**UPPER TRIBUNAL (LANDS CHAMBER)**


**UT Neutral citation number: [2009] UKUT 271 (LC)**
**LT Case Number: BNO/512/2008**

**TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007**

***BLIGHT NOTICE – maisonette – blighted land – appropriate authority's intention not to acquire any part of hereditament – reasonable endeavours to sell – unable to sell unless at substantially reduced price – claimant's failure to comply with prescribed form – objections not upheld – blight notice valid – Town and Country Planning Act 1990 section 151(4)(a), (b) and (g)***

**IN THE MATTER OF A NOTICE OF REFERENCE**

**BETWEEN** **THOMAS DAVID HEAD** **Claimant**

**and**

**EASTBOURNE BOROUGH COUNCIL** **Respondent**

**Re: Top floor flat,**
**58 Ashford Road,**
**Eastbourne,**
**East Sussex,**
**BN21 3TB**

**Determination on the basis of written representations under Rule 27 of the lands Tribunal Rules (as amended)**

**by**

**A J Trott FRICS**

The following cases are referred to in this decision:

*Regina v Secretary of State for the Home Department, ex parte Jeyeanthan* [2000] 1 WLR 354
*Jones v Greater Manchester Passenger Transport Executive* (1997) BNO/206/1995
*Halliday v Secretary of State for Transport* (2003) BNO/129/2002
*Bolton Corporation v Owen* [1962] 1 QB 470
*Elcock v Newham London Borough Council* (1996) 71 P&CR 575
*Sinclair v Secretary of State for Transport* (1998) 75 P&CR 548
*Burn v North Yorkshire County Council* (1992) 63 P&CR 81
*Mancini v Coventry City Council* (1985) 49 P&CR 127
*Betty's Cafes Limited v Phillips Furnishing Stores Limited* [1959] AC 20
*Louisville Investments Ltd v Basingstoke District Council* [1976] 32 P&CR 419
*Kayworth v Highways Agency* (1996) 72 P&CR 433
*Charman v Dorset County Council* (1986) 52 P&CR 88
*Edwards v Surrey County Council* [1999] 39 RVR 223 (LT)

The following cases were referred to in argument:

*Castle House Investments Ltd v City of Bradford Metropolitan District Council* [2007] RVR 277
*Gennard v Bridgnorth District Council* [2004] LT BNO/14/2004
*Cedar Holdings v Walsall Metropolitan Borough Council* (1979) 38 P&CR 715

## DECISION

### Introduction

1. This is a reference to determine whether a counter-notice served by Eastbourne Borough Council on the claimant, Mr Thomas Head, pursuant to service by him of a blight notice under section 150(1) of the Town and Country Planning Act 1990 to purchase his leasehold interest in the property known as Top Floor Flat, 58 Ashford Road, Eastbourne, East Sussex, BN21 3TB was well founded. The council's grounds for serving the counter-notice were (i) that no part of the hereditament was comprised in blighted land (section 151(4)(a)); (ii) that it did not propose to acquire the claimant's property unless compelled to do so (section 151(4)(b)); and (iii) that the conditions specified in paragraphs (b) and (c) of section 150(1) were not fulfilled (section 151(g)). In addition the council made what it described as a "further objection under section 150(1)", namely that the claimant, in serving his blight notice, had failed to comply with the prescribed form as required by section 150(1) of the 1990 Act and the Town and Country Planning General Regulations 1992.

2. Mr Head first served a blight notice on 16 February 2008 following which the council served a counter-notice on 1 April 2008. He did not refer the council's objection under that counter-notice to this Tribunal and it therefore forms no part of this reference. These proceedings are concerned solely with a second blight notice served by Mr Head on 16 July 2008 and with the council's counter-notice dated 15 September 2008. Mr Head referred the objections under the second counter-notice to the Tribunal on 12 November 2008.

### Facts

3. The subject property is a 2-bedroom maisonette occupying the first and second floors of 58 Ashford Road, a mid-terrace property constructed in the late 1890s. The building has been converted into three flats. The lower ground floor flat has a private entrance whilst the upper ground floor flat and the subject property gain access via external steps rising from the public footpath to a small communal entrance hall. The subject property has double-glazing and gas fired central heating. There is no garden and no garage or off-street parking.

4. No.58 is located at the western end of Ashford Road in close proximity to a multi-storey car park to the north, Eastbourne railway station to the west and the Arndale Shopping Centre to the south. Ashford Road forms part of the present ring road and is a busy, two lane, one-way street. There are double yellow lines along the north of the road (even numbers, including the subject property) and restricted parking to the south.

5. Mr Head owns a long leasehold interest in the subject property which he purchased in October 2003. It is agreed that he owns a qualifying interest in the subject hereditament for the purposes of Chapter II of Part VI of the 1990 Act.

6. On 23 February 2005 Eastbourne Borough Council resolved to endorse the Eastbourne Town Centre Regeneration Planning Brief (the Brief) as supplementary planning guidance (SPG). Appendix 3 of the Brief showed a plan of the Town Centre Regeneration Area. The subject property was included within it.

7. The Brief contains the following passages:

> "1. INTRODUCTION
>
> 1.1 This Planning Brief sets out the planning framework for the regeneration of Eastbourne Town Centre. …
>
> …
>
> 1.3 This Planning Brief is supplementary to the Town Centre Policies contained in the Eastbourne Borough Plan (September 2003) which supports additional retail development in the Town Centre along with enhanced transport facilities, in particular a public transport interchange. …
>
> …
>
> 1.5 This Planning Brief should be read in conjunction with the policies contained in the Borough Plan and will be a material consideration in the determination of the development proposals for the identified area. …
>
> 2. THE EASTBOURNE TOWN CENTRE REGENERATION AREA
>
> Boundaries of the Planning Brief
>
> …
>
> 2.5 The implementation of the new ring road along The Avenue provides the scope to consider incorporating part of Ashford and Junction Road into the development site…
>
> …
>
> Land ownership
>
> 2.11 The Regeneration Area includes numerous land interests. The main land interests are as follows:
>
> …
>
> 5. All or parts of Ashford Road… – adopted highways
>
> …

2.13 In view of the benefits of a comprehensive development, it is recognised that if developers cannot assemble the site through negotiation, the Council may need to use its compulsory purchase powers.

