UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

COMPENSATION - Planning permission - Compulsory acquisition of land for village by-pass scheme – development potential – APPEAL under s.18 of the Land Compensation Act 1961 against a negative certificate issued pursuant to an application for a Certificate of Appropriate Alternative Development under s.17 of the Act – Appeal allowed

IN THE MATTER OF AN APPEAL UNDER
SECTION 18 of the LAND COMPENSATION ACT 1961

BETWEEN **MRS OLIVE EDWARDS** **Claimant/Appellant**

and

RHONDDA CYNON TAFF COUNTY BOROUGH COUNCIL **Acquiring Authority/Respondent**

re: Land east of Ty Isaf Farm, Tonteg, Pontypridd CF38 1ST

Before: P R Francis FRICS

Sitting at: Pontypridd Magistrates Court, Union Street, Pontypridd CF37 1SD on 29 May 2014

Graham Walters, instructed by Harmers Ltd, Planning Consultants of Swansea, under the licensed access scheme for the appellant
Gwydion Hughes, instructed by Legal & Democratic Services, Rhondda Cynon Taff CBC for the respondent acquiring authority

The following cases are referred to in this decision:

Fletcher Estates (Harlescott) Ltd v Secretary of State for the Environment [2000] 2 AC 307
R. (On the application of Dacorum BC) v Secretary of State for Communities and Local Government [2009] EWCA Civ 1494
Harringay Meat Traders Ltd v Secretary of State, LB Hackney and GLA [2012] EWHC 1744 (Admin)

DECISION

Introduction

1. Mrs Olive Edwards (who henceforth I shall describe as the appellant), is the widow of the former owner of two small parcels of agricultural land lying immediately to the east and west of a disused railway cutting located directly opposite their property, Ty Isaf Farm, Cheriton Grove, Tonteg, Pontypridd CF38 1ST. The two parcels (part of freehold title number CYM337170) were compulsorily acquired by Rhondda Cynon Taff County Borough Council (the acquiring Authority and the respondent to this appeal) in 2007 in connection with the construction of a highway scheme known locally as the Church Village Bypass. The railway cutting (freehold title number WA757115) was already in the ownership of the council at the date of the making of the CPO, it having been acquired from British Railways Board by the council's predecessor, Mid Glamorgan County Council, by means of a conveyance dated 2 May 1995. However, the appellant and her husband had farmed the former railway cutting in conjunction with the two parcels in their ownership under the terms of an Agreement dated 13 April 1959, but in this regard it was agreed that the question of whether or not the appellant has a compensatable interest therein was not a matter before me in this appeal.

2. In respect of negotiations (as claimant) for compensation under rule (2) of section 5 of the Land Compensation Act 1961 (the 1961 Act) the appellant, through her agents, Harmers Ltd, submitted an application for a Certificate of Appropriate Alternative Development (CAAD) to the council under s.17 of the 1961 Act on 18 May 2012 for "Tipping/Land Reclamation" for the whole of the site (some 3 acres in total) incorporating the two parcels and the cutting. The council, following the planning authority's consideration of a Delegated Report prepared by one of its officers, issued a negative certificate under section 17(4)(b) of the 1961 Act dated 17 April 2013 which stated that:

> "Planning permission would not have been granted for any development of the land in question other than the development which is proposed to be carried out by the authority by whom the interest is proposed to be acquired."

The reasons were set out thus:

> "Planning permission would not have been granted for the proposed landfill/land reclamation on the land as it represents unjustified development in the countryside detrimental to the character and appearance of the area. The development would therefore have been considered contrary to Policies en1, en2, and u12 of the Rhondda Cynon Taf (Taff Ely) Local Plan and Policy EV1 of the Mid Glamorgan (Rhondda Cynon Taff County Borough) Replacement Structure Plan."

3. This is an appeal against that decision.

4. Mr Graham Walters of counsel appeared for the appellant and called Mr Laurence Anthony Forse MA (Cantab) MSc MRICS MRTPI, a director of Harmers Ltd, Town & Country Planning and Development Consultants from Llanishen, Cardiff who gave expert evidence.

5. Mr Gwydion Hughes of counsel appeared for the respondent authority and expert evidence was given by Mrs Donna Marie Bowhay MRTPI, a Senior Planner with Rhondda Cynon Taff CBC (the council).

Facts

6. The parties helpfully produced a brief statement of agreed facts and issues from which, together with the evidence and my inspection of the appeal site on the day prior to the hearing, I find the following facts.

7. The appeal land comprised 1.24 ha (3.06 acres) of land lying to the south-east of Ty Isaf Farm, Tonteg, and to the east of Cheriton Grove. In the centre of the land, running north-south was a disused railway cutting which, at the southern end, ran beneath a bridge carrying an unnamed lane which led off Cheriton Grove, together with Public Footpath 44. The land lay wholly outside the settlement boundary of Church Village/Tonteg as defined within the Rhondda Cynon Taf (Taff Ely) Local Plan (the Local Plan) and the Replacement Structure Plan and sloped generally downwards from west to east, with the deep cutting having steep grassed sides. The northern boundary of the land, prior to the construction of the bypass, was adjacent to an area of woodland, and the eastern boundary was onto agricultural land. Access was through a field gate.

8. The CPO relating to the proposed construction of the Church Village bypass was made on 9 December 2005 and confirmed by the Welsh Ministers on 7 August 2007. Notice of the making of the CPO was given on 15 December 2005, that being now agreed as the relevant date for the purposes of this appeal (s.22(2) of the 1961 Act). Planning permission for the bypass was obtained by the council on 6 July 2006. The appellant's land was vested in the council in 2007, and the date of entry (relevant only for compensation purposes) was 10 July 2008.

The relevant Planning Policies

9. It was agreed that the following planning policies were germane to this appeal.

The Rhondda Cynon Taf (Taff Ely) Local Plan 1991 – 2006 (Adopted June 2003)

> **"Policy en1 – development in the countryside**
>
> 1. Development in areas of countryside, which includes all land outside the defined settlement boundaries, will only be permitted if it is required in the interests of agriculture, forestry, recreational activity compatible with countryside locations and environmentally

acceptable, allocated special employment sites, the minerals or utility industries, renewable energy development, waste management schemes, strategic transportation infrastructure, cemeteries, or as part of a rural building conversion or land reclamation scheme.

