but the Government decided not to adopt the Law Commission's recommendations<sup>7</sup>. Within the last year, the Court of Appeal has in two separate cases criticised the Government's failure to pursue the Law Commission's recommendations. One of those cases, *Transport for London v Spirerose Ltd*<sup>8</sup>, will be discussed later in this paper. Since, as I have mentioned, it is the subject of an appeal to the House of Lords, be warned: this paper endeavours to state the law as it is now in April 2009; the House of Lords may change it.
6. The other recent Court of Appeal decision on planning assumptions, *Greenweb v London Borough of Wandsworth*<sup>9</sup>, arose out of very unusual circumstances and I do not intend to examine it in detail. Nevertheless, it serves to illustrate the need for comprehensive reform of this branch of the law. Briefly, land had been acquired compulsorily which had been used for many years as open space although, prior to the war, a number of houses existed there which had been demolished following wartime bomb damage. The Land Compensation Act 1961 ("the LCA 1961"), section 15(3) enables it to be assumed for the purposes of assessing compensation that planning permission exists for development falling within the Town and Country Planning Act 1990, schedule 3 which includes the rebuilding of war damaged buildings. The Court very reluctantly accepted that this assumption applied and so, more than half a century after the war, the claimant recovered compensation in the sum of £1.6 million reflecting the ability to redevelop the land for housing, in contrast to the figure of £15,000 which was the value of the land on the basis of open space.
7. Finally by way of introduction, it should be made clear that the rules explained in this paper apply to the assessment of the value of the land compulsorily acquired. They do not generally apply to land which has not been acquired but which may have been diminished in value in consequence of severance or injurious affection<sup>10</sup>.

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<sup>6</sup> Towards a Compulsory Purchase Code (1) Compensation: Law Commission Paper LC 286.

<sup>7</sup> Government's Response to Law Commission Report: December 2005.

<sup>8</sup> [2008] RVR 12 (Lands Tribunal); on appeal to the Court of Appeal sub nom *Spirerose Ltd v Transport for London* [2009] RVR 18.

<sup>9</sup> [2008] RVR 294.

<sup>10</sup> LCA 1961, section 14(1) applies sections 15 and 16 to the assessment of compensation for "the relevant interest" defined in section 39(2) to mean the land acquired. With regard to the *Pointe Gourde* rule (discussed below), although Roskill LJ in *Hoveringham Gravels Ltd v Chiltern District Council* (1977) 35 P&CR 295, at p308 accepted that it applies to the assessment of compensation for severance and injurious affection, Morritt LJ in *English Property Corporation v Royal Borough of Kingston-upon-Thames* (1998) 77 P&CR 1 said at p11 that it does not.

### *The statutory assumptions*

8. The following is a summary of the principal rules laid down by statute which I will examine in a little more detail in the paragraphs which follow:
  - a. Any actual planning permission in force may be taken into account (in addition to any permission assumed by virtue of sections 14-16): the LCA 1961, section 14(2).
  - b. The prospect that planning permission may be granted in future may be taken into account: LCA 1961, section 14(3).
  - c. Planning permission may be assumed for the acquiring authority's proposals in so far as they affect the claimant's land: the LCA 1961, section 15(2).
  - d. Planning permission may be assumed for development in accordance with the development plan: LCA 1961, section 16.
  - e. Planning permission may be assumed for a class of development specified in a certificate of "appropriate alternative development" granted under the LCA 1961, section 17: the LCA 1961, section 15(5).
  - f. Where the land compulsorily acquired is to be used for or in connection with construction or improvement of a highway, it must be assumed that, in the absence of the proposed highway, no highway would be constructed to meet the same need: the LCA 1961, section 14(5)-(8).
9. There are numerous problems with the interpretation and application of these rules. There is also a practical problem which the Lands Tribunal has sought to address in a series of decisions culminating in its decision in *Spirerose*: while section 14(3) allows one to take into account the prospect or hope that planning permission will be granted in future, the value of land with the prospect that planning permission will be granted in future is likely to be significantly less than its value with an actual planning permission. The prospect of a grant in future will involve uncertainty and delay which a purchaser will reflect by making a discount from the amount he would otherwise be willing to pay.
10. These difficulties have arisen because the statutory provisions were tacked awkwardly onto the pre-existing compensation code and have not been updated to reflect modern circumstances. The fundamental rule of compensation for land compulsorily acquired – open market value – was enacted in 1919, long before development control was introduced in the Town and Country Planning Act 1947. The 1947 Act also nationalised development value so it was unnecessary when it was enacted to resolve the relationship between compensation and development value. It became necessary to do so when development value was de-nationalised in 1959, and so the provisions now in the LCA 1961, sections 14-18 were enacted in the Town and Country Planning Act 1959 and then consolidated into the LCA 1961. It is likely that sections 14-18 were intended to be a comprehensive code so