…

## 3. PLANNING POLICY FRAMEWORK

…

Housing

3.38 The identified Town Centre Regeneration Area includes a proportion of residential properties on Ashford Road/Junction Road…

## 4. PLANNING GUIDANCE FOR THE TOWN CENTRE REGENERATION

Introduction

4.1 Any proposals for the regeneration of Eastbourne town centre should have regard to the Council's objectives for promoting the area and to the specific planning and design guidelines set out below. These guidelines interpret and elaborate upon the formal policies of the Borough Plan, to provide guidance to potential developers.

…

4.15 Residential – The Council recognises that to achieve its objectives for enhancing retail provision in the town, there may be the need to redevelop some existing residential property within the town centre…

…

## 6. IMPLEMENTATION

…

6.3 The Council will consider whether, should it be necessary in order to achieve the comprehensive development of the identified expansion area, to exercise its powers under section 226(a) of the Town and Country Planning Act 1990/Part 8 of the Planning and Compulsory Purchase Act 2004 to acquire compulsorily appropriate land and property, which cannot be acquired voluntarily. The Council expects that the developer's application submission for the regeneration area will establish what will need to be acquired and a justification why compulsory purchase (CPO) is the only appropriate method of pursuing the proposals. The Council understands that it would act as the acquiring authority but will require an undertaking from the developers to bear the costs of exercising CPO powers and acquisition of land and property."

**Statutory provisions**

8. The relevant statutory provisions are contained in Chapter II of Part VI of the 1990 Act:

> "149(1) This Chapter shall have effect in relation to land falling within any paragraph of Schedule 13 (land affected by planning proposals of public authorities, etc); and in this Chapter such land is referred to as 'blighted land'"

The claimant relies upon paragraph 5 of Schedule 13:

> "5. Land indicated in a plan (other than a development plan) approved by a resolution passed by a local planning authority for the purpose of the exercise of their [development control] powers under Part III as land which may be required for the purposes of any relevant public functions (within the meaning of paragraph 1A or 1B)"

The relevant provision is paragraph 1A which states:

> "1A…
>
> Notes
> (1) Relevant public functions are –
> (a) the functions of a government department, local authority, National Park authority or statutory undertakers;
>
> …"

Section 149(2) defines an interest qualifying for protection under Chapter II. The parties agree that the claimant has such a qualifying interest.

9. Section 150 deals with the service of a blight notice:

> "150(1) Where the whole or part of a hereditament…is comprised in blighted land and a person claims that –
>
> (a) he is entitled to a qualifying interest in that hereditament…;
>
> (b) he has made reasonable endeavours to sell that interest…; and
>
> (c) in consequence of the fact that the hereditament…or a part of it was, or was likely to be, comprised in blighted land, he had been unable to sell that interest except at a price substantially lower than that for which it might reasonably have been expected to sell if no part of the hereditament… were, or were likely to be, comprised in such land

he may serve on the appropriate authority a notice in the prescribed form requiring that authority to purchase that interest to the extent specified in, and otherwise in accordance with, this Chapter.

…"

The "appropriate authority" in this reference is Eastbourne Borough Council (the council). The "prescribed form" means the form contained in Regulation 16 and Schedule 2 of the Town and Country Planning Regulations 1992 (No.1492) as amended.

10. Section 151(1) and (2) provide that within two months beginning with the date of service of the blight notice the appropriate authority may serve on the claimant a counter-notice in the prescribed form objecting to the notice. Section 151 continues (insofar as relevant to this reference):

"151(3) Such a counter-notice shall specify the grounds on which the appropriate authority object to the blight notice (being one or more of the grounds specified in subsection (4)…)

(4) Subject to the following provisions of this Act, the grounds on which objection may be made in a counter-notice to a notice served under section 150 are –

(a) that no part of the hereditament… to which the notice relates is comprised in blighted land;

(b) that the appropriate authority (unless compelled to do so by virtue of this Chapter) do not propose to acquire any part of the hereditament… in the exercise of any relevant powers;

…

(g) that the conditions specified in paragraphs (b) and (c) of section 150(1) are not fulfilled.

…

(8) In this section " relevant powers", in relation to blighted land falling within any paragraph of Schedule 13, means any powers under which the appropriate authority are or could be authorised –

(a) to acquire that land… compulsorily as being land falling within that paragraph; or

(b) to acquire that land… compulsorily for any of the relevant purposes;

and the "relevant purposes", in relation to any such land, means the purposes for which, in accordance with the circumstances by virtue of which that land falls within

the paragraph in question, it is liable to be acquired or is indicated as being proposed to be acquired."

11. Where the claimant has referred the objection in a counter-notice to the Lands Tribunal in accordance with section 153(1) and (2):

"153(3) On any such reference, if the objection is not withdrawn, the Lands Tribunal shall consider –

(a) the matters set out in the notice served by the claimant, and

(b) the grounds of the objection specified in the counter-notice;

and, subject to subsection (4), unless it is shown to the satisfaction of the Tribunal that the objection is not well founded, the Tribunal shall uphold the objection.

(4) An objection on the grounds mentioned in section 151(4)(b), (c) or (d) shall not be upheld by the Tribunal unless it is shown to the satisfaction of the Tribunal that the objection is well founded."

**Ground of objection: procedural defects**

12. I deal firstly with what the council describe as a "further objection under section 150(1)". The council say that there are "many" defects with the blight notice dated 18 July 2008 which may affect the validity of the notice. These defects are said to be:

(i) The notice states that it is made under section 150 rather than section 150(1).

(ii) The notice states that the interest qualifies for protection under Chapter II of Part V, rather than Part VI, of the 1990 Act.

(iii) Details of mortgages should be included in Schedule 1 of the prescribed form. The claimant included details of his first mortgage in Schedule 2 and omitted the details of his second mortgage.

The council did not elaborate upon this further ground of objection in its written representations.

13. The claimant accepts responsibility for these errors but argues that they are simple typographical and other innocuous mistakes that do not go to the substance of the blight notice and do not prejudice the appropriate authority.

**Conclusions: procedural defects**

14. Regulation 16 of the 1992 Regulations states:

> "The forms set out in Schedule 2 to these Regulations or forms substantially to the like effect are the prescribed forms for blight notices… for the purposes of section 150(1)…"

In my opinion the form of notice as submitted by the claimant was substantially to the like effect as that prescribed in the 1992 Regulations.