Policy en2 – criteria for development in the countryside

Developments in the countryside will only be permitted under the exceptions of policy en1 if they would not unacceptably adversely affect the character, visual amenity or nature conservation value of a site, or unacceptably adversely affect the quality or quantity of surface waters or groundwater sources.

Policy u12 – waste

Proposals for waste recycling and disposal will be permitted provided that there would be:

1. No unacceptable effect upon the appearance of the landscape;
2. No loss of access to the countryside;
3. No unacceptable effect on agriculture, and, wherever possible, a beneficial effect on agriculture ultimately;
4. No detriment to surface or underground water quality or quantity;
5. No unacceptable detriment to sites of acknowledged wildlife or archaeological interest;
6. Satisfactory vehicular access;
7. A programme for phased working, restoration and landscaping of disposal sites;
8. Satisfactory proposals for beneficial use and for monitoring and treatment of disposal sites after implementation of approved restoration and landscaping;
9. No unacceptable detriment to air quality;
10. No unacceptable detriment to the amenities of adjoining land uses; and
11. No sterilisation of minerals or other assets."

Mid Glamorgan (Rhondda Cynon Taff County Borough) Replacement Structure Plan1991 – 2006 (Adopted January 1999)

"**Policy EV1**

Development in the countryside will not be permitted except for that in the interests of agriculture and forestry, countryside leisure, the provision of housing for special needs, the conversion of rural buildings, conversions/redevelopment of sites used for institutional purposes, minerals, land reclamation, transportation or utility services."

NATIONAL GUIDANCE – PLANNING POLICY WALES (March 2002)

Chapter 2 – "Planning for Sustainability"

"Paragraph 2.7 Preference for the re-use of land

2.7.1 Previously developed (or brownfield) land (see figure 2.1) should, wherever possible, be used in preference to Greenfield sites, particularly those of high agricultural or ecological value. The Assembly Government recognises that not all previously developed land is suitable for development. This may be, for example, because of its location, the presence of protected species or valuable habitats or industrial heritage, or because it is highly contaminated. For sites like these it may be appropriate to secure remediation for nature conservation, amenity value or to reduce risks to human health."

Figure 2.1 Definition of previously developed land

Previously developed land is that which is or was occupied by a permanent structure (excluding agricultural or forestry buildings) and associated fixed surface infrastructure …

Excluded from the definition are:

- land and buildings currently in use for agricultural or forestry purposes
- land in built up areas which has not been developed previously…
- land where the remains of any structure or activity have blended into the landscape over time so that they can reasonably be considered part of the natural surroundings
- Previously developed land the nature conservation value of which could outweigh the re-use of the site, and
- Previously developed land subsequently put to amenity use".

10. In addition, the respondent considered the following policies from PPW to be relevant:

Chapter 12 "Infrastructure and Services"

Section 12.5: "Planning to reduce and manage waste

12.5.1 Local Planning Authorities are obliged by the EC Framework Directive for Waste to make provision for establishing an integrated and adequate network of waste disposal installations. They are also required, in conjunction with the Environment Agency which issues waste management licences and pollution control permits (see Chapter 13), to ensure that waste is recovered and disposed of without harming the environment …

12.5.2 The UK Government's general policy towards waste management is based on a hierarchy of reduction, re-use and material recovery ….A sustainable approach to waste management will require greater emphasis on reduction, re-use and recovery and less reliance on disposal without recovery ….. "

Section 12.7: "Development Control and Waste Planning

12.7.1 Decisions on planning applications should have regard to the waste management objectives of the national waste strategy. The environmental impact of proposals for waste

management facilities must be adequately assessed, supported by independent surveys where appropriate, to determine whether a planning application is acceptable and, if the adverse impacts on amenity cannot be mitigated, planning permission should be refused…"

Accompanying Technical Advice Note 21 – Waste ("TAN21")

"Chapter 10 Construction and Demolition Waste

"10.3 There is widespread concern that the re-use of material on exempt sites is of questionable environmental benefit and has diverted material away from more beneficial purposes, such as providing cover material at landfill sites or for back-filling derelict excavations. Regional Technical Groups should monitor the extent of landfill operations at exempt sites, in conjunction with the Environment Agency, to determine whether the Assembly should consider changes to planning or waste management controls.

10.5 Wherever possible, provision should be made in UDPs for sites for recycling facilities to enable storage, processing and processing of materials, and thus encourage more beneficial use of inert material, as promoted in Minerals Planning Policy Wales 2000 (National Assembly for Wales). Research has been undertaken to assess the impact of recycling operations of construction and demolition waste and to provide advice on the most suitable locations for these operations. It is considered that the following have the potential to be environmentally acceptable locations:

* Active (and some disused) quarries;
* Landfill sites;
* Industrial Estates where heavy or general industry is located;
* Ports/dockland;
* Transport nodes.

UDPs should assess the environmental capacity of these types of locations to facilitate inert recycling operations to become established.

10.6 Planning applications for the landfill of inert waste material should be considered carefully by local planning authorities to ensure that there are no practicable recycling opportunities, or that such landfill would result in significant improvement to ground conditions to enable more beneficial use of the land. Planning applications for the creation of forestry and farm roads and hardstandings using waste should also be considered carefully. Those proposals not genuinely needed for agriculture should be refused."