far as planning assumptions were concerned<sup>11</sup>, but it has become clear over the years that, in addition to being difficult to interpret and apply, they do not apply comprehensively to all situations and do not provide a fair solution for all circumstances.

11. I will elaborate briefly on each of the rules which I have summarised above as follows<sup>12</sup>.

*Section 14(2)*

12. Section 14(2) is relatively straightforward. The claimant may have secured a planning permission before the land was acquired, or the acquiring authority may have secured planning permission for its own proposals. These may be taken into account in so far as they affect the value of the land, which will depend largely upon whether they are capable of implementation by a purchaser of the claimant's land.
13. On a point of detailed drafting, section 14(2) refers to any planning permission in force at the date of the notice to treat. This no doubt reflects the rule which was current at the time when the LCA 1961 was drafted that compensation had to be assessed as at the date of the notice to treat<sup>13</sup>. In practice, any actual planning permission granted up to the valuation date will now be taken into account so far as relevant.

*Section 14(3)*

14. Section 14(3) is expressed negatively (“nothing in these provisions...”), but has been interpreted positively so as to enable the prospect of the grant of planning permission in the future to be taken into account. However, as I have mentioned, the prospect of a grant in future will normally be less valuable than a grant on or before the valuation date<sup>14</sup>. I will return to section 14(3) when I reach *Spirerose*.

*Section 15(2)*

15. Where planning permission has not been granted for the acquiring authority's proposals, section 15(2) enables it to be assumed that planning permission exists in relation to the claimant's land for the development proposed by the acquiring authority. The assumed permission relates to the claimant's land only: for example, if the acquiring authority's scheme is a road, the claimant has an assumed planning permission for a section of road across his property, but there is no assumption that the road has been permitted on other land: *Roberts v South Gloucestershire District Council*<sup>15</sup>.

<sup>11</sup> The Lands Tribunal expressed this view in paragraph 34 of its decision in *Spirerose Ltd v Transport for London* [2008] RVR 12.

<sup>12</sup> These rules are applied by virtue of the LCA 1961, section 14(1) which provides that the assumptions in sections 15 and 16 “shall” be made “so far as applicable” to the land acquired.

<sup>13</sup> This rule was changed in by the House of Lords in *Birmingham Corporation v West Midland Baptist (Trust) Association Inc* [1970] AC 874. The valuation date is now laid down by statute: LCA 1961, section 5A.

<sup>14</sup> For example, in *Spirerose*, the parties had agreed that the land acquired was worth £608,000 if planning permission was assumed to exist on the valuation date, but only £400,000 on the basis of a future hope that it would be granted.

<sup>15</sup> [2003] 1 P&CR 411.