15. In *Regina v Secretary of State for the Home Department, ex parte Jeyeanthan* [2000] 1 WLR 354 the Court of Appeal held that in determining the consequences of non-compliance with a procedural requirement the Court had to consider the language of the legislation and the legislator's intention and seek to do what was just in all the circumstances. Lord Woolf said at 362:

> "In the majority of cases there are other questions which have to be asked which are more likely to be of greater assistance than the mandatory/discretionary test. The questions which are likely to arise are as follows.
>
> 1. Is the statutory requirement fulfilled if there has been substantial compliance with the requirement and, if so, has there been substantial compliance in the case in issue even though there has not been strict compliance? (The substantial compliance question.)
>
> …"

16. In my opinion the defects in the blight notice are trivial with regards to points (i) and (ii) and are not prejudicial to the council in respect of point (iii) because, by the time of the counter-notice to the (second) blight notice, they were aware of the existence of the second mortgage over the claimant's leasehold interest. Both parts of the substantial compliance question are therefore answered affirmatively and the blight notice does not fail because of its minor procedural defects.

**Ground of objection: section 151(4)(a)**

17. The council said that no part of the hereditament to which the notice relates was comprised in blighted land. The onus was on the claimant to show that this objection was not well founded by demonstrating that paragraph 5 of Schedule 13 to the 1990 Act applied.

18. The claimant said that for land to fall within the definition of blighted land under paragraph 5 it must satisfy three criteria. Firstly, it must be "indicated in a plan (other than a development plan)". A "development plan" was defined in section 336 of the 1990 Act by reference to section 38 of the Planning and Compulsory Purchase Act 2004. The claimant said that this:

> "makes clear that the development plan comprises the Regional Spatial Strategy and the Development Plan Documents for the area in question. SPG/SPD falls outside this."

The Brief was adopted as supplementary planning guidance and was therefore a plan other than a development plan.

19. Secondly, the plan had to be "approved by a resolution passed by a local planning authority for the purpose of the exercise of their powers under Part III [for development control purposes]". The council had resolved to adopt the Brief on 23 February 2005. It was specifically endorsed as SPG "the very purpose of which is to provide guidance in the planning application and decision making process." The claimant argued that this was confirmed in paragraph 1.5 of the Brief (see paragraph 7 above).

20. Thirdly, the land had to be "indicated… as land which may be required for the purposes of relevant public functions…" The claimant said that the appeal property had been shown within the Brief as land which "may" be required. Paragraph 5 of Schedule 13 did not require certainty of acquisition, only the possibility of it. Mr Head supported this claim by reference to paragraphs 2.11.5, 2.13, 3.38 and 4.15 of the Brief (see paragraph 7 above).

21. The claimant argued that the appeal property might be required for the purposes of a relevant public function of the council as defined in paragraph 1A of Schedule 13 to the 1990 Act (see paragraph 8 above). Mr Head said that planning for, and securing the development of, town centre regeneration fell within that definition, regardless of whether the implementation of such regeneration fell to the private sector. He also relied upon the fact that the project would be delivered under a public works contract. Furthermore the council was prepared to use its compulsory purchase powers in order to help the private sector assemble the site.

22. The council denied that the SPG is a "plan" for the purposes of paragraph 5 of Schedule 13. It said in its written representations that:

> "6.1.2.3 In making its objection in CN [counter-notice] 2, the Council considered that even though the hereditament is situated within a plan showing the Town Centre Regeneration Area, at this stage, the Scheme has not been approved by a resolution passed by a local planning authority for the purpose of the exercise of their powers under Part III as land which may be required for the purposes of any functions of a government department, local authority or statutory undertakers and is at present a general policy statement."

The plan to which the council referred was that shown as Appendix 3 to the SPG. They continued:

> "6.1.2.5 Ashford Road was included in the overall area plan, however, the red line on the Plan was not intended to indicate that all land within the Area would be affected.

It was simply the case that a red line was marked on the plan to show the main shopping area of the town."

23. The council said that the SPG was a general policy statement and a non statutory guidance document. It was for use by private developers when submitting planning applications for the regeneration of the town centre in accordance with local plan policies. It referred to paragraph 2.43 of Planning Policy Statement (PPS) 12: Local Development Frameworks which said that supplementary planning documents (SPD) – which superseded SPGs – must not be used to allocate land although they might take the form of design guides, area development briefs and master plans which supplement policies in a development plan document. As an SPG was not permitted to set out proposals for land use and development it could not be considered to be a "plan" under paragraph 5 of Schedule 13 since it could not "propose" land which may be required for the purposes of any relevant public function.

24. Although the council could not find any specific case law that considered whether supplemental planning guidance could blight land, they relied instead upon two Lands Tribunal decisions in which it was held that consultation documents could not blight land (the Brief having been a consultation document prior to adoption). These were *Jones v Greater Manchester Passenger Transport Executive* (1997) BNO/206/1995 and *Halliday v Secretary of State for Transport* (2003) BNO/129/2002. The council argued that if its development plan policies were not capable of blighting the land then the SPG that supplemented them could not do so either. Options or initial proposals for the town centre regeneration, where there was no defined scheme, or planning application for a scheme, were not sufficient to satisfy paragraph 5.

25. It was intended that the redevelopment of the town centre would be undertaken by a private developer rather than by the local authority for its own purposes. In *Bolton Corporation v Owen* [1962] 1 QB 470 the Court of Appeal held that land was not to be taken as allocated by a plan for the purposes of a local authority if the plan simply included it in an area to be cleared and redeveloped without specifying that the process would be undertaken by the local authority. In *Elcock v Newham London Borough Council* (1996) 71 P&CR 575 the Tribunal, Mr A P Musto FRICS, found that the claimants had failed to show that the subject land was allocated in the local plan for the purposes of the functions of a local authority because the plan gave no indication that the site (for use as a polytechnic) would only be developed by the local authority rather than by the University of East London, private enterprise or a combination of these.

**Conclusions: ground (a)**

26. Ashford Road is referred to in the text of the Brief as being part of the Town Centre Regeneration Area and the subject property is shown within that area in the plan at Appendix 3. The council recognise at paragraph 4.15 of the Brief that "there may be the need to redevelop some existing residential property within the town centre". The possibility that the council will exercise its compulsory purchase powers to achieve this is explained in paragraph 6.3.

