

UPPER TRIBUNAL (LANDS CHAMBER)



Neutral Citation Number: [2016] UKUT 172 (LC)
Case No: DET/6/2015

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

Compensation – planning permission – compulsory acquisition of land required for new highway – appeal against certificate of appropriate alternative development restricting residential development to 100% affordable housing – development plan – material consideration of extant planning permission on balance of site – Land Compensation Act 1961, s18 – appeal allowed

IN THE MATTER OF AN APPEAL UNDER S.18 OF THE
LAND COMPENSATION ACT 1961

BY:

MINTBLUE PROPERTIES LIMITED

Appellant

Re: Car Park of former E-Mag Factory,
Brynmawr,
Blaenau Gwent.

Hearing date: 6 April 2016

A J TROTT FRICS

Cardiff Civil Justice Centre, 2 Park Street, Cardiff CF10 1ET

Emyr Jones, instructed by Harmers Limited, for the appellant

The following cases are referred to in this decision:

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Harringay Meat Traders Ltd v Secretary of State for Communities and Local Government [2012] EWHC 1744 (Admin)

Tescan Limited v Cornwall Council [2015] RVR 251

Tesco Stores Ltd v Secretary of State for the Environment and Others [1995] 2 All ER 636

Fletcher Estates (Harlescott) Limited v Secretary of State for the Environment [2000] 2 AC 307

DECISION

Introduction

1. On 14 October 2014 (“the relevant date”) the Welsh Government made the Welsh Ministers (The Neath to Abergavenny Trunk Road (A465) (Abergavenny to Hirwaun Dualling and Slip Roads) and East of Abercynon to East of Dowlais Trunk Road (A4060) and Cardiff to Glan Conwy Trunk Road (A470) (Connecting Roads) (Gilwern to Brynmawr)) Compulsory Purchase Order (“the CPO”). The site known as the former E-Mag factory car park, Brynmawr, Blaenau Gwent (“the appeal site”) was identified as part of the land to be compulsorily acquired. The appeal site had a total area of 1.39 ha of which 0.68 ha previously formed the hardstanding area for the car park. The remainder of the appeal site comprised steeply sloping land to the west and south that was not capable of development.

2. On 15 September 2014 the appellant, Mintblue Properties Ltd, applied under section 17 of the Land Compensation Act 1961 (“the 1961 Act”) to Brecon Beacons National Park Authority (“BBNPA”) as the local planning authority (with a copy served on the Welsh Government as the acquiring authority) for a certificate of appropriate alternative development (“CAAD”). The application specified that in the appellant’s opinion residential development would be appropriate alternative development in relation to the appeal site for the purposes of section 14 of the 1961 Act.

3. On 14 January 2015 BBNPA issued a CAAD certifying that the following classes of development would have been granted planning permission if the acquiring authority had not proposed to compulsorily acquire the appeal site:

“B1 - Light Industry;

B2 – General Industrial;

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C3 – Residential (as a 100% affordable housing development on an exceptions site in the countryside); and

D2 – Assembly and Leisure (for sport, tourism or recreation uses).”

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5. The appeal has a rather unusual procedural history. The notice of appeal identified BBNPA as the respondent to the appeal but the Tribunal served a copy of the notice on both BBNPA and the Welsh Government on 10 February 2015. In its letter to BBNPA the Tribunal directed them to file and serve a response to the appeal. BBNPA served a respondent’s notice

together with a statement of case on 13 March 2015. In its letter to the Welsh Government the Tribunal stated “If you wish to be joined as a party to this appeal, you must make an application to be joined pursuant to Rule 9, complying with Rules 5 and 6.” The Welsh Government did not respond to the Tribunal’s letter.

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7. The parties to an appeal under section 18(1) of the 1961 Act (as amended) are:

- “(a) the person for the time being entitled to [an interest in land in respect of which the local planning authority have served a section 17 certificate], or
- (b) any authority possessing compulsory purchase powers by whom that interest is proposed to be, or is, acquired.”

In this case confusion has arisen because the local planning authority and the acquiring authority are not the same authority. The proper respondent to an appeal made by the person entitled to an interest in the land is the acquiring authority. The local planning authority, whose decision is the subject of the appeal, is not a party to the appeal under section 18 of the 1961 Act. Care should be taken by appellants when submitting a notice of appeal under section 18 to ensure that the acquiring authority is named as the respondent to the appeal.

8. Mr Emyr Jones of counsel appeared for the appellant and called Mr Andrew Muir BSc DipTP, MRTPI, Managing Director of Harmers Limited, as an expert planning witness.

9. I made an accompanied visit to the appeal site on 5 April 2016.

Facts

10. I find the following facts from the evidence.

11. The appeal site forms part of a larger site known as the former E-Mag factory site which is located immediately to the north of the A465(T) Heads of the Valleys Road to the north east of Brynmawr. The appeal site is located to the west of the main factory site and was used in part as a surface car park. To the north of the appeal site is a school and to the south west is the developed area of Brynmawr. The boundary of the Brecon Beacons National Park at this point follows the Heads of the Valleys Road and so the former E-Mag factory site and the appeal site are both within the National Park while Brynmawr, on the other side of the Heads of The Valleys Road, is within the neighbouring authority, Blaenau Gwent County Borough Council.

12. The development plan at the relevant date was the Brecon Beacons National Park Local Development Plan (“the LDP”) which was adopted on 17 December 2013. The appeal site is designated as countryside in that plan. The LDP’s spatial strategy sets out a hierarchy of 5 “settlement types”. Countryside is designated as level 5 and comprises:

“Places with no potential to accommodate any level of growth. Development here will be limited to that which is proven essential in accordance with National Planning Policy.”

13. Policy ELP1: Community Sustainability Edge of Settlement Exceptions provides that development proposals that are essential to community sustainability and/or have limited environmental impact will be enabled at edge of settlement locations. The policy identifies eight types of acceptable exceptions development, the first of which is “proposals for 100% affordable housing development.”

14. The acceptable exception for affordable housing refers to Policy 29: Enabling Affordable Housing Exception Sites which states:

“Exceptionally, development for Affordable Housing will be permitted on sites in or adjoining and forming a logical extension to appropriate settlements, to meet a proven local need that cannot be met in any other way, where a local need has been established by a housing needs survey.”

15. Policy CYD LP1: Enabling Appropriate Development provides that proposals for development in countryside locations will be required to contribute positively to their countryside setting and enhance the quality of the landscape without adverse impact on the wildlife, natural beauty, cultural heritage, environmental assets or biodiversity of the area.

16. BBNPA relied upon policies ELP1, 29 and CYD LP’ to support their decision on the CAAD application. In addition they accepted that the part of the appeal site that was formerly used as a car park conformed with the definition of “previously developed land” as set out in Figure 4.3 of Planning Policy Wales 7th Edition (2014).

17. The former E-Mag factory site was also shown in the LDP as countryside. In addition it was designated as a housing commitment (reference COM-BRM-A) for 94 houses. This

commitment reflected a planning permission that was granted on 12 November 2012 following the completion of a section 106 agreement. That planning permission remains extant. The planning application for this development was submitted on 17 January 2005. In January 2006 BBNPA resolved to grant planning permission subject to the planning agreement that was eventually completed in 2012.

18. It was originally intended the appeal site be included in the application for residential development with the main E-Mag factory site. But on 13 April 2004 the Welsh Assembly Government wrote to the applicant's agent with a copy of the Line Order and the relevant Line Order Plan extract for the A465 improvement. This showed that the appeal site was required for the new road and it was decided to exclude it from the planning application for residential development.

19. At the time of the planning application for the residential development of the E-Mag factory site in 2005 the adopted plan was the Brecon Beacons National Park Local Plan (May 1999) and the Draft Brecon Beacons National Park UDP (June 2004). The appeal site was shown as countryside in both plans. In the Draft Deposit UDP which was approved by BBNPA for development control purposes in 2007 (but never formally adopted) the former E-Mag factory site was shown as a "white area" upon the recommendation of the UDP planning inspector. White areas applied to settlements, or parts of settlements, where the principle of development was acceptable.

20. At the local inquiry into the UDP the BBNPA argued that the best approach was to leave the site as countryside and to determine any application as a departure from the plan. Because only a small amount of Brynmawr's urban form fell within the National Park boundary, the E-Mag factory site was not included in BBNPA's assessment of settlements during the process to establish the settlement hierarchy. BBNPA described the site as an anomaly and while any housing development would benefit residents living outside the National Park it would technically count towards BBNPA's overall housing provision from allocated sites. Leaving the site as countryside would prevent any distortion of BBNPA's housing figures and leave their housing allocation strategy intact.

21. The inspector did not accept this argument and said in his report:

"The BBNPA indicated at the Inquiry that they saw no objection in principle to housing on the site, but felt that it would contribute towards the housing needs of the adjoining area, and not those of the National Park ... The Authority accepted at the Inquiry that, had Brynmawr been in the National Park, this land would probably have been included within the settlement boundary.