Location of Waste Management Facilities

"C.36 There are numerous factors that may influence the type of location of new waste management facilities. New sites might for instance be located, if appropriate, within or adjacent to:

- industrial areas, especially those containing other heavy or specialised industrial uses;
- active or worked out quarries - …
- degraded, contaminated or derelict land – well located, planned, designed and operated waste management facilities may provide good opportunities for remediating and enhancing sites which are damaged or otherwise of poor quality, or bringing derelict or degraded land back into productive use
- existing or redundant sites or buildings – which could be used, or adapted, to house materials recycling facilities, or composting operations
- sites previously or currently occupied by other types of waste management facilities

C.37 All locations also need to be considered in terms of BPEO (See Annex H). If planning applications come forward for other sites not previously identified as having potential for waste management operations, these should also be determined in accordance with policies of the relevant development plan and framework strategies, unless other material considerations indicate otherwise."

The Statutory Provisions

11. Section 17 of the 1961 Act provides:

"**17 Certification of appropriate alternative development.**

(1) Where an interest in land is proposed to be acquired by an authority possessing compulsory purchase powers, either of the parties directly concerned may, subject to subsection (2) of this section, apply to the local planning authority for a certificate under this section.

(2) If the authority proposing to acquire the interest have served a notice to treat in respect thereof, or an agreement has been made for the sale thereof to that authority, and a reference has been made to the Upper Tribunal to determine the amount of the compensation payable in respect of that interest, no application for a certificate under this section shall be made by either of the parties directly concerned after the date of that reference except either—

(a) with the consent in writing of the other of those parties, or

(b) with the leave of the Upper Tribunal.

(3) An application for a certificate under this section—

(a) shall state whether or not there are, in the applicant's opinion, any classes of development which, either immediately or at a future time, would be appropriate for the land in question if it were not proposed to be acquired by any authority possessing compulsory purchase powers and, if so, shall specify the classes of development and the times at which they would be so appropriate;

(b) shall state the applicant's grounds for holding that opinion; and

(c) shall be accompanied by a statement specifying the date on which a copy of the application has been or will be served on the other party directly concerned.

(4) Where an application is made to the local planning authority for a certificate under this section in respect of an interest in land, the local planning authority shall, not earlier than twenty-one days after the date specified in the statement mentioned in paragraph (c) of subsection (3) of this section, issue to the applicant a certificate stating either of the following to be the opinion of the local planning authority regarding the grant of planning permission in respect of the land in question, if it were not proposed to be acquired by an authority possessing compulsory purchase powers, that is to say—

(a) that planning permission would have been granted for development of one or more classes specified in the certificate (whether specified in the application or not) and for any development for which the land is to be acquired, but would not have been granted for any other development; or

(b) that planning permission would have been granted for any development for which the land is to be acquired, but would not have been granted for any other development,

and for the purposes of this subsection development is development for which the land is to be acquired if the land is to be acquired for purposes which involve the carrying out of proposals of the acquiring authority for that development.

(5) Where, in the opinion of the local planning authority, planning permission would have been granted as mentioned in paragraph (a) of subsection (4) of this section, but would only have been granted subject to conditions, or at a future time, or both subject to conditions and at a future time, the certificate shall specify those conditions, or that future time, or both, as the case may be, in addition to the other matters required to be contained in the certificate.

(6) – (11) …"

12. Appeals against certificates under s.17 were formerly made to the Minister under s.18 of the 1961 Act. However, sections 14 – 18 of the 1961 Act were amended by section 232 of the Localism Act 2011, those amendments coming into effect on 6 April 2012. The amendments were subject to complex transitional provisions set out in The Localism Act 2011 (Commencement No. 4 and Transitional, Transitory and Saving Provisions) Order 2012. By Article 18 of the Order, the main amendments do not apply where a CPO was confirmed by the Minister before 6 April 2012, but the substitution of section 18 of the 1961 Act by the following provision does apply:

"(2) In paragraph (1) and article 21 "the main amendments made by section 232 of, and Part 34 of Schedule 25 to, the Act" means the amendments made by these provisions other than-

(a) …

(b) the substitution of section 18 of the 1961 Act (appeal to Upper Tribunal against certificate under section 17);

(c) …

(d) …"

13. Section 18 of the 1961 Act now provides:

"**18 Appeal to Upper Tribunal against certificate under section 17**

(1) Where the local planning authority have issued a certificate under section 17 in respect of an interest in land—

(a) the person for the time being entitled to that interest, or

(b) any authority possessing compulsory purchase powers by whom that interest is proposed to be, or is, acquired,

may appeal to the Upper Tribunal against that certificate.

(2) On any appeal under this section against a certificate, the Upper Tribunal—

(a) must consider the matters to which the certificate relates as if the application for a certificate under section 17 had been made to the Upper Tribunal in the first place, and

(b) must—

(i) confirm the certificate, or

(ii) vary it, or

(iii) cancel it and issue a different certificate in its place,

as the Upper Tribunal may consider appropriate.

(3) Where an application is made for a certificate under section 17, and at the expiry of the time prescribed by a development order for the issue of the certificate (or, if an extended period is at any time agreed upon in writing by the parties and the local planning authority, at the end of that period) no certificate has been issued by the local planning authority in accordance with that section, the preceding provisions of this section apply as if the local planning authority has issued such a certificate containing a statement under section 17(1)(b)."

The important effect of s.18 in its new form is that since 6 April 2012, appeals against certificates under section 17 of the 1961 Act now lie to the Upper Tribunal (Lands Chamber).

Issue

14. The issue for me to decide is whether a CAAD for a scheme of tipping/land reclamation should be granted under section 17 of the 1961 Act. In that regard, the principal points of dispute between the parties, and the key determining factors, concern the relevance of, and the weight to be given to, the National Planning Policy Guidance over and above the Policies within the Local Plan and Replacement Structure Plan; whether, pursuant to the Guidance, the land should or should not be defined as "previously developed land"; the relevance or otherwise of the planning permission granted on the land for the new highway and whether or not the proposed scheme would have been justified development in the countryside, particularly in respect of the visual and landscape impact of the proposal.

The appellant's case

15. **Mr Forse** has 38 years experience as a chartered surveyor and town planner, and has been in private practice for 24 years, having commenced his career with Local Authorities, including a spell as Assistant Borough Planning Officer for Bridgend and surrounding areas.