27. The Brief is not a "development plan" for the purposes of section 38(3) of the Planning and Compulsory Purchase Act 2004, but the expression "a plan" is not defined. For their part the council argue that the Brief does not contain specific proposals for land use and development and as a general policy statement it cannot be considered to be "a plan" for the purposes of paragraph 5 of Schedule 13. In my opinion the Brief does constitute a plan for the purposes of paragraph 5. It sets out the planning framework for the regeneration of Eastbourne town centre (paragraph 1.1) and is a material consideration in the determination of the development proposals for the identified area (paragraph 1.5). It describes the council's intentions, and their proposals for achieving them, in sufficient detail to constitute a plan. In the more narrow sense of the word Appendix 3 indicates the subject property on a plan as being part of the Town Centre Regeneration Area.

28. The council argue that "at this stage" (the date of the counter-notice) the "Scheme" had not been approved by resolution of the local planning authority. There is no requirement under paragraph 5 that it should have been so approved in order for the subject property to be considered blighted land. The word "Scheme" (rather than "planning application") in this context suggests that the council are referring to a scheme of compulsory purchase, the consequences of which for the definition of blighted land are dealt with elsewhere in Schedule 13. The land was indicated in the Brief which was approved by a resolution of the local planning authority and that is sufficient to satisfy the first part of paragraph 5.

29. Neither *Jones* nor *Halliday* help the council on this point. Those cases were concerned, in this context, with whether a plan produced as part of a public consultation exercise can blight land for the purposes of Schedule 13. It was held in both cases that it could not. But the Brief was approved by a resolution of the council following a public consultation exercise and was not a consultation document itself.

30. The council also argue that the boundary of the Town Centre Regeneration Area was not intended to indicate that all the land within it would be affected. That may be so but it is not to the point. What matters is that the Brief indicates the possibility that the subject land *may* be affected; there is no requirement that the land shall be affected (by way of specific allocation) for it to be blighted land under paragraph 5.

31. The next part of paragraph 5 requires the resolution of the local planning authority to be "for the purpose of the exercise of their powers under Part III" of the 1990 Act. Part III deals with control over development. From paragraphs 1.1 and 1.5 of the Brief (see paragraph 7 above) and from the SPG as a whole, I consider that the Brief was approved for the purposes of the council's exercise of its development control powers.

32. The final requirement of paragraph 5 is that the land which is indicated in a plan shall be land which "may be required for the purposes of any relevant public functions (within the meaning of paragraph 1A…)". Substituting in the words of paragraph 1A (as relevant) this becomes:

> "…as land which may be required for the purposes of any functions of a local authority"

33. I have already noted above that it is only necessary to show that there is the possibility of the land being required for such a purpose and not the probability or certainty of it. The Brief does this at paragraphs 2.5, 2.11, 3.38 and 4.15 (see paragraph 7 above).

34. The council rely upon the Court of Appeal decision in *Bolton Corporation* in support of their view that for land to be required for the purposes of any functions (ie powers or duties) of a local authority it must be shown that the local authority, and not the private sector, will exercise those functions. They conclude that:

> "6.1.4.3 … The redevelopment is intended to be a private development, undertaken by a private developer and therefore it is not being undertaken by the local authority for its own purposes."

35. *Bolton Corporation* was concerned with a blight notice served under section 39(1)(b) of the Town and Country Planning Act 1959 in which the claimant argued that his house was:

> "land allocated by a development plan for the purposes of any functions of a… local authority."

Lord Evershed MR, said at 483:

> "Now, Mr Nowell [for the claimant], in putting before us his forceful and clear argument, said that if you look at a development plan and then you ask what "allocation" might be said to mean, you would pose for yourself these questions: Is the effect of the plan to say, first, that the local authority will in fact exercise its necessary compulsory purchase powers, or, secondly, does the plan indicate that private enterprise will be relied upon to do what the plan envisages, or, thirdly, does it leave it open as an unresolved matter at the time whether it shall be the local authority that exercises its statutory powers or private enterprise or perhaps sometimes one and sometimes the other? I read it so…"

He concluded at 484:

> "Having regard to the particular words used in the plan, and particularly in the Act, I find it impossible to say that this plan has "allocated", in the sense of designation, for the express and specific purpose of the exercise in regard to the whole of it of statutory powers by the local authority. In other words, I feel, particularly, bearing in mind where the onus is and with all respect to the tribunal, that this is a case in which the answer to Mr Nowell's question is that this is the third instance he gave, a case where the plan has left it open whether, as regards any particular piece of property at any particular point of time, the redevelopment will be done by private enterprise or by the local authority itself exercising the appropriate statutory powers."

The Court of Appeal unanimously held that the claimant's blight notice was not valid.

36. The Tribunal followed *Bolton Corporation* in the more recent case of *Elcock* where a blight notice was served under (the then) paragraph 2 of Schedule 13:

> "Land which –
>
> (a) is allocated for the purposes of any such functions as are mentioned in paragraph 1(a)(i) or (ii) by a local plan in force for the district…"

Paragraph 1(a)(i) identifies the land "as land which may be required for the purposes – (i) of the functions of a… local authority…"

37. The Tribunal concluded that:

> "Applying this principle [in *Bolton Corporation*] to the facts of the instant case I am not satisfied from the evidence that the claimants have discharged the onus of proof that the site falls within paragraph 2 of Schedule 13. The development plan does not indicate (implicitly or explicitly) that the site will only be redeveloped by the respondent. The position seems to me to fall within Mr Nowell's third question that the plan leaves it open as an unresolved matter at the time whether it should be the local authority that exercises compulsory purchase powers or private enterprise or perhaps sometimes one and sometimes the other."

38. The council say that it is intended that the private sector should undertake the town centre redevelopment, although it acknowledges that, if the private sector cannot assemble the land, the council may need to use its compulsory purchase powers, albeit that the private sector will be responsible for funding such acquisition (paragraphs 2.13 and 6.3 of the Brief). Again this is an example of the third instance of the answer to Mr Nowell's question in *Bolton Corporation*.