In my view it would be incongruous to show this site as countryside, whilst acknowledging that it would be appropriate for development."

Accordingly the inspector recommended that the E-Mag factory be defined as a white area.

Statutory provisions

22. An application under section 17 of the 1961 Act, as amended, enables “either of the parties directly concerned” (i.e. the landowner and the acquiring authority) to apply to the local planning authority for a certificate stating whether or not, in the authority’s opinion, there is development that, for the purposes of section 14 (i.e. taking account of actual or prospective planning permission), is appropriate alternative development in relation to the compulsory acquisition. If the local planning authority considers that there is appropriate alternative development, the certificate must identify every description of such development and give a general indication of any conditions to which planning permission for it could reasonably have been expected to be subject, when the permission could reasonably have been expected to be granted and any pre-condition for granting the permission (section 17(5)).

23. The certification process under section 17 requires the decision-maker (whether the local planning authority or, on appeal, the Tribunal) to form an opinion on the description of development that would have been allowed had a planning application been made in accordance with the Planning Acts by determining the hypothetical application in accordance with normal planning principles as at the relevant date. That involves consideration of section 38(6) of the Planning and Compulsory Purchase Act 2004, i.e. the requirement to determine planning applications in accordance with the development plan unless material considerations indicate otherwise. The decision-maker may therefore depart from the development plan where appropriate: see *Harringay Meat Traders Ltd v Secretary of State for Communities and Local Government* [2012] EWHC 1744 (Admin) and *Tescan Limited v Cornwall Council* [2015] RVR 251.

24. What constitutes a “material consideration” is a matter of law; what weight should be given to it is solely a judgment for the decision-maker: see *Tesco Stores Ltd v Secretary of State for the Environment and Others* [1995] 2 All ER 636 per Lord Hoffmann at 657[13]. The decision-maker must be satisfied on the balance of probabilities that planning permission would have been granted for the description of development applied for and it does not have to assess more precisely the chances or prospects of that development happening or of the permission being implemented: see *Tescan* at paragraph 68.

25. In *Fletcher Estates (Harlescott) Limited v Secretary of State for the Environment* [2000] 2 AC 307 Lord Hope said at 322 that section 17 requires the decision-maker to assume that:

“The scheme for which the land is proposed to be acquired together with the underlying proposal which may appear in any of the planning documents must be assumed on [the relevant date] to have been cancelled. No assumption has to be made as to [what] may or may not have happened in the past.”

26. On any appeal against a section 17 certificate the Tribunal must consider the matters to which the certificate relates as if the application for a certificate under section 17 had been made to the Tribunal in the first place and must (i) confirm the certificate or (ii) vary it, or (iii) cancel

it and issue a different certificate in its place, as the Tribunal may consider appropriate (section 18(2)).

The appellant's case

27. The appellant's case may be summarised as follows:

- (i) BBNPA have accepted the principle of residential development on the appeal site.
- (ii) They have restricted such residential development to 100% affordable housing because:
 - (a) The appeal site is shown in the LDP as countryside and therefore
 - (b) Policy 29 applies.
- (iii) BBNPA's approach only takes account of the development plan and ignores material considerations such as the extant planning permission for residential development granted on the adjoining former E-Mag factory site in 2012.
- (iv) The planning policy context that existed and was taken into account when BBNPA resolved to grant residential planning permission in 2006 was equally applicable to the consideration of the potential development of the appeal site today.
- (v) BBNPA should have given due weight to the factors which led them to resolve to grant planning permission on the former E-Mag factory site when considering the CAAD application on the adjoining appeal site.
- (vi) The existence of the planning permission on the E-Mag factory site meant that the appeal site was in fact more suitable for residential development. In the no-scheme world at the relevant date the edge of the Brynmawr settlement would have extended to the east of the former E-Mag factory site leaving the appeal site as an obvious infill development.
- (vii) In the no scheme world the appeal site would not have been included in the Heads of the Valleys Road improvement scheme and would have formed part of the site of the former E-Mag factory site for which BBNPA resolved to grant residential planning permission in 2006.
- (viii) Policy 29 was not satisfied at the relevant date because:
 - (a) There was no proven local need for affordable housing in the locality of the appeal site;
 - (b) No housing needs survey existed;
 - (c) The appeal site was not an extension of a settlement in the National Park but of a settlement, Brynmawr, that was in Blaenau Gwent; and

- (d) There was no evidence that any local need, if it existed, could not be met in another way.
- (ix) Policy 28 of the LDP (Affordable Housing Contributions) stated that in the Heads of the Valleys and Rural Submarket, where the appeal site is located, the target level of affordable housing contributions was 0%.
- (x) The certificate issued by BBNPA was a failed attempt to slavishly follow the LDP's designation of the appeal site as countryside.

Discussion

28. I am required to determine whether, on the balance of probabilities, planning permission for the residential development of the appeal site with no requirement for any affordable housing could reasonably have been expected to be granted on the relevant date in the circumstances known to the market on that date and on an application decided on that date or at a time after that date (section 14(4)). I must determine the issue in accordance with the development plan unless material considerations indicate otherwise.

29. At the relevant date:

- (i) The development plan was the LDP;
- (ii) The appeal site was shown as countryside in the LDP but adjoined a site identified as a residential commitment (the former E-Mag factory site); and
- (iii) The former E-Mag factory site had planning permission for residential development subject to an affordable housing element of 20%.

30. In my opinion the existence of an extant residential planning permission on the adjoining E-Mag factory site is a material consideration to which significant weight should be given. BBNPA have seemingly failed to accord any weight to this planning permission, relying instead upon an interpretation of Policy 29: Affordable Housing Exceptions. I consider BBNPA's reliance upon this policy to be misdirected for a number of reasons:

- (i) The appeal site adjoins and forms a logical extension to the settlement of Brynmawr which is not in the Brecon Beacons National Park but in the neighbouring authority of Blaenau Gwent County Borough Council;
- (ii) There is no proven need for affordable housing that cannot be met in any other way;
- (iii) There is no housing needs survey;

- (iv) Policy 28 of the LDP says that no affordable housing contributions are required in the Heads of the Valleys and Rural South Submarket in which the appeal site is located.

31. The inspector at the UDP Inquiry found it incongruous that BBNPA wanted to show the E-Mag factory site as countryside while at the same time acknowledging its suitability for development. Their reasoning seems to have been one of simple expediency: they were reluctant to allocate the site for housing which would thereby count towards BBNPA's overall housing provision when it would primarily benefit Brynmawr in neighbouring Blaenau Gwent.

32. BBNPA continue to recognise the suitability of the site for residential development but they have tried to shoehorn this acceptance into Affordable Housing Exceptions Policy 29. For the reasons stated above I do not consider this to be appropriate.

33. The appeal site is a brownfield site that was previously used in part as a hardstanding for car parking. It is in a sustainable location and, if the scheme was cancelled, would be surrounded by the urban form of Brynmawr to the south and west, by the school to the north and by the committed residential development site at the former E-Mag factory site to the east. Under these circumstances I am satisfied that on the balance of probabilities the appeal site could reasonably have been expected to be granted planning permission for residential development without dependence upon Policy 29 which I do not consider to be applicable. The 20% affordable housing policy that was in force when planning permission was granted for the former E-Mag factory site in 2012 no longer applied at the relevant date. Instead Policy 28 had been introduced and it required no affordable housing for developments, such as could have been expected at the appeal site, which were located in the Heads of the Valleys and Rural South Submarket.

34. Mr Muir argues that in the no scheme world the appeal site would have been combined into a larger residential site with the E-Mag factory site. I consider that to be the wrong approach. The scheme is taken to be cancelled at the relevant date; its pre-existence is not to be ignored and it is not open to the appellant to assess what may or may not have happened in the past had the scheme never existed.

Determination

35. I am satisfied that residential development without any requirement for affordable housing is, for the purposes of section 14 of the 1961 Act appropriate alternative development in relation to the acquisition of the appeal site. I therefore vary the CAAD issued by BBNPA on 14 January 2015 so as to delete the parenthesis "(as a 100% affordable housing development on an exception site in the countryside)" as it applies to C3-residential use. The remainder of the certificate is unaltered. A copy of the certificate as varied is attached as Appendix A.

36. For the avoidance of doubt the only part of the appeal site to which such an open residential use would apply is the area of previously developed car park land which Mr Muir confirmed at the hearing amounts to 0.68 ha (1.68 acres).

37. The conditions to which planning permission for the residential development of the appeal site could reasonably have expected to be subject would be the same, mutatis mutandis, as those attached to the planning permission for the residential development of the former E-Mag factory site dated 12 November 2012.