16. He said the nub of the matter before me was that a scheme of tipping to fill over a former railway cutting and feather-fill off to contours on adjacent areas to approximately re-create what would have been the original landform was an acceptable form of development under the relevant development plan policies. It was the appellant's view, he said, that the council should have dealt with the proposals on their merits. Instead its decision was made on the misplaced assumption that the retention of a disused railway cutting and scrub growth was preferable to reclaiming the land for agricultural purposes. Further, they completely ignored the fact that the appellant is entitled to assume that planning permission would be forthcoming for the highway scheme for which the CPO had been made under the relevant statutory provisions.

17. In his evidence, he advised that the supporting statement to the application for a CAAD made on 18 May 2012 had stated:

> "It is considered that this area of previously developed land could have been utilised to undertake tipping thereby restoring the land to its former levels. This would have enabled the land to then be subsequently used for agricultural purposes in conjunction with the adjacent areas of agricultural land to the east and south-east owned by the applicant.
>
> Such use of the application site would make good use of previously developed land, whilst ultimately bringing it back to a sustainable agricultural use, such an objective being generally in line with the intentions of Planning Policy Wales (2002).

For those reasons, there is a reasonable prospect that planning permission would have been granted for tipping/reclaiming the site".

18. Mr Forse said that during the course of the application, meetings and discussions were held with the planners, and advice was sought from Richard Harris BSc (Hons) MRICS of Brinsons Fairfax, Chartered Surveyors. As a result, and following the obtaining of detailed engineering calculations, contoured plans and cross-sections of the site, further information was provided in a letter to the council on 22 November 2012. The plans showed the details of the resultant landform following tipping operations which had been calculated by engineers at 33,137 cu m (which converted by a factor of 2 to produce an estimated total tonnage of 66,274).

19. At 15 loads per day of inert waste and subsoil, this would take some 10 months following which the site would receive an upper layer of approximately two feet of topsoil. It was proposed that the north and south (bridge) ends of the cutting would be "feathered off" to the existing ground levels. The southern end would, therefore, leave the area beneath the bridge open to access. Further information along with submissions in justification, were made in a letter of 22 February 2013.

20. Achieving consent for tipping, and the restoration of the land to the levels they were preceding the construction of the railway cutting, would, Mr Forse said, create a gently sloping unobstructed nine acre field (with the inclusion of further land within the appellant's ownership and farmed by them). Such a configuration would be far more productive than a steep sided and overgrown old railway cutting that could only really be effectively used for the keeping of horses.

21. The Policies contained within the Local Plan were, he said, the most appropriate to consider in detail as they were the ones that local planning officers deal with on a daily basis. The National Policy (PPW) was much more general and advisory. Considering the three Local Plan Policies that were agreed to be relevant, Mr Forse said that it appeared from the council's Delegated Report prepared by it in connection with the s.17 application, and their reasons for refusal, that they were attempting to obliquely introduce into the relevant policy a requirement that a specific agricultural justification needed to be established. However, no such justification is required under 'Policy en1' of the Local Plan – it just says "if required in the interests of agriculture". The proposed after use once the tipping and reclamation had been completed would dramatically improve the usefulness of the land for agricultural purposes, and the proposal is therefore clearly supported by that policy. He went on to say that irrespective of the question of whether the land could be considered to be "previously developed land" within the planning context, the fact remained that it could not be properly used for agricultural purposes as it was.

22. There was also no rationale for the conclusion in the council's Delegated Report that read:

> "It is therefore considered that in terms of the principle of the proposed development it is considered that the extent of tipping should be regarded as excessive landfill and unjustified development in the countryside."

The reclamation scheme has been carefully designed to pick up on existing contours on either side of the former railway cutting, in effect reinstating the landform that would have existed prior to the railway being built. Given the considerable benefits that reinstatement to agricultural use would bring, there is therefore no substance in the claim that the amount of proposed infilling was excessive. It appeared, Mr Forse said, that the council had completely ignored Mr Harris's advice (which had been provided to them during the application process) relating to the significant benefits that would accrue from careful re-grading of the land.

23. As to 'Policy en2' relating to the criteria for development in the countryside and the impact of the proposals in terms of the effects upon character, visual amenity and nature conservation, Mr Forse said the council's suggestion that they would involve the removal of mature vegetation and habitats which have amenity value within the former railway cutting was simply misplaced. This was particularly so given that planning consent for the highway scheme has to be assumed under the 1961 Act. The vegetation that existed within and to the slopes of the cutting was not mature – it was rough scrubland due to the felling of most of the trees that had been there during the miners strike in the 1980s. Further, the suggestion that the proposals would cause "a more bland and regular form compared to the greater visual interest of the former land" is equally unsustainable given the highway assumptions, and in any event the proposals would, as a potentially productive field, not look the least bit out of place given the area in which it is located, and the rural surroundings generally. Thus, there would be no adverse effects upon character, visual amenity or nature conservation.

24. The requirements under 'Policy u12 – Waste' are such that the proposals should be deemed perfectly acceptable. There would be a beneficial affect on agriculture, rather than anything unacceptable in those terms, and there would be no unacceptable affect upon the appearance of the land.

25. In respect of 'Policy EV1' in the Replacement Structure Plan, Mr Forse said that the proposed improvements to the land for agricultural purposes would clearly be acceptable under this policy. Further, the proposal also falls generally within the National Guidance set out in PPW.

26. Mr Forse also included within his report a number of photomontages that were designed to simulate how the land would appear once the reclamation was complete. These, he said, indicated that the notional scheme would have no adverse visual impact, and would readily fit in with the surrounding landscape. The scheme of tipping for agricultural improvement should have been acceptable under the terms of the relevant planning policies prevailing at the agreed date, and thus there is no reason why a positive certificate should not be issued. It was his view that the proposal should have been considered on its merits, and not, as he suspected, with a view to reducing the amount of compensation ultimately payable. Any concerns that the council may have had about the proposed scheme and particularly any issues about the resultant profiling of the land could, and would, be adequately covered by conditions 3 and 6 of

the draft proposed conditions (set out in the Delegated Report) to be applied if the Upper Tribunal were to grant a positive certificate.