39. Unlike *Bolton Corporation* and *Elcock* the definition of blighted land in paragraph 5 of Schedule 13 upon which the claimant relies does not refer to the "allocation" of the land for the purposes of the functions of a local authority. Paragraph 1A of Schedule 13 was inserted, and paragraph 2 was repealed, by the Planning and Compulsory Purchase Act 2004:

> "1A. Land which is identified for the purposes of relevant public functions by a development plan document for the area in which the land is situated."

40. The requirement under paragraph 5 is that, to be blighted land, the land is "indicated… as land which may be required for the purposes of [the functions of a local authority]". In my opinion this wording covers the third instance answer referred to in *Bolton Corporation* and *Elcock*, namely where it is possible, but not certain, that the local authority will exercise its powers and duties. It contrasts with the wording of the 1959 Act and paragraph 2 (now repealed) and paragraph 1A of Schedule 13 to the 1990 Act. In those definitions of blighted land the terminology is that of certainty; the land must be either "allocated" or "identified" for the purposes of the functions of a local authority. The requirement under paragraph 5 is not the same and I distinguish *Bolton Corporation* and *Elcock*.

41. The council argues that the date for considering its objections should be when their written representations are considered by the Tribunal and not the date of the counter-notice. This argument is discussed more fully below in connection with ground of objection 151(4)(b). However the council do not appear to restrict it to that ground and so I deal with it briefly under this ground of objection also. In *Sinclair v Secretary of State for Transport* (1998) 75 P&CR 548 the President, His Honour Judge Marder QC, said at 555:

> "I cannot find 'the language of futurity' in paragraph (a) of section 151(4) which is simply a statement of existing fact. Hence, I do not think the comments of Purchas LJ in *Mancini* preclude me from holding that the relevant date for determining the ground of objection under ground (a) is the date of the counter notice."

I agree and I conclude that the date upon which the objection under ground (a) should be considered is the date of the council's counter-notice.

42. I conclude that the claimant has shown that the objection under ground (a) is not well founded.

**Ground of objection: section 151(4)(b)**

43. The claimant said that the burden of proof under this ground of objection was with the council to show that the objection was well founded. The requirement was to show that the council "…do not propose to acquire any part of the hereditament… in the exercise of any relevant powers." In its counter-notice the council said:

> "Eastbourne Borough Council cannot categorically confirm whether or not it proposes to acquire any part of the hereditament…"

Mr Head said that this was not sufficient to establish ground (b) and that therefore this objection should fail.

44. He said that the date for considering whether the council's objections were well founded was the date of their counter-notice which was 15 September 2008. In support of this argument he relied, inter alia, upon the Lands Tribunal decisions in *Burn v North Yorkshire County Council* (1992) 63 P&CR 81 and *Sinclair*. He said that the council's abandonment of the Brief after the date of the counter-notice was irrelevant.

45. The council said that although the subject property was included in the regeneration area, they had consistently advised in their newsletters, which they sent to householders and businesses, that no decision had been taken about whether or not properties would be acquired. Six such news letters were issued between January 2005 and March 2008. In newsletter No.7, dated October 2008, the council said that they had been unable to select a development partner following a tender. In newsletter No.8, dated November 2008, they announced that the Brief was to be replaced with an updated town centre Masterplan and that "This means that the original regeneration zone has been removed…"

46. At the time the counter-notice was served there was no intention to acquire as there were no proposals in place to acquire. The fact that the Brief had been rescinded did not change the position; up until the SPG was rescinded and the regeneration zone removed, there was no intention to acquire the claimant's property.

47. The council did not accept the claimant's argument that the date for considering whether the objection under ground (b) was well founded should be the date of the counter-notice. They referred to *Sinclair* in which the Tribunal recognised that some doubt remained about whether events subsequent to the date of the counter-notice could be taken into account in establishing whether ground (b) had been established. The Court of Appeal in *Mancini v Coventry City Council* (1985) 49 P&CR 127 had recognised that this was possible.

**Conclusions: ground (b)**

48. In my opinion the council have not shown this ground of objection to be well founded as at the date of the counter-notice. At no time did they say in terms that they did not propose to acquire the subject property. It was included within the Town Centre Regeneration Area and the Brief indicated that it might be acquired (paragraphs 2.11, 2.13, 3.38, 4.15 and 6.3). The newsletters to which they refer make it clear that the council were developing a purchasing strategy:

> "The Council's next priority is to work towards a Purchasing Strategy with the Partnership. This will provide the homes and businesses in the area with clearer guidance on the timing and processes that will be put in place to enable people and businesses to move if they so wish." (Newsletter No.2, June 2005)
>
> "We expect draft plans to be presented to the public later this year, and that they will be available for discussion before a formal planning application is submitted. This means that by the end of 2006 you should be aware of whether your property will be affected and what shape the development will take." (Newsletter No.3, January 2006)
>
> "Work has continued on mapping out a feasible Purchasing Strategy for residential properties. We are confident that this will be in place at about the same time that a Development Agreement is signed between the Council and the Partnership. We expect this to be ready by early 2007 at which point we hope to be in a position to notify residents of the agreed process for purchasing." (Newsletter No.4, August 2006)
>
> "PRLP's [Performance Retail Limited Partnership] plans are in the early stage of preparation. Until they are finalised we are unable to say exactly which properties within the identified regeneration area will be required for the proposed redevelopment." (Newsletter No.5, July 2007)

49. It seems to me that the council have concentrated on showing that they have not said that they propose to acquire the subject property. In this they have been successful. But ground (b)

requires them to show that they do not propose to acquire it, and in this they have failed. Acquisition remained a possibility at the date of the counter-notice.

50. The question remains of whether, under ground (b), the date upon which this ground falls to be considered is the date of the counter-notice or whether events subsequent to that date may be taken into account. The council say in their written representations:

> "5.2 …On 19 November 2008, the full Council formally rejected the Scheme, removed the regeneration zone area and rescinded the SPG [Brief].
>
> 5.3 Therefore, from 19 November, 2008, there is now no town centre regeneration proposal, no town centre regeneration area and no town centre regeneration planning guidance. The claimant's property is not in blighted land and there is no intention to acquire the property."