38. This decision is final. The question of costs is dealt with under section 17(10) of the 1961 Act which states:

“In assessing any compensation payable to any person in respect of any compulsory acquisition, there must be taken into account any expenses reasonably incurred by the person in connection with the issue of a certificate under this section (including expenses incurred in connection with an appeal under section 18 where any of the issues are determined in the person’s favour).”

39. The appellant has succeeded in its appeal and is entitled to its expenses reasonably incurred of making the section 17 application and the section 18 appeal as part of any compensation payable by the acquiring authority (the Welsh Government) as yet to be agreed or determined.

Dated: 14 April 2016

A J Trott FRICS

APPENDIX A

LAND COMPENSATION ACT 1961 (AS AMENDED)

CERTIFICATE OF APPROPRIATE ALTERNATIVE DEVELOPMENT

LAND KNOWN AS THE FORMER E-MAG FACTORY CAR PARK SITE, BRYNMAWR

PURSUANT TO the Tribunal's powers under section 18 of the Land Compensation Act 1961 (as amended) it is hereby **CERTIFIED** in relation to the said land that for the **REASONS** set out in its decision dated 13 April 2016:

- (1) The certificate issued by Brecon Beacons National Park Authority on 14 January 2015 is varied;
- (2) The following descriptions of development are, for the purposes of section 14 of the 1961 Act, appropriate alternative development in relation to the acquisition of the said land:
 - B1 - Light Industry;
 - B2 – General Industrial;
 - B8 – Storage and Distribution;
 - C3 – Residential; and
 - D2 – Assembly and Leisure (for sport, tourism or recreation uses).
- (3) The conditions to which planning permission for the residential development of the said land could reasonably have expected to be subject would be the same, mutatis mutandis, as those attached to the planning permission for the residential development of the former E-Mag factory site dated 12 November 2012.

Dated 14 April 2016

Signed: A J Trott FRICS

Member Upper Tribunal (Lands Chamber)

UPPER TRIBUNAL (LANDS CHAMBER)



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21. The inspector did not accept this argument and said in his report:

"The BBNPA indicated at the Inquiry that they saw no objection in principle to housing on the site, but felt that it would contribute towards the housing needs of the adjoining area, and not those of the National Park ... The Authority accepted at the Inquiry that, had Brynmawr been in the National Park, this land would probably have been included within the settlement boundary.

In my view it would be incongruous to show this site as countryside, whilst acknowledging that it would be appropriate for development."

Accordingly the inspector recommended that the E-Mag factory be defined as a white area.

Statutory provisions

22. An application under section 17 of the 1961 Act, as amended, enables “either of the parties directly concerned” (i.e. the landowner and the acquiring authority) to apply to the local planning authority for a certificate stating whether or not, in the authority’s opinion, there is development that, for the purposes of section 14 (i.e. taking account of actual or prospective planning permission), is appropriate alternative development in relation to the compulsory acquisition. If the local planning authority considers that there is appropriate alternative development, the certificate must identify every description of such development and give a general indication of any conditions to which planning permission for it could reasonably have been expected to be subject, when the permission could reasonably have been expected to be granted and any pre-condition for granting the permission (section 17(5)).

23. The certification process under section 17 requires the decision-maker (whether the local planning authority or, on appeal, the Tribunal) to form an opinion on the description of development that would have been allowed had a planning application been made in accordance with the Planning Acts by determining the hypothetical application in accordance with normal planning principles as at the relevant date. That involves consideration of section 38(6) of the Planning and Compulsory Purchase Act 2004, i.e. the requirement to determine planning applications in accordance with the development plan unless material considerations indicate otherwise. The decision-maker may therefore depart from the development plan where appropriate: see *Harringay Meat Traders Ltd v Secretary of State for Communities and Local Government* [2012] EWHC 1744 (Admin) and *Tescan Limited v Cornwall Council* [2015] RVR 251.

24. What constitutes a “material consideration” is a matter of law; what weight should be given to it is solely a judgment for the decision-maker: see *Tesco Stores Ltd v Secretary of State for the Environment and Others* [1995] 2 All ER 636 per Lord Hoffmann at 657[13]. The decision-maker must be satisfied on the balance of probabilities that planning permission would have been granted for the description of development applied for and it does not have to assess more precisely the chances or prospects of that development happening or of the permission being implemented: see *Tescan* at paragraph 68.

25. In *Fletcher Estates (Harlescott) Limited v Secretary of State for the Environment* [2000] 2 AC 307 Lord Hope said at 322 that section 17 requires the decision-maker to assume that:

“The scheme for which the land is proposed to be acquired together with the underlying proposal which may appear in any of the planning documents must be assumed on [the relevant date] to have been cancelled. No assumption has to be made as to [what] may or may not have happened in the past.”

26. On any appeal against a section 17 certificate the Tribunal must consider the matters to which the certificate relates as if the application for a certificate under section 17 had been made to the Tribunal in the first place and must (i) confirm the certificate or (ii) vary it, or (iii) cancel

it and issue a different certificate in its place, as the Tribunal may consider appropriate (section 18(2)).

The appellant's case

27. The appellant's case may be summarised as follows:

- (i) BBNPA have accepted the principle of residential development on the appeal site.
- (ii) They have restricted such residential development to 100% affordable housing because:
 - (a) The appeal site is shown in the LDP as countryside and therefore
 - (b) Policy 29 applies.
- (iii) BBNPA's approach only takes account of the development plan and ignores material considerations such as the extant planning permission for residential development granted on the adjoining former E-Mag factory site in 2012.
- (iv) The planning policy context that existed and was taken into account when BBNPA resolved to grant residential planning permission in 2006 was equally applicable to the consideration of the potential development of the appeal site today.
- (v) BBNPA should have given due weight to the factors which led them to resolve to grant planning permission on the former E-Mag factory site when considering the CAAD application on the adjoining appeal site.
- (vi) The existence of the planning permission on the E-Mag factory site meant that the appeal site was in fact more suitable for residential development. In the no-scheme world at the relevant date the edge of the Brynmawr settlement would have extended to the east of the former E-Mag factory site leaving the appeal site as an obvious infill development.
- (vii) In the no scheme world the appeal site would not have been included in the Heads of the Valleys Road improvement scheme and would have formed part of the site of the former E-Mag factory site for which BBNPA resolved to grant residential planning permission in 2006.
- (viii) Policy 29 was not satisfied at the relevant date because:
 - (a) There was no proven local need for affordable housing in the locality of the appeal site;
 - (b) No housing needs survey existed;
 - (c) The appeal site was not an extension of a settlement in the National Park but of a settlement, Brynmawr, that was in Blaenau Gwent; and

- (d) There was no evidence that any local need, if it existed, could not be met in another way.
- (ix) Policy 28 of the LDP (Affordable Housing Contributions) stated that in the Heads of the Valleys and Rural Submarket, where the appeal site is located, the target level of affordable housing contributions was 0%.
- (x) The certificate issued by BBNPA was a failed attempt to slavishly follow the LDP's designation of the appeal site as countryside.

Discussion

28. I am required to determine whether, on the balance of probabilities, planning permission for the residential development of the appeal site with no requirement for any affordable housing could reasonably have been expected to be granted on the relevant date in the circumstances known to the market on that date and on an application decided on that date or at a time after that date (section 14(4)). I must determine the issue in accordance with the development plan unless material considerations indicate otherwise.

29. At the relevant date:

- (i) The development plan was the LDP;
- (ii) The appeal site was shown as countryside in the LDP but adjoined a site identified as a residential commitment (the former E-Mag factory site); and
- (iii) The former E-Mag factory site had planning permission for residential development subject to an affordable housing element of 20%.

30. In my opinion the existence of an extant residential planning permission on the adjoining E-Mag factory site is a material consideration to which significant weight should be given. BBNPA have seemingly failed to accord any weight to this planning permission, relying instead upon an interpretation of Policy 29: Affordable Housing Exceptions. I consider BBNPA's reliance upon this policy to be misdirected for a number of reasons:

- (i) The appeal site adjoins and forms a logical extension to the settlement of Brynmawr which is not in the Brecon Beacons National Park but in the neighbouring authority of Blaenau Gwent County Borough Council;
- (ii) There is no proven need for affordable housing that cannot be met in any other way;
- (iii) There is no housing needs survey;

- (iv) Policy 28 of the LDP says that no affordable housing contributions are required in the Heads of the Valleys and Rural South Submarket in which the appeal site is located.

31. The inspector at the UDP Inquiry found it incongruous that BBNPA wanted to show the E-Mag factory site as countryside while at the same time acknowledging its suitability for development. Their reasoning seems to have been one of simple expediency: they were reluctant to allocate the site for housing which would thereby count towards BBNPA's overall housing provision when it would primarily benefit Brynmawr in neighbouring Blaenau Gwent.