27. Whilst it was acknowledged that the council's Delegated Report had been wide ranging in its consideration of the matter, Mr Forse said it was notable that there had been no objections from either the Highways and Transportation Section or the Environmental Health Department, and the lack of any strong objections should have put them in a position to issue a positive certificate. Indeed two of the residents of Cheriton Grove, whose properties directly overlooked the appellant's land and disused railway cutting, submitted letters to the council indicating strong support for such a scheme of reclamation. He said the Council's own policies permit schemes of agricultural improvements involving tipping, but they appeared to have gone out of their way to manufacture reasons why it was not permissible in this case. Further, the council appeared to have overlooked the fact that the regenerating trees and shrubs in the cutting enjoyed no statutory protection, and that in any event, under the required highway planning assumptions, the trees and the cutting itself would have been totally obliterated.

28. In cross-examination, Mr Forse said that although he had referred to the appeal land as "previously developed land" in the supporting statement to the CAAD application, that was a generally descriptive comment and he was not relying upon the specific definitions of what "previously developed land" is as set out in Figure 2.1 of Chapter 2 of the PPW. Whether or not the appeal land falls specifically within the definitions set out in PPW was, he said, arguable, but he had never sought to set out his case on that basis. The guidance set out in PPW was of general application, and the point was that it did not over-ride the provisions set out in the Local Plan and Replacement Structure Plan, as Mr Walters would be submitting in the light of *R. (On the application of Dacorum BC) v Secretary of State for Communities and Local Government* [2009] EWCA Civ 1494. He did not accept the respondent's argument that the PPW was the more up to date and comprehensive guidance in relation to waste planning, and said that the extracts provided by them were not relevant to the determination. He also stressed that, in any event, the situation here was not "development" as such. It was the reclamation of former agricultural land for re-instatement to that original use. Thus he would have expected the land to come forward under any of the local or national policies.

29. Although he accepted that the land was not really derelict and was not contaminated, it was clearly evident that it was an old railway line that could no longer be utilised for any productive or useful purpose. As to what were described as suitable potential locations in the Technical Advice Note on waste that accompanied PPW (referred to as "TAN 21"), Mr Forse accepted that they are markedly different to the location of the appellant's land, but said that note was aimed more at recycling facilities. This was not a potential recycling site, but was for very short term landfill purposes.

30. It was put to Mr Forse that the proposal was not driven in the interests of agriculture, but by the potentially significant value that would achieved from the tipping of over 66,000 tonnes of inert waste. He accepted that the spin off from that was self evident, but in planning terms it was the reversion to a productive agricultural use that was important. In that regard, he accepted that at the relevant date Ty Isaf was not a viable agricultural unit in the planning sense, but reiterated that it had been farmed by the family for very many years.

The case for the council

31. **Mrs Bowhay** is a Chartered Town Planner and is currently a Senior Planning Officer with the council. She has over 25 years town & country planning experience in south Wales. In her report, she said the council's principal reasons behind its view that it was correct to issue a negative certificate were that the proposal would have represented unjustified development in the countryside, and would have been detrimental to the character and appearance of the area. In any event, she said, it was the council's view that the primary purpose of the proposed development was to obtain the significant increase in value that the opportunity to dispose of 66,000 tonnes of inert waste on the land would provide.

32. The appeal land would not, Mrs Bowhay said, have been regarded as 'previously developed land' as defined by para 2.7 and figure 2.1 of PPW. This was principally because the remains of the previous railway activity had blended into the landscape sufficiently to be considered to have become part of the natural surroundings. Further, it appeared to have been used at the relevant date for either agricultural or amenity purposes – such purposes being specifically excluded from the definition of previously developed land under the provisions.

33. The land was neither derelict nor contaminated and was not in need of reclamation and therefore did not come within the Derelict and Contaminated Land Policies (D1 to D7) in the Replacement Structure Plan. Paragraph 8.2.2 of that Plan sets out the types of land which may be considered derelict, and which would have been considered in need of reclamation by the Welsh Development Agency in its land reclamation programme which funded both private and public schemes. Although that programme related mainly to major sites, Mrs Bowhay said it applied equally to small ones. It was certainly not a site which was unsightly or detrimental to the environment, and there would have been no concerns as to safety.

34. For these reasons the proposal would have been unjustified development in the countryside, contrary to Policies EV1 of the Replacement Structure Plan and also en62 of the Local Plan. It would also have been contrary to the provisions of National Planning Policies in relation to waste management issues (paragraphs 12.5.2 and 12.7.1 of PPW) and the advice given in TAN21 at paragraphs C.36 and C.37 together with paragraphs 10.5 and 10.6 of Chapter 10 [see paragraph 10 above]. The land certainly did not fall within the definitions set out in paragraph 10.5, and there were no other material considerations to justify the granting of planning permission.

35. It was also, Mrs Bowhay said, the council's view that the land acquired had not been considered to form part of a viable agricultural business, and therefore there was no justification in bringing what was effectively a small area of land back into agricultural use on completion of the proposed tipping operations. If a development was to be justified in the interests of agriculture, it had to be demonstrated that there was an overall need for it, and that could certainly not be shown here. In conclusion, she said that the proposed development would have been in direct conflict with both National and Local Planning Policies and the general assumption against unnecessary new development in the countryside.

36. As to the visual and landscape impact, the proposed tipping operations would have had an unacceptably adverse impact upon the character, appearance and visual amenity of the land itself and the immediate area. The land comprised gently sloping pasture land and a steep sided cutting that contained a variety of habitats including broad leaved woodland, individual trees, mature scrub and bushes with no evidence of neglect and nothing unsightly in its appearance. The land was in close proximity to, and visible from, a number of residential properties and an adjacent footpath, and apart from the short-term disturbance from the tipping operations, the reclaimed land when restored and re-graded would have an unnatural and bland "manufactured" appearance rather than the interest of the irregular surfaces which fitted in well with the natural topography.