51. In *Mancini* the Court of Appeal considered the equivalent provision to ground (b) under the Town and Country Planning Act 1971. Purchas LJ said at 141:

> "In my opinion the council are correct in contending that for the purposes of this appeal the date of the objection notice is the material date.
>
> I would add one qualification: during argument mention was made of the provisions of the Landlord and Tenant Act 1954 with reference to the right of the landlord to serve a counter-notice in certain circumstances, in which case it is well established law that the material date is not the date of the counter-notice but the date of the hearing. This may well arise in a case in which the critical decision lies between the date of the objection to the blight notice and the date on which the tribunal determines the matter. This does not arise in this case nor has the matter been fully argued before us. It is sufficient for me to hold that the earliest material date for the purposes of this appeal is the date of the objection notice. Nothing in this judgment should be taken to exclude the possibility of contending, in any appropriate case, that the material date might even be postponed to the date of the hearing by the tribunal."

52. The position in respect of the 1954 Act was determined by the House of Lords in *Betty's Cafes Limited v Phillips Furnishing Stores Limited* [1959] AC 20. It was held (Lord Keith of Avonholm dissenting) that the intention established by the landlords (in respect of the proposed reconstruction of the premises) was sufficient to prevent the grant of a new lease and that the landlords proved the requisite intention if they proved its existence at the date of the hearing. Lord Denning said at 51:

> "Provided, however, that the notice is a good and honest notice when it is given, then it is clear to my mind that the ground stated therein must be established to exist at the time of the hearing… To succeed he [the landlord] must satisfy the trial judge that, at the time when the court comes to make its order, he is *then* willing to provide alternative accommodation, or *then* intends to reconstruct, or as the case may be…

> In short, it comes to this: the landlord must *honestly and truthfully* state his ground in his notice and he must establish it as *existing* at the time of the hearing."

53. There have been several cases where *Mancini* has been considered. In *Sinclair* the President noted that Purchas LJ was not expressing a decided view. The point was not argued and was not necessary to the Court of Appeal decision. The President then went on to consider *Betty's Cafe* and said:

> "The mechanism for serving notice and expressing intention was, in the words of Viscount Simonds at page 35 in the 'language of futurity'. It may be that if a case arises in which an authority serves a counter-notice of objection to a blight notice in reliance on a ground such as ground (b) in section 151(4), that is to say that the authority do not propose to acquire the land, then by analogy with the *Betty's Café* case, the intention of the authority may be sufficiently proved as at the date of the hearing."

(That was not the case in *Sinclair* where the objection was under ground (a) and the President found that the 'language of futurity' did not apply, see paragraph 41 above.)

54. I do not consider that *Burn* assists the claimant. That case concerned an objection made under ground (c), where part only of the land was to be acquired. After its service of a counter-notice the appropriate authority then sought, unsuccessfully, to change this ground to ground (b). There is no attempt by the council to change their grounds of objection in this reference.

55. The claimant relies upon *Louisville Investments Ltd v Basingstoke District Council* [1976] 32 P&CR 419 in which the President, V G Wellings QC, held that the date upon which an objection under ground (b) was to be considered was the date of the counter-notice. The appropriate authority in that case had abandoned its CPO between the date of the blight notice and the date of the counter-notice, arguing that by the time of the latter it had no intention to acquire the subject land. The Tribunal was not satisfied on the facts that the appropriate authority had abandoned its wish to acquire the claimant's land and it upheld the blight notice. In *Louisville* the critical decision of abandonment came between the service of the blight notice and the service of the counter-notice. In the subject reference that act of abandonment came after the service of the counter-notice and the cases may therefore be distinguished on their facts.

56. In *Kayworth v Highways Agency* (1996) 72 P&CR 433, the Tribunal, Dr T Hoyes FRICS, considered an objection under ground (b). He held that the material date for considering whether or not the appropriate authority intended to acquire the hereditament was the date of the counter-notice, as its intention not to acquire had been formed at that date and the position had not changed between that date and the date of the hearing. In the absence of any resolution, notice or action by the appropriate authority as to its position post the counter-notice the member saw no reason to have regard to a material date after the date of that counter-notice. In the present case the council made a resolution to abandon the Brief before the matter was considered by this Tribunal by way of written representations. That resolution

was made on 19 November 2008. The reference to the Tribunal was made on 13 November 2008 and the council were notified of the reference on 2 December 2008.

57. *Charman v Dorset County Council* (1986) 52 P&CR 88 is another case concerning an objection under ground (b). The facts are similar to the present reference in that the appropriate authority sought to rely on post counter-notice resolutions in support of its ground of objection. The member, Mr JH Emlyn Jones FRICS, followed the authority of *Mancini* and said at 97:

> "Purchas LJ therefore leaves open the possibility that the relevant date might be the date of the hearing. These remarks are strictly *obiter* and for present purposes, I think it is sufficient that I should say that I take the relevant date to be at the earliest date of the lodging of the counter-notice. At the same time in judging the validity of the grounds expressed in the counter-notice and in particular the precise nature of the county council's declared intention, I cannot shut my eyes to subsequent events as an indication of the weight to be attached to that declared intention."

58. In this reference I have determined that the council failed to establish ground (b) at the date of the counter-notice since it had not shown a categorical intention not to acquire the claimant's property. But the subsequent abandonment of the Brief and the town centre regeneration proposals may appear to strengthen the council's case. I do not accept this for two reasons. Firstly, in my opinion the counter-notice must itself be "good and honest" (per analogy with *Betty's Café*) before any subsequent events can be taken into account. I do not think that the council's counter-notice satisfies that test; at the time it was served it was wrong to object under ground (b) when it was clear, on the face of the Brief, that the council anticipated that some residential property might be acquired by them (even if funded by the private sector) and that such property might include the subject hereditament. The fact that subsequently, and, judging from the newsletters, unexpectedly, the town centre regeneration proposals were unable to progress "at the current time" should not be allowed to rescue what would otherwise be an unsuccessful objection. Secondly, the council seem to conflate their objections under grounds (a) and (b). They say in paragraph 5.3 of their written representations that, following the council's resolution to reject the town centre regeneration scheme:

> "The claimant's property is not in blighted land and there is no intention to acquire the property."

This suggests that the lack of an intention to purchase depends, or at least is reinforced by, the absence of blighted land. But I have already found in paragraph 41 that the date upon which the objection under ground (a) should be considered is the date of the council's counter-notice. I do not accept that there can be one date for considering whether land is blighted for the purpose of ground (a) and another, later, date for considering that same question in the context of an objection made under ground (b).