32. BBNPA continue to recognise the suitability of the site for residential development but they have tried to shoehorn this acceptance into Affordable Housing Exceptions Policy 29. For the reasons stated above I do not consider this to be appropriate.

33. The appeal site is a brownfield site that was previously used in part as a hardstanding for car parking. It is in a sustainable location and, if the scheme was cancelled, would be surrounded by the urban form of Brynmawr to the south and west, by the school to the north and by the committed residential development site at the former E-Mag factory site to the east. Under these circumstances I am satisfied that on the balance of probabilities the appeal site could reasonably have been expected to be granted planning permission for residential development without dependence upon Policy 29 which I do not consider to be applicable. The 20% affordable housing policy that was in force when planning permission was granted for the former E-Mag factory site in 2012 no longer applied at the relevant date. Instead Policy 28 had been introduced and it required no affordable housing for developments, such as could have been expected at the appeal site, which were located in the Heads of the Valleys and Rural South Submarket.

34. Mr Muir argues that in the no scheme world the appeal site would have been combined into a larger residential site with the E-Mag factory site. I consider that to be the wrong approach. The scheme is taken to be cancelled at the relevant date; its pre-existence is not to be ignored and it is not open to the appellant to assess what may or may not have happened in the past had the scheme never existed.

Determination

35. I am satisfied that residential development without any requirement for affordable housing is, for the purposes of section 14 of the 1961 Act appropriate alternative development in relation to the acquisition of the appeal site. I therefore vary the CAAD issued by BBNPA on 14 January 2015 so as to delete the parenthesis "(as a 100% affordable housing development on an exception site in the countryside)" as it applies to C3-residential use. The remainder of the certificate is unaltered. A copy of the certificate as varied is attached as Appendix A.

36. For the avoidance of doubt the only part of the appeal site to which such an open residential use would apply is the area of previously developed car park land which Mr Muir confirmed at the hearing amounts to 0.68 ha (1.68 acres).

37. The conditions to which planning permission for the residential development of the appeal site could reasonably have expected to be subject would be the same, mutatis mutandis, as those attached to the planning permission for the residential development of the former E-Mag factory site dated 12 November 2012.

38. This decision is final. The question of costs is dealt with under section 17(10) of the 1961 Act which states:

“In assessing any compensation payable to any person in respect of any compulsory acquisition, there must be taken into account any expenses reasonably incurred by the person in connection with the issue of a certificate under this section (including expenses incurred in connection with an appeal under section 18 where any of the issues are determined in the person’s favour).”

39. The appellant has succeeded in its appeal and is entitled to its expenses reasonably incurred of making the section 17 application and the section 18 appeal as part of any compensation payable by the acquiring authority (the Welsh Government) as yet to be agreed or determined.

Dated: 14 April 2016

A J Trott FRICS

APPENDIX A

LAND COMPENSATION ACT 1961 (AS AMENDED)

CERTIFICATE OF APPROPRIATE ALTERNATIVE DEVELOPMENT

LAND KNOWN AS THE FORMER E-MAG FACTORY CAR PARK SITE, BRYNMAWR

PURSUANT TO the Tribunal's powers under section 18 of the Land Compensation Act 1961 (as amended) it is hereby **CERTIFIED** in relation to the said land that for the **REASONS** set out in its decision dated 13 April 2016:

- (1) The certificate issued by Brecon Beacons National Park Authority on 14 January 2015 is varied;
- (2) The following descriptions of development are, for the purposes of section 14 of the 1961 Act, appropriate alternative development in relation to the acquisition of the said land:
 - B1 - Light Industry;
 - B2 – General Industrial;
 - B8 – Storage and Distribution;
 - C3 – Residential; and
 - D2 – Assembly and Leisure (for sport, tourism or recreation uses).
- (3) The conditions to which planning permission for the residential development of the said land could reasonably have expected to be subject would be the same, mutatis mutandis, as those attached to the planning permission for the residential development of the former E-Mag factory site dated 12 November 2012.

Dated 14 April 2016

Signed: A J Trott FRICS

Member Upper Tribunal (Lands Chamber)

UPPER TRIBUNAL (LANDS CHAMBER)



Neutral Citation Number: [2016] UKUT 0172 (LC)
Case No: DET/6/2015

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

Compensation – planning permission – compulsory acquisition of land required for new highway – appeal against certificate of appropriate alternative development restricting residential development to 100% affordable housing – development plan – material consideration of extant planning permission on balance of site – Land Compensation Act 1961, s18 – appeal allowed

IN THE MATTER OF AN APPEAL UNDER S.18 OF THE
LAND COMPENSATION ACT 1961

BY:

MINTBLUE PROPERTIES LIMITED

Appellant

Re: Car Park of former E-Mag Factory,
Brynmawr,
Blaenau Gwent.

Hearing date: 6 April 2016

A J TROTT FRICS

Cardiff Civil Justice Centre, 2 Park Street, Cardiff CF10 1ET

Emyr Jones, instructed by Harmers Limited, for the appellant

The following cases are referred to in this decision:

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Harringay Meat Traders Ltd v Secretary of State for Communities and Local Government [2012] EWHC 1744 (Admin)

Tescan Limited v Cornwall Council [2015] RVR 251

Tesco Stores Ltd v Secretary of State for the Environment and Others [1995] 2 All ER 636

Fletcher Estates (Harlescott) Limited v Secretary of State for the Environment [2000] 2 AC 307

DECISION

Introduction

1. On 14 October 2014 (“the relevant date”) the Welsh Government made the Welsh Ministers (The Neath to Abergavenny Trunk Road (A465) (Abergavenny to Hirwaun Dualling and Slip Roads) and East of Abercynon to East of Dowlais Trunk Road (A4060) and Cardiff to Glan Conwy Trunk Road (A470) (Connecting Roads) (Gilwern to Brynmawr)) Compulsory Purchase Order (“the CPO”). The site known as the former E-Mag factory car park, Brynmawr, Blaenau Gwent (“the appeal site”) was identified as part of the land to be compulsorily acquired. The appeal site had a total area of 1.39 ha of which 0.68 ha previously formed the hardstanding area for the car park. The remainder of the appeal site comprised steeply sloping land to the west and south that was not capable of development.

2. On 15 September 2014 the appellant, Mintblue Properties Ltd, applied under section 17 of the Land Compensation Act 1961 (“the 1961 Act”) to Brecon Beacons National Park Authority (“BBNPA”) as the local planning authority (with a copy served on the Welsh Government as the acquiring authority) for a certificate of appropriate alternative development (“CAAD”). The application specified that in the appellant’s opinion residential development would be appropriate alternative development in relation to the appeal site for the purposes of section 14 of the 1961 Act.

3. On 14 January 2015 BBNPA issued a CAAD certifying that the following classes of development would have been granted planning permission if the acquiring authority had not proposed to compulsorily acquire the appeal site:

“B1 - Light Industry;

B2 – General Industrial;

B8 – Storage and Distribution;

C3 – Residential (as a 100% affordable housing development on an exceptions site in the countryside); and

D2 – Assembly and Leisure (for sport, tourism or recreation uses).”

4. On 27 January 2015 the appellant appealed to the Tribunal against the CAAD. The only dispute was about the limitation which BBNPA had imposed on the C3 residential use. The appellant said there was no justification for limiting that use to 100% affordable housing.

5. The appeal has a rather unusual procedural history. The notice of appeal identified BBNPA as the respondent to the appeal but the Tribunal served a copy of the notice on both BBNPA and the Welsh Government on 10 February 2015. In its letter to BBNPA the Tribunal directed them to file and serve a response to the appeal. BBNPA served a respondent’s notice

together with a statement of case on 13 March 2015. In its letter to the Welsh Government the Tribunal stated “If you wish to be joined as a party to this appeal, you must make an application to be joined pursuant to Rule 9, complying with Rules 5 and 6.” The Welsh Government did not respond to the Tribunal’s letter.

6. Ms Tracy Nettleton, the Planning and Heritage Manager at BBNPA, filed and served an expert report in August 2015 but then queried why BBNPA were a party to the appeal since the acquiring authority was the Welsh Government. The Tribunal acknowledged that it should have notified BBNPA of the proceedings as a matter of courtesy rather than as the respondent to the appeal. BBNPA then withdrew from the proceedings on 27 August 2015. The proper respondent to the proceedings was the Welsh Government and the Tribunal re-served its letter to them dated 10 February 2015 on 2 September 2015. That letter did not state that the Welsh Government was the respondent to the appeal and the notice of reference, which was copied to the Welsh Government, stated that the respondent was BBNPA. Nevertheless the Welsh Government was offered the opportunity to become a respondent. On 10 September 2015 the Welsh Government wrote to the Tribunal acknowledging the (re-served) letter of 10 February 2015 and confirming “that we will not be a joint party to the Appeal.” That decision was taken without the Tribunal having told the Welsh Government in terms that it considered that it was the proper respondent to the appeal. As a consequence of the Welsh Government’s decision not to become a party the appeal proceeded unopposed.