16. Whether or not this assumed planning permission adds value to the land in the eyes of the hypothetical open market purchaser will depend on the circumstances and the development permitted. If the assumed permission is for a road, it will be of little use to a purchaser. If, on the other hand, the permission is for housing or commercial development and is capable of implementation on the claimant's land alone, it may add considerable value<sup>16</sup>.
17. Two cases illustrate why section 15(2) is often of little assistance to a claimant. In *Roberts v South Gloucestershire District Council*<sup>17</sup>, the acquiring authority proposed to construct a road which was going to involve making a cutting across the claimant's land thereby removing minerals under the surface. The claimant contended that the permission to be assumed under section 15(2) authorised the extraction of the minerals. This contention was rejected by the Lands Tribunal and the Court of Appeal which held that the assumed permission did not authorise mineral extraction as such but only construction of a section of the road across the claimant's land.
18. In *Colneway v Environment Agency*<sup>18</sup>, the Environment Agency had obtained planning permission to construct a new river to act as a flood alleviation scheme. Implementation of this permission was inevitably going to involve excavation of material along the route of the new river much of which comprised sand and gravel. The claimant, who owned land on the route of the new river, claimed compensation on the basis that the planning permission granted to the Environment Agency would have authorised him to extract the minerals, but this contention was rejected by the Lands Tribunal for similar reasons to those in *Roberts v South Gloucestershire District Council*.

## Section 16

19. Of all the statutory provisions relating to planning assumptions, section 16 is probably the most difficult to interpret and apply. Its purpose is to enable a claimant to benefit from an assumed planning permission where his land is shown in the statutory development plan as proposed for development, but various difficulties stand in the way.
20. The first difficulty arises from the fact that, having been drafted in 1959 when the Town and Country Planning Act 1947 was in force, section 16 uses terminology which was defined in the 1947 Act (referring to land which was "defined" for certain development and "allocated" for certain uses), but this terminology was repealed and not replaced when the 1947 style of plan was replaced by structure and local plans in 1968.
21. The second difficulty is that the concept of the "development plan" has changed significantly over the years. The original style of plan was literally a geographical plan showing how land was used or intended to be developed, accompanied by a

<sup>16</sup> See the discussion about the relationship between this planning assumption and the exercise of valuation in *Myers v Milton Keynes Development Corporation* (1974) 27 P&CR 518 (Court of Appeal).

<sup>17</sup> [2003] 1 P&CR 411.

<sup>18</sup> [2004] RVR 37 (Lands Tribunal).

short written statement. When this style of plan was replaced in 1968 by structure plans and local plans, the emphasis shifted to written policies and other text most of which were not site specific, although the proposals map showed site specific proposals. For unitary authorities, there were also unitary development plans combining the principal features of structure and local plans. Since 2004, there has been a massive proliferation of documents which form part of the statutory plan the majority of which are not site specific. It has been argued in a recent Lands Tribunal case that section 16 simply does not apply to development plans post 1968; this awaits a decision<sup>19</sup>. If this had been Parliament's intention, it is difficult to see why the Town and Country Planning Act 1990, section 27 expressly applies the definition of development plan in the 1990 Act to the LCA 1961. In *Purfleet Farms Ltd v Secretary of State*<sup>20</sup>, the Lands Tribunal acknowledged the difficulties but said that one has to try and apply the statutory provisions as best one can to modern plans.

22. A third difficulty is that, notwithstanding the weight to be attributed to the statutory development plan, there are often many other material planning considerations some of which will carry as much or more weight than the statutory plan. The consequences are: first, that even if land is shown on the proposals map for development, it does not follow that planning permission will be granted for such development and, even if it will be, the development plan will not indicate the likely conditions and planning obligation which will be very relevant to land value; and second, if land is not shown for development on the proposals map, it does not follow that planning permission will not be granted.
23. Section 16(1) applies where the statutory development plan<sup>21</sup> defines the land in question for some specific form of development. Modern development plans tend not to define specific parcels for specific development, and so it is rare for section 16(1) to have any application nowadays. However, if and where it does apply, it is then to be assumed that planning permission would be granted.
24. Section 16(2) and (3) are similar, but differ from section 16(1) in one important respect. Section 16(2) applies where the land in question is allocated in the statutory development plan primarily for a single use and section 16(3) applies where it is allocated for a range of two or more uses. However, in contrast to section 16(1), to secure an assumption under section 16(2) or (3) that planning permission would be granted, it is necessary for a claimant to overcome a further hurdle as set out in section 16(2)(b) and 16(3)(b)<sup>22</sup>. It must be shown that planning permission might reasonably have been expected to be granted for development for the allocated use (or a uses or uses within the allocated range of uses) on the