37. There were other material considerations which would have militated against the grant of planning permission, such as highway safety, residential amenity, ecology and nature conservation, although it was accepted that they were not key determining factors and no objections had been received from consultees in respect of any of these matters. As such, this indicated that any concerns under those heads could have been dealt with through planning conditions – those proposed should the Upper Tribunal be minded to grant a positive certificate being included in the Delegated Report.

38. In cross-examination, Mrs Bowhay acknowledged that the proposed end-use of the land for agricultural purposes could be distinguished from the landfill operations, but nevertheless she was of the view that whilst the finished, re-graded site would not be contrary to residential amenity, it would still be unacceptable on strict policy terms. The tipping operations would, of course, have an affect upon residential amenity and the character and appearance of the area, and again this would be contrary to policy.

39. Mrs Bowhay was challenged about the consultation process undertaken in relation to the preparation of the Delegated Report, and what in particular the Environment Agency for Wales had been told about the application, because in the report it was stated that the EA said "the proposed development would have been likely to have required a bespoke Environmental Permit…" However, they were not introduced until 2007 and at the relevant date in December 2005, the requirement was for a Waste Management Licence which had different criteria as to agricultural exemptions. She said that as far as she was aware, the EA was advised that it was a section 17 application, and that the relevant date was 15 December 2005, so she could not square the reasoning for that statement having been made. She was not aware of the implications in terms of exemption criteria.

40. Taken to the reference in the Delegated Report to paragraph 10.3 of TAN21 which states that "there is widespread concern that the re-use of material on exempt sites is of questionable environmental benefits", Mrs Bowhay was asked if it was, indeed, an exempt site because there was specific reference to it in the Delegated Report. She said she had not considered that but, even if it was exempt, that did not mean it does not need to obtain planning consent. There was certainly no evidence from the claimant to suggest that it was.

41. Taken to paragraph 10.40 of Policy u12 in the Taff Ely Local Plan, which stated that "…the practice of landfill disposal should continue and additional space should be sought.", Mrs Bowhay pointed out that paragraph 10.44 states that the "purpose of the Policy is to ensure that planning permission is given only to sustainable schemes…" However, she said that whilst Policy u12 was relevant in December 2005, and that the council remained dependent upon the availability of landfill sites at that time, those policies rapidly became out of date and that at the time the council had access to landfill sites within its catchment area. She said that in her view PPW was more up to date than the Local Plan.

42. Asked about her view that an application needed to demonstrate an overriding need for the proposed development, Mrs Bowhay said that whilst Policy EV1 of the Replacement Structure Plan did not specifically refer to overriding need, it had to be read in conjunction with the supporting text – see paragraph 6.2.4.

43. As to the requirement for the application to be justified in the interests of agriculture under Local Plan policies, Mrs Bowhay accepted that no evidence had been produced by the council to contradict the conclusions that Mr Harris of Brinsons Chartered Surveyors had come to in their letter to her of 21 February 2013, and accepted that there would be some benefit in agricultural terms once the tipping and the re-grading had been completed. She accepted that in respect of Local Plan Policy u12 – Waste, it was only item 1 in the Schedule that stated there should be "No unacceptable effect upon the appearance of the landscape" that was being relied upon, and that item 3 which reads "No unacceptable affect on agriculture, and, wherever possible, a beneficial effect on agriculture ultimately" actually supports the proposal. She accepted that her reliance upon item 1 was purely opinion and that she could produce no specific evidence in support.

Submissions

44. For the respondent, **Mr Hughes** pointed out that, under s.18(2)(a) of the 1961 Act (as amended), the Upper Tribunal is required to approach this appeal as if the application had been made to it in the first place. Thus, it was submitted, it is necessary for the Upper Tribunal to approach the issues raised in the application for the certificate afresh, to consider the steps mandated by s.18(2)(b)(i) to (iii) and to confirm, vary or cancel the Certificate as it deems appropriate. The Upper Tribunal is thus not confined by the grounds on which the respondent council determined the application under s.17.

45. In connection with the appellant's argument as to the relevance of the planning permission for the Church Village bypass scheme in relation to the application under section 17(1) of the 1961 Act, the assertion that the council should not have ignored the fact that planning permission had been granted for the bypass scheme was not accepted.

46. It was submitted that the approach the respondent was obliged to take when making its decision, and that which the Tribunal has to take, was addressed by Lord Hope of Craighead in *Fletcher Estates (Harlescott) Ltd v Secretary of State for the Environment* [2000] 2 AC 307, at 319-325. His conclusions could be summarised as:

> "The assumption which the planning authority must make relates to the situation at the relevant date. The scheme for which the land is proposed to be acquired, together with the underlying proposal which may appear in any of the planning documents, must be assumed on that date to have been cancelled. No assumption has to be made as to (what) may or may not have happened in the past."

47. That the respondent would be willing to grant planning permission for the bypass scheme is therefore a given, as whichever of the two certificates it was obliged to issue under s.17(4) of the 1961 Act states that permission would have been granted *for any development for which the land is required.*

48. However, Mr Hughes said that that is not the end of the matter. The extent to which the appellant can argue that because the council was willing to grant permission for the bypass scheme on 15 December 2005 it would have been prepared to grant consent for the appellant's proposal is severely limited.

49. It was common ground between the parties and trite law, that the approach as to whether permission would have been granted for the appellant's proposal is mandated by s.38(6) of the Planning and Compulsory Purchase Act 2004 (the 2004 Act) which provides:

> "If regard is to be had to the development plan for the purpose of any determination to be made under the planning acts, the determination must be made in accordance with the plan unless material considerations indicate otherwise."

In this case, the bypass scheme was expressly contemplated by the relevant development plan, and in general terms fostered by it. As set out in the Delegated Report, Policy t1.1 of the Local Plan (adopted June 2003) *"safeguards land for the Church Village Bypass"* and Policy T2 of the Replacement Structure Plan (adopted January 1999) refers to *"proposed implementation of the Church Village Bypass as a Phase 1 (programmed)scheme."* Indeed, the scheme had been included in the Mid Glamorgan County Council Structure Plan as far back as 1978.