59. I am not satisfied that the council have shown that their objection under ground (b) is well founded.

**Ground of objection: section 151(4)(g)**

60. Both parties relied upon expert evidence to support their case under ground (g). Mr Richard Hayward BSc (Est. Man.), FRICS, currently a sole practitioner based in Litlington, Sussex acted for the claimant and was instructed to give his opinion, inter alia, upon the marketing and valuation of the subject property. He analysed the council's arguments as being:

> "1. That the property was marketed at the wrong time (Christmas 2007); and
>
> 2. That it was marketed at the wrong price; and
>
> 3. That other properties within the Regeneration Area were selling at the relevant time."

61. The claimant instructed local agents King & Chasemore to sell the subject property. The letter from them dated 4 December 2007 accepting the instructions said:

> "As agreed, although the appraisal price was in the region of £135,000, we confirm we will commence marketing at £139,950, subject to contract."

On 8 January 2008 King & Chasemore wrote again to the claimant:

> "Further to our various conversations, I write to confirm that apart from the couple of viewings we have had for your property and possible viewings the major concern is as to how it will be affected by the Town Centre Regeneration. I also enclose the Rightmove Website Report relevant to your flat. From this you will see that although in the last seven days the click through rate has increased it has not brought about the desired viewings. In view of all this, I feel that the sale of your flat is going to prove a very slow and lengthy process."

62. At the same time as he instructed King & Chasemore, Mr Head also sought to instruct Andrews Estate Agents. They declined the instructions saying in a letter dated 5 December 2007:

> "… I write to confirm that because the above mentioned property is situated within the site of the proposed Eastbourne regeneration plan and its future is currently uncertain, we believe that it would not be possible to secure a buyer at the open market value."

63. Having failed to sell the property after six months Mr Head approached two other local estate agents in June 2008, Bradleys and Interactive Estates, but both declined to act because the property was located within the regeneration area. On 30 June 2008 King & Chasemore terminated their instructions saying:

> "Further to our various conversations with you, we write to confirm that due to the Town Centre Regeneration Scheme your maisonette is proving to be totally

> unsaleable. In view of this lack of interest, we feel that in fairness to you it is more prudent to remove it off our property register."

64. Finally Mr Head approached two more local estate agents, Fox & Sons and Trosell Osborn Property Services, but by letters dated 7 July 2008 both declined to act, citing the fact that the property fell within the town centre regeneration scheme (Fox & Sons) or would be revealed in a local search as being within an area of "intended redevelopment" (Trosell Osborn).

65. Mr Hayward interpreted this correspondence as showing that the property could not be sold because prospective purchasers were not interested in buying due to the regeneration proposals and the risk of compulsory purchase. The property had been on the market for seven months which was long enough to test the market. He considered that Mr Head had done as much as anyone could do:

> "… The property was in the hands of a well regarded firm of agents for at least seven months, until they refused to retain it on their books, it has been on the web, and when other agents refuse to accept instructions because the property is sited within the Regeneration Area I have to wonder what else the Appellant (sic) could have done."

66. From the evidence of two 2-bedroom maisonettes in adjoining streets that were sold subject to contract in early December 2007 for £149,950 (38 Longstone Road) and £147,000 (80A Tideswell Road), Mr Hayward concluded that the subject property had not been overpriced. (Although Mr Head acknowledged that both these flats were in better locations.) However, he continued:

> "… This firm [King & Chasemore] never suggested reducing the asking price. My opinion is that they probably ought to have done so."

However, Mr Hayward said it was normal to put a property on the market at an asking price higher than its value and that purchasers were free to negotiate. In this case what little interest there was did not culminate in an offer at any price. Although he was not instructed to give valuation evidence Mr Hayward considered that an unblighted price of £120,000 was a fair value for the claimant's property as at the date of the blight notice. This reflected the fall in the property market generally since the start of 2008.

67. Mr Hayward contested the council's refusal to accept in their counter-notice that no properties in the area were selling. He said that only two sales could be traced in Ashford Road, one of which (No.48C) was historic (April 2006) and the other of which (No.50A) had been purchased in December 2007 by the selling agent itself, Town Flats, at a price (£90,000) that it estimated was 70% of its true value (£130,000). It was said to be unmortgageable due to the regeneration proposals.

68. Mr Head described No.50A as a good comparable in size, location and layout and produced a letter from the eventual purchaser, Town Flats, saying:

> "At this time [November 2007] we valued the property in the region of £130,000 (if the property had been mortgageable)."

69. He pointed out that Andrews had valued his property in June 2007 at £130,000 in a rising market. By comparison an estimated market value of £135,000 in December 2007 was reasonable.

70. The claimant did not accept Mr Morehen's view that the 1-bedroom flat at 68A Ashford Road was of similar value to the subject property. He supported his argument by comparing the asking prices in May 2009 of a 1-bedroom garden flat in Jevington Gardens with those of 2-bedroom flats in the same road. This showed that, on average, the 2-bedroom flats were asking 14% more. No68A had been sold previously in February 2003 for £73,000. Mr Head said that between that date and when he bought No.58 in October 2003 for £90,000 flat values in this postal district had risen by 17%. Increasing the sale price of 68A by that amount gave an indexed value of £85,000, ie less than the value of No.58.

71. In their counter-notice the council said that the claimant had provided no evidence to indicate that an offer had been made that was substantially below the price at which the subject property might reasonably have been expected to sell. Mr Hayward said that the claimant had gone further than this and had shown that he could not sell at any price because the subject property was within the regeneration area. There was no market interest of any significance.

72. The council argued that:

> "… the issue of the blight notice was premature because it considered that insufficient time had been given in order to establish whether or not the Property would sell and there may have been other factors which may have affected the ability to sell such as being overpriced and the adverse market conditions."

The council also said that the asking price had not been reduced in line with the falling market.

73. The council's expert was Mr Roger Morehen BSc (Est. Man.) MRICS, the principal of Kingston Morehen, Chartered Surveyors of Eastbourne. He considered that the subject property, when placed on the market in early December 2007, should have had an asking price of between £122,500 and £125,000 to achieve a sale at £120,000. He thought that the asking price of £139,950 at which it was marketed was "totally excessive". He said that its market value had fallen to £110,000 by July 2008. Consequently the council considered that by the date of the blight notice the property was being marketed at nearly £20,000 above its open market value. Other dwellings in the area had been sold, for instance 48C Ashford Road on 4 April 2006, as well as at least six commercial units in the Arndale Centre.