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<sup>19</sup> *Urban Edge Group Ltd v London Underground Ltd*: ACQ/186/2005 (hearing of preliminary issues completed and decision awaited).

<sup>20</sup> [2002] RVR 203, at paragraph 39. This case went to the Court of Appeal but only on the question of costs.

<sup>21</sup> This is the statutory plan in force at the date of the notice to treat: see the definitions of "current development plan" and "development plan" in the LCA 1961, section 39(1). The latter has been replaced by the Town and Country Planning Act 1990, section 27.

<sup>22</sup> In *Provincial Properties (London) Ltd v Warlingham UDC* (1971) 23 P&CR 8, the Court of Appeal rejected an argument that the proper interpretation of section 16(2)(b) was that this was not a separate hurdle but merely a means of defining the nature of the development for which planning permission is to be assumed. As the Law Commission has commented, this greatly restricts the usefulness of section 16 to a claimant.

assumption that no part of the land had been proposed to be acquired compulsorily<sup>23</sup>.

25. Section 16(4) applies to land within an action area<sup>24</sup>. Although the wording is convoluted, it operates in a similar manner to section 16(2) and (3). If the land falls within an action area, one has to go on to determine whether planning permission might reasonable have been expected to be granted for one or more of the planned range of uses, but this determination must be made on the assumption that the land had not been in an action area.
26. The question whether planning permission might reasonably have been expected to be granted is, on the face of it, a conventional planning judgement except that it involves looking backwards to circumstances at a previous date and judging how the local planning authority, or the Secretary of State on appeal, would have determined a planning application taking account of the development plan and all other material considerations. One of the oddities is that, in order for section 16 to apply at all, the land in question must be defined or allocated for development in the plan in force at the date of the notice to treat. However, the judgement as to whether planning permission might reasonably have been expected to be granted has to be made at the valuation date. The development plan might well have changed in the interim.
27. Section 16(6) enables conditions to be specified. Although the section is silent about planning obligations, since they would normally be entered into before the formal grant of permission, they can be identified and taken into account.
28. Finally in relation to section 16, it will be noted that, where one of the sub-sections applies, the assumption to be made is that planning permission “would be” granted. This has been interpreted and applied by the Lands Tribunal as though an actual planning permission exists on the valuation date, thereby eliminating uncertainty about the grant and its timing. However, it has been argued in a recent case<sup>25</sup> that, while the words “would be” introduce certainty as to the grant, they indicate that the grant would be after the valuation date, thereby leaving open and uncertain as to when it would have been granted.

#### *Sections 17 certificates*

29. Section 17 provides a procedure by which either a claimant or an acquiring authority may apply to the local planning authority for a “certificate of appropriate alternative development”. Section 18 provides for appeals to the Secretary of State. Where such a certificate is granted, it must be assumed that planning permission would be granted for development in accordance with the certificate<sup>26</sup>.

<sup>23</sup> Section 16(7). Note that this assumption is not the same as the “no-scheme world” assumption associated with the *Pointe Gourde* rule discussed below.

<sup>24</sup> Section 16(4) uses the term area of “comprehensive development”. This now refers to actions areas: see the Town and Country Planning Act 1990, section 54(5).

<sup>25</sup> *Urban Edge Group Ltd v London Underground Ltd*: ACQ/186/2005 (hearing of preliminary issues completed and decision awaited).

<sup>26</sup> LCA 1961, section 15(5). Where in response to an application under section 17 a contrary opinion is expressed, that also must be taken into account: LCA 1961, section 14(3A).