50. Conversely, the appellant's proposed scheme was not contemplated in any of the relevant development plans. It was a small scale proposal that had to be determined by reference to general policies contained in the development plan, and to any material considerations which would have included national planning policy. It followed therefore that merely because the application of the policies in the development plan resulted in planning permission being granted for the bypass scheme, it cannot be assumed that planning permission could be assumed for the appellant's proposal.

51. It was submitted that the National Planning Policy is a "material consideration" as contemplated by s.38(6) of the 2004 Act, and as such it was something that the body determining the application was entitled to take into account. Indeed, that it was a material consideration had been accepted by Mr Walters [as confirmed at paragraph 2 of his closing submissions]. However, the appellant's reliance upon a passage in *R. (On the application of Dacorum BC) v Secretary of State for Communities and Local Government* [2009] EWCA Civ 1494 needed to be seen in context. Sir David Keane said, at paragraph 17:

> "17 As for the proposition that, as a matter of law, plain words in an adopted Local Plan are to be overridden or set aside by wording in a planning policy guidance note, I have to say that I regard that as not only misconceived but quite astonishing. Unlike a PPG, a Local Plan will have gone through the statutory processes, including public consultation and normally a public inquiry, and a report by an independent inspector, before being formally and ultimately adopted. It has statutory force, being explicitly referred to in the legislation. The Secretary of State will have had the opportunity to change it if he regards it as failing to conform to national policy (see sections 43, 44 and 45 of the 1990 Act).
>
> 18 PPG2, by contrast, is not a document which has any statutory force, albeit that it will be a material consideration. Such guidance notes do not expressly feature in the relevant Acts, will not have been through a public inquiry process, and simply cannot take precedence over clear language in the statutory development plan. They may, of course, assist if the statutory development plan uses words which are not precisely defined, and that was the situation in the Heath and Hampstead case…"

In that case, a planning inspector had used words in a PPG to effectively circumvent clear policy contained in a Local Plan (to restrict development in the green belt).

52. Here, it was not being contended by the respondent that the national guidance in PPW or TAN21 should in some way circumvent the policies contained in the Local and Replacement Structure Plans. However, the content of the relevant sections of PPW and TAN21 are material considerations in considering the merits of the appellant's proposal. Thus, it was submitted that the determination should be made in accordance with national policy, particularly as it would have been the more comprehensive policy on the topic of waste management proposals.

53. It was submitted that in any event the policies in the Local and Replacement Structure Plans as referred to by Mrs Bowhay were sufficient grounds for refusal. The appellant's proposal would not come within either of the two exceptions referred to in Policy en1 in the Local Plan (development in the interests of agriculture or development associated with waste management schemes). It could not be said to be in the interests of agriculture as this very small farm (about 13 acres) consisted of low-grade land which was not being operated, and could not operate, as a viable agricultural unit. Any agricultural benefit that might accrue from the filling and re-grading of the old railway cutting would be ancillary or incidental to the major economic benefits that would accrue from the exercise of tipping 66,000 tonnes of inert waste. There were no overriding reasons to support the proposal to overcome the presumption against development in the countryside.

54. It would also not come within the exceptions in Policy en2 if it would unacceptably adversely affect the character, visual amenity or nature conservation value of the site. Use for waste management purposes would certainly adversely affect the character and amenity value of the land. Whilst it was accepted that some of the relevant policies in TAN21 relate to recycling sites, the majority, it was submitted, were of more general application. Specifically, paragraph 10.6 states that landfill proposals not genuinely needed for agriculture should be refused, and paragraph C36 clearly contemplates waste management sites being located in very different types of location – a fact accepted by Mr Forse.

55. The land cannot be described as a reclamation scheme as it was not identified as derelict land in the Replacement Structure Plan, and what constitutes reclamation also needs to be considered in the context of PPW.

56. For the appellant, **Mr Walters** submitted in his skeleton argument that in considering the appellant's proposal, it has to be assumed that planning permission for the council's highway scheme would be granted and that, per *Fletcher Estates*, it is to be assumed that at the relevant date of 15 December 2005 that scheme and its underlying proposals were assumed to have been cancelled. It was suggested that the respondent had misunderstood and misapplied this doctrine. It does not mean, as the council seemed to be saying, that the fact planning permission would have been granted for the bypass could be ignored. What it means is that, at the relevant date, the permission no longer exists. This, he said, was a different scenario to the "no-scheme world" situation in compensation.

57. In his closing submissions, Mr Walters submitted that the appellant is not saying that because the road scheme was deemed acceptable in planning and environmental terms, the appellant's proposal *must* also be acceptable. It was accepted that planning applications are each dealt with on their merits and the individual facts and circumstances have to be weighed. However, there cannot be inconsistency; on the same material issue the same material facts must be relied upon. So, in considering the appellant's proposal, the impact on the landscape and its overall effects need to be compared to those that would have been caused by the highway scheme if it had gone ahead. Because the council had erred in its understanding of the statutory requirements, it had produced a decision that was unfair and inconsistent. The landscape impact of the highway scheme is clearly far greater than the impact that the appellant's much more limited proposals would cause. According to the council, the need to preserve the existing landscape was sufficient to justify a negative certificate, but by assuming that planning permission for the highway scheme would have been granted, the far greater impact on the landscape was deemed acceptable.

58. It was accepted in closing that the decision must be made in accordance with the development plans, unless material considerations indicate otherwise, and that national guidance is a material consideration. However, it was pointed out that the PPW policies were not referred to in the negative certificate, and reference to them as a reason for refusal appears to have been added now into the evidence before me. Whilst the national policy was quite properly referred to in the Delegated Report, it was not cited as a reason for refusal and should not therefore be promoted as such now.

59. The council is not entitled to rely upon new reasons additional to those considered at the application stage, especially as the operation of the site and other considerations were expressly considered to be capable of resolution by condition and thus did not justify refusal. It was apposite that the council's Land Reclamation Division and Environmental Health Departments raised no objections, and neither did Highways. There was also no objection from the (then) Environment Agency for Wales.