7. The parties to an appeal under section 18(1) of the 1961 Act (as amended) are:

- “(a) the person for the time being entitled to [an interest in land in respect of which the local planning authority have served a section 17 certificate], or
- (b) any authority possessing compulsory purchase powers by whom that interest is proposed to be, or is, acquired.”

In this case confusion has arisen because the local planning authority and the acquiring authority are not the same authority. The proper respondent to an appeal made by the person entitled to an interest in the land is the acquiring authority. The local planning authority, whose decision is the subject of the appeal, is not a party to the appeal under section 18 of the 1961 Act. Care should be taken by appellants when submitting a notice of appeal under section 18 to ensure that the acquiring authority is named as the respondent to the appeal.

8. Mr Emyr Jones of counsel appeared for the appellant and called Mr Andrew Muir BSc DipTP, MRTPI, Managing Director of Harmers Limited, as an expert planning witness.

9. I made an accompanied visit to the appeal site on 5 April 2016.

Facts

10. I find the following facts from the evidence.

11. The appeal site forms part of a larger site known as the former E-Mag factory site which is located immediately to the north of the A465(T) Heads of the Valleys Road to the north east of Brynmawr. The appeal site is located to the west of the main factory site and was used in part as a surface car park. To the north of the appeal site is a school and to the south west is the developed area of Brynmawr. The boundary of the Brecon Beacons National Park at this point follows the Heads of the Valleys Road and so the former E-Mag factory site and the appeal site are both within the National Park while Brynmawr, on the other side of the Heads of The Valleys Road, is within the neighbouring authority, Blaenau Gwent County Borough Council.

12. The development plan at the relevant date was the Brecon Beacons National Park Local Development Plan (“the LDP”) which was adopted on 17 December 2013. The appeal site is designated as countryside in that plan. The LDP’s spatial strategy sets out a hierarchy of 5 “settlement types”. Countryside is designated as level 5 and comprises:

“Places with no potential to accommodate any level of growth. Development here will be limited to that which is proven essential in accordance with National Planning Policy.”

13. Policy ELP1: Community Sustainability Edge of Settlement Exceptions provides that development proposals that are essential to community sustainability and/or have limited environmental impact will be enabled at edge of settlement locations. The policy identifies eight types of acceptable exceptions development, the first of which is “proposals for 100% affordable housing development.”

14. The acceptable exception for affordable housing refers to Policy 29: Enabling Affordable Housing Exception Sites which states:

“Exceptionally, development for Affordable Housing will be permitted on sites in or adjoining and forming a logical extension to appropriate settlements, to meet a proven local need that cannot be met in any other way, where a local need has been established by a housing needs survey.”

15. Policy CYD LP1: Enabling Appropriate Development provides that proposals for development in countryside locations will be required to contribute positively to their countryside setting and enhance the quality of the landscape without adverse impact on the wildlife, natural beauty, cultural heritage, environmental assets or biodiversity of the area.

16. BBNPA relied upon policies ELP1, 29 and CYD LP’ to support their decision on the CAAD application. In addition they accepted that the part of the appeal site that was formerly used as a car park conformed with the definition of “previously developed land” as set out in Figure 4.3 of Planning Policy Wales 7th Edition (2014).

17. The former E-Mag factory site was also shown in the LDP as countryside. In addition it was designated as a housing commitment (reference COM-BRM-A) for 94 houses. This

commitment reflected a planning permission that was granted on 12 November 2012 following the completion of a section 106 agreement. That planning permission remains extant. The planning application for this development was submitted on 17 January 2005. In January 2006 BBNPA resolved to grant planning permission subject to the planning agreement that was eventually completed in 2012.

18. It was originally intended the appeal site be included in the application for residential development with the main E-Mag factory site. But on 13 April 2004 the Welsh Assembly Government wrote to the applicant's agent with a copy of the Line Order and the relevant Line Order Plan extract for the A465 improvement. This showed that the appeal site was required for the new road and it was decided to exclude it from the planning application for residential development.

19. At the time of the planning application for the residential development of the E-Mag factory site in 2005 the adopted plan was the Brecon Beacons National Park Local Plan (May 1999) and the Draft Brecon Beacons National Park UDP (June 2004). The appeal site was shown as countryside in both plans. In the Draft Deposit UDP which was approved by BBNPA for development control purposes in 2007 (but never formally adopted) the former E-Mag factory site was shown as a "white area" upon the recommendation of the UDP planning inspector. White areas applied to settlements, or parts of settlements, where the principle of development was acceptable.

20. At the local inquiry into the UDP the BBNPA argued that the best approach was to leave the site as countryside and to determine any application as a departure from the plan. Because only a small amount of Brynmawr's urban form fell within the National Park boundary, the E-Mag factory site was not included in BBNPA's assessment of settlements during the process to establish the settlement hierarchy. BBNPA described the site as an anomaly and while any housing development would benefit residents living outside the National Park it would technically count towards BBNPA's overall housing provision from allocated sites. Leaving the site as countryside would prevent any distortion of BBNPA's housing figures and leave their housing allocation strategy intact.

21. The inspector did not accept this argument and said in his report:

"The BBNPA indicated at the Inquiry that they saw no objection in principle to housing on the site, but felt that it would contribute towards the housing needs of the adjoining area, and not those of the National Park ... The Authority accepted at the Inquiry that, had Brynmawr been in the National Park, this land would probably have been included within the settlement boundary.

In my view it would be incongruous to show this site as countryside, whilst acknowledging that it would be appropriate for development."

Accordingly the inspector recommended that the E-Mag factory be defined as a white area.

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22. An application under section 17 of the 1961 Act, as amended, enables “either of the parties directly concerned” (i.e. the landowner and the acquiring authority) to apply to the local planning authority for a certificate stating whether or not, in the authority’s opinion, there is development that, for the purposes of section 14 (i.e. taking account of actual or prospective planning permission), is appropriate alternative development in relation to the compulsory acquisition. If the local planning authority considers that there is appropriate alternative development, the certificate must identify every description of such development and give a general indication of any conditions to which planning permission for it could reasonably have been expected to be subject, when the permission could reasonably have been expected to be granted and any pre-condition for granting the permission (section 17(5)).

23. The certification process under section 17 requires the decision-maker (whether the local planning authority or, on appeal, the Tribunal) to form an opinion on the description of development that would have been allowed had a planning application been made in accordance with the Planning Acts by determining the hypothetical application in accordance with normal planning principles as at the relevant date. That involves consideration of section 38(6) of the Planning and Compulsory Purchase Act 2004, i.e. the requirement to determine planning applications in accordance with the development plan unless material considerations indicate otherwise. The decision-maker may therefore depart from the development plan where appropriate: see *Harringay Meat Traders Ltd v Secretary of State for Communities and Local Government* [2012] EWHC 1744 (Admin) and *Tescan Limited v Cornwall Council* [2015] RVR 251.

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it and issue a different certificate in its place, as the Tribunal may consider appropriate (section 18(2)).

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27. The appellant's case may be summarised as follows:

- (i) BBNPA have accepted the principle of residential development on the appeal site.
- (ii) They have restricted such residential development to 100% affordable housing because:
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 - (b) Policy 29 applies.
- (iii) BBNPA's approach only takes account of the development plan and ignores material considerations such as the extant planning permission for residential development granted on the adjoining former E-Mag factory site in 2012.
- (iv) The planning policy context that existed and was taken into account when BBNPA resolved to grant residential planning permission in 2006 was equally applicable to the consideration of the potential development of the appeal site today.
- (v) BBNPA should have given due weight to the factors which led them to resolve to grant planning permission on the former E-Mag factory site when considering the CAAD application on the adjoining appeal site.
- (vi) The existence of the planning permission on the E-Mag factory site meant that the appeal site was in fact more suitable for residential development. In the no-scheme world at the relevant date the edge of the Brynmawr settlement would have extended to the east of the former E-Mag factory site leaving the appeal site as an obvious infill development.
- (vii) In the no scheme world the appeal site would not have been included in the Heads of the Valleys Road improvement scheme and would have formed part of the site of the former E-Mag factory site for which BBNPA resolved to grant residential planning permission in 2006.
- (viii) Policy 29 was not satisfied at the relevant date because:
 - (a) There was no proven local need for affordable housing in the locality of the appeal site;
 - (b) No housing needs survey existed;
 - (c) The appeal site was not an extension of a settlement in the National Park but of a settlement, Brynmawr, that was in Blaenau Gwent; and

- (d) There was no evidence that any local need, if it existed, could not be met in another way.
- (ix) Policy 28 of the LDP (Affordable Housing Contributions) stated that in the Heads of the Valleys and Rural Submarket, where the appeal site is located, the target level of affordable housing contributions was 0%.
- (x) The certificate issued by BBNPA was a failed attempt to slavishly follow the LDP's designation of the appeal site as countryside.