30. This procedure was no doubt introduced in 1959 in the expectation that planning issues would be resolved by the local planning authority, not the Lands Tribunal. However, the procedure has proved to be unsatisfactory in a number of respects.
31. First, the date at which the local planning authority must consider all the relevant policies and other material considerations is the date of publication of the notice of making the compulsory purchase order<sup>27</sup>. This is usually a long time before the valuation date, so that policies and other considerations likely to be relevant might have changed significantly in the interim.
32. Second, the certificate which may be issued is required to state the “class” (or classes) of development which are regarded as appropriate, but a broad indication as to the class of development may well not provide a sufficient indication of the form of development which may be required to value the land properly.
33. Third, local planning authorities and their officers are geared to making decisions on planning applications and often find it difficult to make a satisfactory judgement about how they would have determined an application at some earlier date in different circumstances and on the hypothesis that the land in question was not proposed to be acquired compulsorily.
34. Since there is no requirement that a certificate be applied for under section 17, in practice, due to the unsatisfactory features of the procedures mentioned above, planning issues are often referred to the Lands Tribunal.

### Special assumption about highways

35. The LCA 1961, section 14(5)-(8) apply where the land compulsorily acquired is to be used for or in connection with construction or improvement of a highway. In these circumstances, it must be assumed that, in the absence of the proposed highway, no highway would be constructed to meet the same need.
36. These provisions were enacted to reverse the effect of the decision of the House of Lords in *Margate Corporation v Devotwill*<sup>28</sup> in which it was held that, faced with the need to disregard the scheme underlying the acquisition (in that case a road), the valuer had to conduct an examination of what would have happened in the no-scheme world, and in particular whether a new road would have been constructed and if so where.

### *Spirerose*

37. At last we have almost reached the title of this paper: *Spirerose*. The decision of the Lands Tribunal in *Spirerose Ltd v Transport for London*, which was upheld by the Court of Appeal under the title *Transport for London v Spirerose Ltd*, was an application of the well-known *Pointe Gourde* rule.

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<sup>27</sup> LCA 1961, section 22(2) as interpreted by the Court of Appeal in *Fletcher Estates (Harlescott) Ltd v Secretary of State* (1998) 76 P&CR 383 (appealed to the House of Lords on a different point).

<sup>28</sup> [1970] 3 All ER 864.

38. The *Pointe Gourde* rule<sup>29</sup> is that, in assessing compensation for the value of land compulsorily acquired, no account may be taken of any increase in value which is attributable to the scheme underlying the acquisition. This rule was subsequently developed to apply also to decreases in value attributable to the scheme<sup>30</sup>.
39. The *Pointe Gourde* rule was examined recently by the House of Lords in *Waters v Welsh Development Agency*<sup>31</sup>. It was held, in short, that the statutory code was not comprehensive and the *Pointe Gourde* rule still applies as an adjunct to the statutory code. The overriding guiding principle is to achieve fair compensation.
40. I have mentioned that *Spirerose* was the culmination of a series of decisions in which the Lands Tribunal sought to resolve the gaps in the statutory code. In *Pentrehobyn Trustees v National Assembly for Wales*<sup>32</sup>, decided before the House of Lords decision in *Waters*, the Tribunal held that the claimant could rely upon any planning permission which would have been granted if the scheme had never been conceived. In *RMC (UK) Ltd and ACE Electrical Distributors v London Borough of Greenwich*<sup>33</sup>, decided after *Waters*, the Tribunal concluded that the *Pointe Gourde* rule comes in at two points: in relation to planning assumptions and in relation to increases and decreases in value. In relation to planning assumptions, the Tribunal concluded that it was open to a claimant to show that, in the absence of the scheme, planning permission would have been granted for development and that this should be taken into account in assessing the value of the land.
41. In *Spirerose Ltd v Transport for London*<sup>34</sup>, the land in question had been acquired for the construction of a new underground line known as the East London Line Extension. The proposal had first emerged in the early 1990s and the line had been ‘safeguarded’ in the UDP adopted in 1995. The claimant’s property was a single storey building with basement used as a printing works with an established B2/B8 use situated in Holywell Lane, a little north of Liverpool Street Station. The new line was proposed to pass through the old Bishopsgate Goods Yard, the scene of much previous litigation<sup>35</sup>.
42. No reliance appears to have been placed upon the statutory planning assumptions and, in particular, section 16<sup>36</sup>. This may have been because, on the facts, section 16 would have given rise to some difficulty. Although the land was within South