74. Mr Morehen also referred to the sale of 68A Ashford Road on 4 October 2007 for £122,950. Although this was a one bedroom flat it had a private entrance and a private garden, features that Mr Morehen said counterbalanced the two relatively small attic rooms in the subject property. He produced details of the asking prices of seven other nearby 2-bedroom flats which were marketed between late July and early December 2007, which varied between £112,500 and £124,950. On 13 December 2007 54 Ashford Road, a 2-bedroom flat also in the regeneration area, was marketed as an investment (on an assured shorthold tenancy) at £125,000.

75. The council concluded that:

> "In view of the high marketing price of the Property and the only evidence supplied by the claimant in the form of estate agents' letters which are opinion and are not substantiated, the Council considers that the claimant has not shown that he made a reasonable attempt to sell the Property, that it could only sell for a price substantially lower and it has not sold because it was in the town centre regeneration area."

**Conclusions: ground (g)**

76. It is for the claimant to show that this ground of objection is not well founded. To do so he must demonstrate that he made reasonable endeavours to sell his qualifying interest but that, in consequence of the fact that the hereditament was comprised in blighted land, he had been unable to sell it except at a price substantially lower than that for which it might reasonably have been expected to sell if no part of the hereditament were comprised in such land.

77. Mr Head put his property onto the market following the refusal of the Halifax to advance him additional borrowing facilities due to the "town centre redevelopment". He had already approached Andrews Estate Agents for a valuation of the property in June 2007 (£130,000), but they declined to accept selling instructions in December 2007 because of the uncertainties arising from the "Eastbourne regeneration plan".

78. King & Chasemore did accept instructions to sell and placed the property on the market at £139,950 with an estimated market value of £135,000. King & Chasemore declined to act further at the end of June 2008 and the claimant tried unsuccessfully to instruct four further agents. So, at various times, five out of the six agents approached by Mr Head declined to accept instructions because of the regeneration scheme. I consider that the actions taken by the claimant in trying to market and sell his property were reasonable and that seven months was a reasonable marketing period under the circumstances. I therefore find that the claimant has satisfied the requirements of section 150(1)(b).

79. I find the question of whether he fulfilled the requirements of section 150(1)(c) to be more problematic. To satisfy these Mr Head must show that he could not sell his property other than at a price substantially lower than that for which it might reasonably be expected to

sell if it had not been blighted land. Furthermore this failure to sell must be in consequence of the land being blighted.

80. The first problem is the asking price. I have considered the evidence and arguments of the parties and I find that both the asking price of £139,950 and the estimated market value of £135,000 as at December 2007 were at least £5,000 too high. The second problem is the failure of the selling agent to lower the asking price throughout the seven months that the subject property was on the market.

81. The council argue that the facts in this respect are similar to those in *Edwards v Surrey County Council* [1999] 39 RVR 223 (LT) in which the President, His Honour Judge Marder QC, held that the claimant had not satisfied him that the objection under ground (g) was not well founded. The President said at 231:

> "I do not know why Dimbula [the blighted land] was offered for sale for £220,000 for a period of about 18 months during which no serious interest was shown, and no reduction was made in the asking price, which was so substantially above its true [unblighted] market value [£150,000]. I heard no evidence from the owners or from the agents then acting. It may be that the owners were badly advised, or that the marketing was indeed half-hearted and for the purposes only of supporting a blight notice. Whatever the reason may be, I am not satisfied that the servers have shown that in consequence of blight they were unable to sell the property except at a price substantially lower than might otherwise have been expected. Accordingly I find that the objection to the blight notice is well founded in that the conditions specified in paras (b) and (c) of s150(1) were not fulfilled."

82. In my opinion there are two key differences between *Edwards* and the present reference. Firstly, in *Edwards* the asking price was nearly 50% higher than the unblighted market value and remained unchanged for 18 months. In this reference the equivalent figure is less than 10% over a marketing period of 7 months. Secondly, the claimant in this reference was trying to sell his property during a period of sustained market weakness and retrenchment, when mortgages were difficult to obtain.

83. I have considered the particular difficulties faced by the claimant in a sharply declining market where his attempts to satisfy section 150(1)(c) became more difficult because he is vulnerable to the suggestion that the lower price achievable is due to the general downward movement of prices rather than to blight. In this falling market there was a reduced volume of transactions according to Mr Hayward and, in my opinion, the lack of interest in blighted property, and agents' reluctance (and, more often, refusal) to accept instructions to sell it, can be seen as the result, in a buyer's market, of purchasers shunning any property which is out of the ordinary. They have the pick of the market and will avoid marginal properties. In these circumstances a blighted property becomes more difficult to sell and, in my opinion, it is unrealistic to suppose that the failure of the subject property to attract purchasers' interest was due to its asking price rather than to the fact that it was blighted. Mr Hayward fairly accepts that the asking price was not reduced over time and that it should have been. I agree, but I do not think that this fact alone is sufficient to uphold the council's objection under ground (g).

84. I have weighed the claimant's failure to reduce the asking price against the evidence that five other estate agents refused to accept instructions because of the blighting effects of the scheme and also the claimant's evidence about the sale of 50A Ashford Road (also blighted land) in December 2007 for a substantial discount (30%) to its estimated unblighted value. Whilst that sale does not appear to have resulted following an unsuccessful period of marketing during 2007, the vendor had previously tried to sell his property through Town Flats in 2004 only for the purchaser to withdraw when he found out about the town centre regeneration plan. The vendor again approached Town Flats in November 2007 only to be told that the situation with the town centre had not changed and that his property was unmortgageable. He then proceeded with a cash sale in December 2007 to Town Flats themselves. No.50A is a good comparable and its sale for substantially less (£40,000) than its estimated open market value in December 2007 is, I believe, persuasive evidence in favour of the claimant.

85. On balance I am satisfied that the claimant has fulfilled the requirements of section 150(1)(c) and that he has shown that the objection under ground (g) is not well founded. I have upheld none of the council's objections and I therefore allow the blight notice.

86. This decision determines the substantive issues in this reference. A letter on costs accompanies this decision which will take effect when, but not until, the question of costs is decided.

Dated 22 December 2009

A J Trott FRICS