Discussion

28. I am required to determine whether, on the balance of probabilities, planning permission for the residential development of the appeal site with no requirement for any affordable housing could reasonably have been expected to be granted on the relevant date in the circumstances known to the market on that date and on an application decided on that date or at a time after that date (section 14(4)). I must determine the issue in accordance with the development plan unless material considerations indicate otherwise.

29. At the relevant date:

- (i) The development plan was the LDP;
- (ii) The appeal site was shown as countryside in the LDP but adjoined a site identified as a residential commitment (the former E-Mag factory site); and
- (iii) The former E-Mag factory site had planning permission for residential development subject to an affordable housing element of 20%.

30. In my opinion the existence of an extant residential planning permission on the adjoining E-Mag factory site is a material consideration to which significant weight should be given. BBNPA have seemingly failed to accord any weight to this planning permission, relying instead upon an interpretation of Policy 29: Affordable Housing Exceptions. I consider BBNPA's reliance upon this policy to be misdirected for a number of reasons:

- (i) The appeal site adjoins and forms a logical extension to the settlement of Brynmawr which is not in the Brecon Beacons National Park but in the neighbouring authority of Blaenau Gwent County Borough Council;
- (ii) There is no proven need for affordable housing that cannot be met in any other way;
- (iii) There is no housing needs survey;

- (iv) Policy 28 of the LDP says that no affordable housing contributions are required in the Heads of the Valleys and Rural South Submarket in which the appeal site is located.

31. The inspector at the UDP Inquiry found it incongruous that BBNPA wanted to show the E-Mag factory site as countryside while at the same time acknowledging its suitability for development. Their reasoning seems to have been one of simple expediency: they were reluctant to allocate the site for housing which would thereby count towards BBNPA's overall housing provision when it would primarily benefit Brynmawr in neighbouring Blaenau Gwent.

32. BBNPA continue to recognise the suitability of the site for residential development but they have tried to shoehorn this acceptance into Affordable Housing Exceptions Policy 29. For the reasons stated above I do not consider this to be appropriate.

33. The appeal site is a brownfield site that was previously used in part as a hardstanding for car parking. It is in a sustainable location and, if the scheme was cancelled, would be surrounded by the urban form of Brynmawr to the south and west, by the school to the north and by the committed residential development site at the former E-Mag factory site to the east. Under these circumstances I am satisfied that on the balance of probabilities the appeal site could reasonably have been expected to be granted planning permission for residential development without dependence upon Policy 29 which I do not consider to be applicable. The 20% affordable housing policy that was in force when planning permission was granted for the former E-Mag factory site in 2012 no longer applied at the relevant date. Instead Policy 28 had been introduced and it required no affordable housing for developments, such as could have been expected at the appeal site, which were located in the Heads of the Valleys and Rural South Submarket.

34. Mr Muir argues that in the no scheme world the appeal site would have been combined into a larger residential site with the E-Mag factory site. I consider that to be the wrong approach. The scheme is taken to be cancelled at the relevant date; its pre-existence is not to be ignored and it is not open to the appellant to assess what may or may not have happened in the past had the scheme never existed.

Determination

35. I am satisfied that residential development without any requirement for affordable housing is, for the purposes of section 14 of the 1961 Act appropriate alternative development in relation to the acquisition of the appeal site. I therefore vary the CAAD issued by BBNPA on 14 January 2015 so as to delete the parenthesis "(as a 100% affordable housing development on an exception site in the countryside)" as it applies to C3-residential use. The remainder of the certificate is unaltered. A copy of the certificate as varied is attached as Appendix A.

36. For the avoidance of doubt the only part of the appeal site to which such an open residential use would apply is the area of previously developed car park land which Mr Muir confirmed at the hearing amounts to 0.68 ha (1.68 acres).

37. The conditions to which planning permission for the residential development of the appeal site could reasonably have expected to be subject would be the same, mutatis mutandis, as those attached to the planning permission for the residential development of the former E-Mag factory site dated 12 November 2012.

38. This decision is final. The question of costs is dealt with under section 17(10) of the 1961 Act which states:

“In assessing any compensation payable to any person in respect of any compulsory acquisition, there must be taken into account any expenses reasonably incurred by the person in connection with the issue of a certificate under this section (including expenses incurred in connection with an appeal under section 18 where any of the issues are determined in the person’s favour).”

39. The appellant has succeeded in its appeal and is entitled to its expenses reasonably incurred of making the section 17 application and the section 18 appeal as part of any compensation payable by the acquiring authority (the Welsh Government) as yet to be agreed or determined.

Dated: 14 April 2016

A J Trott FRICS

APPENDIX A

LAND COMPENSATION ACT 1961 (AS AMENDED)

CERTIFICATE OF APPROPRIATE ALTERNATIVE DEVELOPMENT

LAND KNOWN AS THE FORMER E-MAG FACTORY CAR PARK SITE, BRYNMAWR

PURSUANT TO the Tribunal's powers under section 18 of the Land Compensation Act 1961 (as amended) it is hereby **CERTIFIED** in relation to the said land that for the **REASONS** set out in its decision dated 13 April 2016:

- (1) The certificate issued by Brecon Beacons National Park Authority on 14 January 2015 is varied;
- (2) The following descriptions of development are, for the purposes of section 14 of the 1961 Act, appropriate alternative development in relation to the acquisition of the said land:
 - B1 - Light Industry;
 - B2 – General Industrial;
 - B8 – Storage and Distribution;
 - C3 – Residential; and
 - D2 – Assembly and Leisure (for sport, tourism or recreation uses).
- (3) The conditions to which planning permission for the residential development of the said land could reasonably have expected to be subject would be the same, mutatis mutandis, as those attached to the planning permission for the residential development of the former E-Mag factory site dated 12 November 2012.

Dated 14 April 2016

Signed: A J Trott FRICS

Member Upper Tribunal (Lands Chamber)

UPPER TRIBUNAL (LANDS CHAMBER)



Neutral Citation Number: [2016] UKUT 0172 (LC)
Case No: DET/6/2015

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

Compensation – planning permission – compulsory acquisition of land required for new highway – appeal against certificate of appropriate alternative development restricting residential development to 100% affordable housing – development plan – material consideration of extant planning permission on balance of site – Land Compensation Act 1961, s18 – appeal allowed

IN THE MATTER OF AN APPEAL UNDER S.18 OF THE
LAND COMPENSATION ACT 1961

BY:

MINTBLUE PROPERTIES LIMITED

Appellant

Re: Car Park of former E-Mag Factory,
Brynmawr,
Blaenau Gwent.

Hearing date: 6 April 2016

A J TROTT FRICS

Cardiff Civil Justice Centre, 2 Park Street, Cardiff CF10 1ET

Emyr Jones, instructed by Harmers Limited, for the appellant

The following cases are referred to in this decision:

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Harringay Meat Traders Ltd v Secretary of State for Communities and Local Government [2012] EWHC 1744 (Admin)

Tescan Limited v Cornwall Council [2015] RVR 251

Tesco Stores Ltd v Secretary of State for the Environment and Others [1995] 2 All ER 636

Fletcher Estates (Harlescott) Limited v Secretary of State for the Environment [2000] 2 AC 307

DECISION

Introduction

1. On 14 October 2014 (“the relevant date”) the Welsh Government made the Welsh Ministers (The Neath to Abergavenny Trunk Road (A465) (Abergavenny to Hirwaun Dualling and Slip Roads) and East of Abercynon to East of Dowlais Trunk Road (A4060) and Cardiff to Glan Conwy Trunk Road (A470) (Connecting Roads) (Gilwern to Brynmawr)) Compulsory Purchase Order (“the CPO”). The site known as the former E-Mag factory car park, Brynmawr, Blaenau Gwent (“the appeal site”) was identified as part of the land to be compulsorily acquired. The appeal site had a total area of 1.39 ha of which 0.68 ha previously formed the hardstanding area for the car park. The remainder of the appeal site comprised steeply sloping land to the west and south that was not capable of development.

2. On 15 September 2014 the appellant, Mintblue Properties Ltd, applied under section 17 of the Land Compensation Act 1961 (“the 1961 Act”) to Brecon Beacons National Park Authority (“BBNPA”) as the local planning authority (with a copy served on the Welsh Government as the acquiring authority) for a certificate of appropriate alternative development (“CAAD”). The application specified that in the appellant’s opinion residential development would be appropriate alternative development in relation to the appeal site for the purposes of section 14 of the 1961 Act.