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<sup>29</sup> This rule takes its name from the decision of the Privy Council in *Pointe Gourde Quarrying and Transport Ltd v Sub-Intendent of Crown Lands* [1947] AC 565. It is often referred to as the “no-scheme” rule, which arguable puts an inaccurate gloss on it.

<sup>30</sup> *Melwood Units Property Ltd v Commissioner of Main Roads* [1979] AC 426 (Privy Council).

<sup>31</sup> [2004] 1 WLR 1304.

<sup>32</sup> [2003] RVR 140.

<sup>33</sup> [2005] RVR 140.

<sup>34</sup> [2008] RVR 12.

<sup>35</sup> *R (on the application of Prokopp) v London Underground Ltd* [2004] 1 P&CR 31; *Bishopsgate Space Management and Teamworks Karting Ltd v London Underground Ltd* [2004] 1 RVR 89.

<sup>36</sup> In contrast, in another case concerning a site immediately adjoining the *Spirerose* land, it has been argued on behalf of the claimant that section 16(2) applies: *Urban Edge Group Ltd v London Underground Ltd*: ACQ/186/2005 (hearing of preliminary issues completed and decision awaited).

Shoreditch employment area, the proposals map showed the proposed railway as a coloured strip across the employment area.

43. The claimant contended that, in the absence of the scheme, planning permission would have been granted for a mixed use development and that the land should be valued as though such permission had been granted on the valuation date. It was argued that the question whether planning permission would have been granted should be determined on the balance of probabilities. The acquiring authority admitted that there was some prospect, or chance, that planning permission would have been granted after the valuation date (although there was a difference between the parties as to the degree of chance in this respect), and admitted that section 14(3) enabled this chance to be reflected in the valuation, but contended that it would be wrong to treat the chance as a certainty.
44. The Lands Tribunal reviewed the relevant statutory provisions and previous decisions in detail and summarised its conclusions as follows:

*“(a) On the basis of the Pointe Gourde rule compensation may be awarded on the assumption that planning permission for development would have been granted in the no-scheme world even though no such assumption may fall to be made under the provisions of section 15 and 16.*

*(b) If the conclusion of the Tribunal is that planning permission would have been granted at the valuation date, it is to be assumed, in the absence of evidence to the contrary, that the hypothetical willing seller would have applied for such permission in time for it to be granted by that date.*

*(c) The assumption of such planning permission under the Pointe Gourde rule is discretionary, and the purpose is to ensure that the claimant received fair compensation; but there is no requirement that it may only be made where the compensation on the statutory assumptions would be far removed from what would be fair.*

*(d) Whether planning permission would have been granted in the no-scheme world is to be determined by reference to the decision that a reasonable planning authority would have made. By contrast hope value is to be assessed by reference to the view that the market would have taken as to the prospects of achieving planning permission.*

*(e) Jelson v Blaby<sup>37</sup> is authority that section 9 enables a claimant to rely on such planning permission as would have been granted in the no-scheme world.”*

45. *The Court of Appeal dismissed the acquiring authority’s appeal. The ratio appears essentially to be as follows<sup>38</sup>:*

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<sup>37</sup> (1977) 34 P&CR 77, CA.

<sup>38</sup> Paragraph 65.

“It is accepted that, where the statutory assumptions apply, probability of a permission is converted into full value for valuation purposes. As has been seen, the claimant was unable to take advantage of the statutory assumptions because of an anomaly in the provisions for fixing the date of consideration<sup>39</sup>. As far as possible, we would interpret the no-scheme rule so as to remedy the anomaly rather than extend it. Further, reflecting the same point, it is plainly desirable that there should be consistency in the assessment of compensation for compulsory acquisition of land in materially similar cases, whether or not the statutory assumptions apply”.

46. The Acquiring Authority points out that the reasons given by the Court of Appeal are somewhat different from those of the Lands Tribunal and argues that in several respects they do not stand up to detailed scrutiny. The essence of the Acquiring Authority’s argument is that there is no justification for extending the statutory scheme set out in sections 14-18 so as to include a non-statutory assumption. Much of the argument in the Lands Tribunal and Court of Appeal involved analysis of a previous Court of Appeal decision under section 17: *Porter v Secretary of State*.
47. The House of Lords will no doubt find it necessary to analyse the statutory provisions in some detail; although the interpretation of these is not directly in issue, it is possible that the opinions of their Lordships will throw light on how they should be interpreted and applied. However, at the end of the day, the likelihood is that the decision will turn on the question of ‘fairness’, which was identified in *Waters* as the overriding principle.
48. In its petition for leave to the House of Lords, the Acquiring Authority has said this about fairness:

*“There are landowners in South Shoreditch unaffected by the ELLX who sell or have sold land without planning permission for redevelopment but with only a hope of obtaining it. They, of course, receive a price which is consistent with the level of that hope, which in valuations terms is naturally different from the price obtainable with an actual permission. Yet an owner in the position of Spirerose is awarded at the public expense compensation based on a planning permission which he does not have. It is submitted that this is profoundly unfair to other landowners and should cause disquiet especially when the result is not one of interpretation of the actual statutory provisions but of an additional rule first enunciated by the Lands Tribunal”.*

49. This does not seem to be a balanced way of looking at ‘fairness’. Landowners not affected by ELLX could have made planning applications at any time that seemed to serve their interests. Such applications would have been determined in the normal way having regard to the development and all other material considerations, with a right of appeal to the Secretary of State. In contrast,

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<sup>39</sup> This anomaly is referred to in paragraph 13 of the judgement: the relevant date for a s17 application would have been 1993, prior to adoption of the UDP in 1995. By the valuation date, the UDP itself had been to some degree overtaken by more up-to-date national policies. See also paragraph 23.

landowners like Spirerose Ltd whose land had been ‘safeguarded’ for ELLX in the UDP would have known that planning permission for any significant development on their land would not have been granted lest it prejudiced ELLX. Further, they were forced to sell at a time not of their own choosing. It is reasonable to suppose that, in the absence of the compulsory purchase, persons contemplating disposal of their land would have taken such advice and such steps as seemed appropriate to obtain the best price for the land, and if that involved making a planning application before the sale, they would have done so. Others might have contemplated redeveloping their land for their own use rather than for a sale. If the interpretation of the UDP is such that their land cannot be treated as allocated for development in the statutory development plan, then section 14(3) is the only statutory provision which would assist, but on the Acquiring Authority’s interpretation, section 14(3) would only allow for the discounted effect of hope rather than an actual planning permission.

Conclusion: planning assumptions after Spirerose

50. The imminent appeal means that the conclusion of this paper is inevitably uncertain. The statutory assumptions which I have explained will of course remain in place and we may have some assistance from any comments from their Lordships as to how they should be interpreted or operated. In our crowded world, the inadequacies of the statutory provisions is a problem frequently encountered. So, in relation to section 14(3), non-statutory assumptions, *Pointe Gourde* and *Spirerose*, my own personal view, for what it is worth, is that ‘fairness’ would be best served by upholding the decision of the Lands Tribunal and the Court of Appeal, but it remains to be seen whether this view is shared by their Lordships.

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