3. On 14 January 2015 BBNPA issued a CAAD certifying that the following classes of development would have been granted planning permission if the acquiring authority had not proposed to compulsorily acquire the appeal site:

“B1 - Light Industry;

B2 – General Industrial;

B8 – Storage and Distribution;

C3 – Residential (as a 100% affordable housing development on an exceptions site in the countryside); and

D2 – Assembly and Leisure (for sport, tourism or recreation uses).”

4. On 27 January 2015 the appellant appealed to the Tribunal against the CAAD. The only dispute was about the limitation which BBNPA had imposed on the C3 residential use. The appellant said there was no justification for limiting that use to 100% affordable housing.

5. The appeal has a rather unusual procedural history. The notice of appeal identified BBNPA as the respondent to the appeal but the Tribunal served a copy of the notice on both BBNPA and the Welsh Government on 10 February 2015. In its letter to BBNPA the Tribunal directed them to file and serve a response to the appeal. BBNPA served a respondent’s notice

together with a statement of case on 13 March 2015. In its letter to the Welsh Government the Tribunal stated “If you wish to be joined as a party to this appeal, you must make an application to be joined pursuant to Rule 9, complying with Rules 5 and 6.” The Welsh Government did not respond to the Tribunal’s letter.

6. Ms Tracy Nettleton, the Planning and Heritage Manager at BBNPA, filed and served an expert report in August 2015 but then queried why BBNPA were a party to the appeal since the acquiring authority was the Welsh Government. The Tribunal acknowledged that it should have notified BBNPA of the proceedings as a matter of courtesy rather than as the respondent to the appeal. BBNPA then withdrew from the proceedings on 27 August 2015. The proper respondent to the proceedings was the Welsh Government and the Tribunal re-served its letter to them dated 10 February 2015 on 2 September 2015. That letter did not state that the Welsh Government was the respondent to the appeal and the notice of reference, which was copied to the Welsh Government, stated that the respondent was BBNPA. Nevertheless the Welsh Government was offered the opportunity to become a respondent. On 10 September 2015 the Welsh Government wrote to the Tribunal acknowledging the (re-served) letter of 10 February 2015 and confirming “that we will not be a joint party to the Appeal.” That decision was taken without the Tribunal having told the Welsh Government in terms that it considered that it was the proper respondent to the appeal. As a consequence of the Welsh Government’s decision not to become a party the appeal proceeded unopposed.

7. The parties to an appeal under section 18(1) of the 1961 Act (as amended) are:

- “(a) the person for the time being entitled to [an interest in land in respect of which the local planning authority have served a section 17 certificate], or
- (b) any authority possessing compulsory purchase powers by whom that interest is proposed to be, or is, acquired.”

In this case confusion has arisen because the local planning authority and the acquiring authority are not the same authority. The proper respondent to an appeal made by the person entitled to an interest in the land is the acquiring authority. The local planning authority, whose decision is the subject of the appeal, is not a party to the appeal under section 18 of the 1961 Act. Care should be taken by appellants when submitting a notice of appeal under section 18 to ensure that the acquiring authority is named as the respondent to the appeal.

8. Mr Emyr Jones of counsel appeared for the appellant and called Mr Andrew Muir BSc DipTP, MRTPI, Managing Director of Harmers Limited, as an expert planning witness.

9. I made an accompanied visit to the appeal site on 5 April 2016.

Facts

10. I find the following facts from the evidence.

11. The appeal site forms part of a larger site known as the former E-Mag factory site which is located immediately to the north of the A465(T) Heads of the Valleys Road to the north east of Brynmawr. The appeal site is located to the west of the main factory site and was used in part as a surface car park. To the north of the appeal site is a school and to the south west is the developed area of Brynmawr. The boundary of the Brecon Beacons National Park at this point follows the Heads of the Valleys Road and so the former E-Mag factory site and the appeal site are both within the National Park while Brynmawr, on the other side of the Heads of The Valleys Road, is within the neighbouring authority, Blaenau Gwent County Borough Council.

12. The development plan at the relevant date was the Brecon Beacons National Park Local Development Plan (“the LDP”) which was adopted on 17 December 2013. The appeal site is designated as countryside in that plan. The LDP’s spatial strategy sets out a hierarchy of 5 “settlement types”. Countryside is designated as level 5 and comprises:

“Places with no potential to accommodate any level of growth. Development here will be limited to that which is proven essential in accordance with National Planning Policy.”

13. Policy ELP1: Community Sustainability Edge of Settlement Exceptions provides that development proposals that are essential to community sustainability and/or have limited environmental impact will be enabled at edge of settlement locations. The policy identifies eight types of acceptable exceptions development, the first of which is “proposals for 100% affordable housing development.”

14. The acceptable exception for affordable housing refers to Policy 29: Enabling Affordable Housing Exception Sites which states:

“Exceptionally, development for Affordable Housing will be permitted on sites in or adjoining and forming a logical extension to appropriate settlements, to meet a proven local need that cannot be met in any other way, where a local need has been established by a housing needs survey.”

15. Policy CYD LP1: Enabling Appropriate Development provides that proposals for development in countryside locations will be required to contribute positively to their countryside setting and enhance the quality of the landscape without adverse impact on the wildlife, natural beauty, cultural heritage, environmental assets or biodiversity of the area.

16. BBNPA relied upon policies ELP1, 29 and CYD LP’ to support their decision on the CAAD application. In addition they accepted that the part of the appeal site that was formerly used as a car park conformed with the definition of “previously developed land” as set out in Figure 4.3 of Planning Policy Wales 7th Edition (2014).

17. The former E-Mag factory site was also shown in the LDP as countryside. In addition it was designated as a housing commitment (reference COM-BRM-A) for 94 houses. This

commitment reflected a planning permission that was granted on 12 November 2012 following the completion of a section 106 agreement. That planning permission remains extant. The planning application for this development was submitted on 17 January 2005. In January 2006 BBNPA resolved to grant planning permission subject to the planning agreement that was eventually completed in 2012.

18. It was originally intended the appeal site be included in the application for residential development with the main E-Mag factory site. But on 13 April 2004 the Welsh Assembly Government wrote to the applicant's agent with a copy of the Line Order and the relevant Line Order Plan extract for the A465 improvement. This showed that the appeal site was required for the new road and it was decided to exclude it from the planning application for residential development.

19. At the time of the planning application for the residential development of the E-Mag factory site in 2005 the adopted plan was the Brecon Beacons National Park Local Plan (May 1999) and the Draft Brecon Beacons National Park UDP (June 2004). The appeal site was shown as countryside in both plans. In the Draft Deposit UDP which was approved by BBNPA for development control purposes in 2007 (but never formally adopted) the former E-Mag factory site was shown as a "white area" upon the recommendation of the UDP planning inspector. White areas applied to settlements, or parts of settlements, where the principle of development was acceptable.

20. At the local inquiry into the UDP the BBNPA argued that the best approach was to leave the site as countryside and to determine any application as a departure from the plan. Because only a small amount of Brynmawr's urban form fell within the National Park boundary, the E-Mag factory site was not included in BBNPA's assessment of settlements during the process to establish the settlement hierarchy. BBNPA described the site as an anomaly and while any housing development would benefit residents living outside the National Park it would technically count towards BBNPA's overall housing provision from allocated sites. Leaving the site as countryside would prevent any distortion of BBNPA's housing figures and leave their housing allocation strategy intact.

21. The inspector did not accept this argument and said in his report:

"The BBNPA indicated at the Inquiry that they saw no objection in principle to housing on the site, but felt that it would contribute towards the housing needs of the adjoining area, and not those of the National Park ... The Authority accepted at the Inquiry that, had Brynmawr been in the National Park, this land would probably have been included within the settlement boundary.

In my view it would be incongruous to show this site as countryside, whilst acknowledging that it would be appropriate for development."

Accordingly the inspector recommended that the E-Mag factory be defined as a white area.

Statutory provisions

22. An application under section 17 of the 1961 Act, as amended, enables “either of the parties directly concerned” (i.e. the landowner and the acquiring authority) to apply to the local planning authority for a certificate stating whether or not, in the authority’s opinion, there is development that, for the purposes of section 14 (i.e. taking account of actual or prospective planning permission), is appropriate alternative development in relation to the compulsory acquisition. If the local planning authority considers that there is appropriate alternative development, the certificate must identify every description of such development and give a general indication of any conditions to which planning permission for it could reasonably have been expected to be subject, when the permission could reasonably have been expected to be granted and any pre-condition for granting the permission (section 17(5)).

23. The certification process under section 17 requires the decision-maker (whether the local planning authority or, on appeal, the Tribunal) to form an opinion on the description of development that would have been allowed had a planning application been made in accordance with the Planning Acts by determining the hypothetical application in accordance with normal planning principles as at the relevant date. That involves consideration of section 38(6) of the Planning and Compulsory Purchase Act 2004, i.e. the requirement to determine planning applications in accordance with the development plan unless material considerations indicate otherwise. The decision-maker may therefore depart from the development plan where appropriate: see *Harringay Meat Traders Ltd v Secretary of State for Communities and Local Government* [2012] EWHC 1744 (Admin) and *Tescan Limited v Cornwall Council* [2015] RVR 251.

24. What constitutes a “material consideration” is a matter of law; what weight should be given to it is solely a judgment for the decision-maker: see *Tesco Stores Ltd v Secretary of State for the Environment and Others* [1995] 2 All ER 636 per Lord Hoffmann at 657[13]. The decision-maker must be satisfied on the balance of probabilities that planning permission would have been granted for the description of development applied for and it does not have to assess more precisely the chances or prospects of that development happening or of the permission being implemented: see *Tescan* at paragraph 68.

25. In *Fletcher Estates (Harlescott) Limited v Secretary of State for the Environment* [2000] 2 AC 307 Lord Hope said at 322 that section 17 requires the decision-maker to assume that:

“The scheme for which the land is proposed to be acquired together with the underlying proposal which may appear in any of the planning documents must be assumed on [the relevant date] to have been cancelled. No assumption has to be made as to [what] may or may not have happened in the past.”

26. On any appeal against a section 17 certificate the Tribunal must consider the matters to which the certificate relates as if the application for a certificate under section 17 had been made to the Tribunal in the first place and must (i) confirm the certificate or (ii) vary it, or (iii) cancel

it and issue a different certificate in its place, as the Tribunal may consider appropriate (section 18(2)).

The appellant's case

27. The appellant's case may be summarised as follows:

- (i) BBNPA have accepted the principle of residential development on the appeal site.
- (ii) They have restricted such residential development to 100% affordable housing because:
 - (a) The appeal site is shown in the LDP as countryside and therefore
 - (b) Policy 29 applies.
- (iii) BBNPA's approach only takes account of the development plan and ignores material considerations such as the extant planning permission for residential development granted on the adjoining former E-Mag factory site in 2012.
- (iv) The planning policy context that existed and was taken into account when BBNPA resolved to grant residential planning permission in 2006 was equally applicable to the consideration of the potential development of the appeal site today.
- (v) BBNPA should have given due weight to the factors which led them to resolve to grant planning permission on the former E-Mag factory site when considering the CAAD application on the adjoining appeal site.
- (vi) The existence of the planning permission on the E-Mag factory site meant that the appeal site was in fact more suitable for residential development. In the no-scheme world at the relevant date the edge of the Brynmawr settlement would have extended to the east of the former E-Mag factory site leaving the appeal site as an obvious infill development.
- (vii) In the no scheme world the appeal site would not have been included in the Heads of the Valleys Road improvement scheme and would have formed part of the site of the former E-Mag factory site for which BBNPA resolved to grant residential planning permission in 2006.
- (viii) Policy 29 was not satisfied at the relevant date because:
 - (a) There was no proven local need for affordable housing in the locality of the appeal site;
 - (b) No housing needs survey existed;
 - (c) The appeal site was not an extension of a settlement in the National Park but of a settlement, Brynmawr, that was in Blaenau Gwent; and

- (d) There was no evidence that any local need, if it existed, could not be met in another way.
- (ix) Policy 28 of the LDP (Affordable Housing Contributions) stated that in the Heads of the Valleys and Rural Submarket, where the appeal site is located, the target level of affordable housing contributions was 0%.
- (x) The certificate issued by BBNPA was a failed attempt to slavishly follow the LDP's designation of the appeal site as countryside.

Discussion

28. I am required to determine whether, on the balance of probabilities, planning permission for the residential development of the appeal site with no requirement for any affordable housing could reasonably have been expected to be granted on the relevant date in the circumstances known to the market on that date and on an application decided on that date or at a time after that date (section 14(4)). I must determine the issue in accordance with the development plan unless material considerations indicate otherwise.

29. At the relevant date:

- (i) The development plan was the LDP;
- (ii) The appeal site was shown as countryside in the LDP but adjoined a site identified as a residential commitment (the former E-Mag factory site); and
- (iii) The former E-Mag factory site had planning permission for residential development subject to an affordable housing element of 20%.

30. In my opinion the existence of an extant residential planning permission on the adjoining E-Mag factory site is a material consideration to which significant weight should be given. BBNPA have seemingly failed to accord any weight to this planning permission, relying instead upon an interpretation of Policy 29: Affordable Housing Exceptions. I consider BBNPA's reliance upon this policy to be misdirected for a number of reasons:

- (i) The appeal site adjoins and forms a logical extension to the settlement of Brynmawr which is not in the Brecon Beacons National Park but in the neighbouring authority of Blaenau Gwent County Borough Council;
- (ii) There is no proven need for affordable housing that cannot be met in any other way;
- (iii) There is no housing needs survey;

- (iv) Policy 28 of the LDP says that no affordable housing contributions are required in the Heads of the Valleys and Rural South Submarket in which the appeal site is located.

31. The inspector at the UDP Inquiry found it incongruous that BBNPA wanted to show the E-Mag factory site as countryside while at the same time acknowledging its suitability for development. Their reasoning seems to have been one of simple expediency: they were reluctant to allocate the site for housing which would thereby count towards BBNPA's overall housing provision when it would primarily benefit Brynmawr in neighbouring Blaenau Gwent.

32. BBNPA continue to recognise the suitability of the site for residential development but they have tried to shoehorn this acceptance into Affordable Housing Exceptions Policy 29. For the reasons stated above I do not consider this to be appropriate.

33. The appeal site is a brownfield site that was previously used in part as a hardstanding for car parking. It is in a sustainable location and, if the scheme was cancelled, would be surrounded by the urban form of Brynmawr to the south and west, by the school to the north and by the committed residential development site at the former E-Mag factory site to the east. Under these circumstances I am satisfied that on the balance of probabilities the appeal site could reasonably have been expected to be granted planning permission for residential development without dependence upon Policy 29 which I do not consider to be applicable. The 20% affordable housing policy that was in force when planning permission was granted for the former E-Mag factory site in 2012 no longer applied at the relevant date. Instead Policy 28 had been introduced and it required no affordable housing for developments, such as could have been expected at the appeal site, which were located in the Heads of the Valleys and Rural South Submarket.

34. Mr Muir argues that in the no scheme world the appeal site would have been combined into a larger residential site with the E-Mag factory site. I consider that to be the wrong approach. The scheme is taken to be cancelled at the relevant date; its pre-existence is not to be ignored and it is not open to the appellant to assess what may or may not have happened in the past had the scheme never existed.

Determination

35. I am satisfied that residential development without any requirement for affordable housing is, for the purposes of section 14 of the 1961 Act appropriate alternative development in relation to the acquisition of the appeal site. I therefore vary the CAAD issued by BBNPA on 14 January 2015 so as to delete the parenthesis "(as a 100% affordable housing development on an exception site in the countryside)" as it applies to C3-residential use. The remainder of the certificate is unaltered. A copy of the certificate as varied is attached as Appendix A.

36. For the avoidance of doubt the only part of the appeal site to which such an open residential use would apply is the area of previously developed car park land which Mr Muir confirmed at the hearing amounts to 0.68 ha (1.68 acres).

37. The conditions to which planning permission for the residential development of the appeal site could reasonably have expected to be subject would be the same, mutatis mutandis, as those attached to the planning permission for the residential development of the former E-Mag factory site dated 12 November 2012.

38. This decision is final. The question of costs is dealt with under section 17(10) of the 1961 Act which states:

“In assessing any compensation payable to any person in respect of any compulsory acquisition, there must be taken into account any expenses reasonably incurred by the person in connection with the issue of a certificate under this section (including expenses incurred in connection with an appeal under section 18 where any of the issues are determined in the person’s favour).”

39. The appellant has succeeded in its appeal and is entitled to its expenses reasonably incurred of making the section 17 application and the section 18 appeal as part of any compensation payable by the acquiring authority (the Welsh Government) as yet to be agreed or determined.

Dated: 14 April 2016

A J Trott FRICS

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LAND COMPENSATION ACT 1961 (AS AMENDED)

CERTIFICATE OF APPROPRIATE ALTERNATIVE DEVELOPMENT

LAND KNOWN AS THE FORMER E-MAG FACTORY CAR PARK SITE, BRYNMAWR

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- (1) The certificate issued by Brecon Beacons National Park Authority on 14 January 2015 is varied;
- (2) The following descriptions of development are, for the purposes of section 14 of the 1961 Act, appropriate alternative development in relation to the acquisition of the said land:
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- (3) The conditions to which planning permission for the residential development of the said land could reasonably have expected to be subject would be the same, mutatis mutandis, as those attached to the planning permission for the residential development of the former E-Mag factory site dated 12 November 2012.

Dated 14 April 2016

Signed: A J Trott FRICS

Member Upper Tribunal (Lands Chamber)