60. As to the Local and Replacement Structure Plan Policies, it was submitted that the simple test of whether the development should be permitted in the interests of agriculture was that it would produce additional, workable, agricultural land. The evidence from Mr Harris relating to how the re-grading of the land would be achieved, made available to the council and reproduced at pages 51 and 52 of the appellant's bundle, was accepted in cross-examination, and not contradicted. There is no additional test of need and the question of viability was not a planning consideration and therefore not relevant.

61. The development is waste management within Local Plan Policy en1 and u12 is the policy covering waste disposal. It was accepted by Mrs Bowhay in cross-examination that criterion 3 in u12 was met, but it was submitted that the council's case that criterion 1 was not met was wrong. The Delegated Report showed that there was no residential or consultee objection to the proposed scheme (subject to conditions), and there was no evidence produced to prove any potential operational impact during the tipping activities. Further, the anticipated detrimental impact referred to was admitted by Mrs Bowhay to just be her own opinion, and was not supported by any facts or reasoning.

62. It was submitted that the development plan policies were clear and do not require reference to national guidance to resolve any uncertainty. The suggestion that the Local Plan was out of date, and was effectively superseded by PPW was incorrect – the Local Plan was adopted after publication of the relevant national guidance and no evidence was produced to indicate a material change introduced by those national policy documents.

63. In summary, Mr Walters submitted that the council simply has no evidence to support the refusal of planning permission, and a positive certificate should be issued.

Legal framework

64. As noted in opening by Mr Hughes, in determining for the purposes of section 17(4) of the 1961 Act whether planning permission would have been granted for the appellant's proposal, it is necessary for me to pursue the approach that the local planning authority would have been obliged to follow on the relevant date. This is by virtue of section 70 of the Town and Country Planning Act 1990 (TCPA), and section 38(6) of the Planning and Compulsory Purchase Act 2004 (PCPA) (which is applied to determinations under section 17 of the Land Compensation Act 1961 by section 37(d) of the PCPA). That approach was confirmed to be correct in *Harringay Meat Traders Ltd v Secretary of State , LB Hackney and GLA* [2012] EWHC 1744 (Admin).

65. Thus, pursuant to s.18(2) of the 1961 Act I am bound to approach the issues entirely afresh, as if the application had been made to the Upper Tribunal in the first place, and in that regard I agree with Mr Hughes's statement that "the Upper Tribunal is not confined by the grounds upon which the council determined the [s.17] application".

66. The relevant date for the consideration of the applicable planning policies has now been agreed at 15 December 2005, the date of publication of the CPO – per the judgment in *Fletcher Estates.*

Discussion

67. The matters for my consideration in determining this appeal are as set out in paragraph 14 above. I deal firstly with the question of the relevance or otherwise of the planning permission for the council's Church Village Bypass scheme and the parties' submissions in that regard. It is common ground that, at the relevant date, it is to be assumed that the acquiring authority's scheme has been cancelled. However, Mr Walters seemed to infer that the respondent council took that to mean that it was also to be assumed it had never existed, and as such any argument over the relative impact upon the landscape and the overall affects of the appellant's proposal in comparison with the CPO scheme were not relevant matters for consideration. Mr Walters did say in closing that it was not being argued that just because the road scheme must be assumed to have obtained planning permission, then the appellant's proposal must be acceptable due to its more limited impact, but that the point he was making was that there cannot be inconsistency. On the same material issue, the same facts must be relied upon. Whether it was in the development plan or not, the CPO scheme was considered acceptable in planning terms, so a proposal that had a lesser impact, for instance in regard to the need to preserve the existing landscape, should also be deemed acceptable. No reasoned justification, he said, was given by the respondent for this apparent distinction.

68. In closing, Mr Hughes, rightly in my view, reminded us of section 38(6) of the PCPA 2004 and the requirement for any determination to be made in accordance with the development plan "unless material considerations indicate otherwise." He was not saying that the assumed existence of planning consent for the highway scheme should be ignored because the scheme was assumed to have been cancelled, but that the primary issue against which a decision should be made was whether the proposed use was within the development plan. The CPO scheme clearly was, and the appellant's proposed development was not.

69. I agree with the respondent's approach. Taken to the extreme, the weakness in the appellant's argument in this regard, despite what Mr Walters said in closing, can readily be seen. Throughout England and Wales there have been, and will continue to be, major infrastructure schemes such as HS1, Crossrail and now the HS2 railway lines, and the Olympic Park and Legacy Development in London which have had or will have a very significant impact on the environment. For parties whose land has been affected by such schemes to be able to argue that because their proposals (whatever they may be) would have a lesser impact, then they should be entitled to a Certificate of Appropriate Alternative Development, just does not stand up to scrutiny, whatever the facts that are being relied upon are. I therefore fully accept Mr Hughes statement that "merely because the application of the policies in the development plan resulted in planning permission being granted for the bypass scheme, it cannot be assumed that planning permission could be assumed for the appellant's proposal." The considerations required for determining whether planning permission should be granted for a much needed and long awaited highway scheme, and whether it should be granted for the appellant's proposal are entirely different. The appellant's proposal must be considered upon

its merits, in accordance with the relevant policies in the development plan and any applicable national guidance.

70. In regard to national guidance (PPW), it was agreed that it was a "material consideration" as contemplated by section 38(6) of the 2004 Act, but the weight to be applied to it was in issue. The appellant relied upon the strongly expressed views of Sir David Keane in *R (on the application of Dacorum BC) v Secretary of State for Communities and Local Government* [2009] EWCA Civ 1494, in submissions made at the start of the hearing, that national policy cannot override the statutory Development Plans. The appellant argued that if any of the wording in the Local or Replacement Structure Plans was unclear and support was needed from the national guidance, the council should have said so. Reliance in this appeal upon policies that were not given as reasons for refusal in the s.17 application was not appropriate or permissible. The respondent agreed that PPW and TAN21 could not be used to circumvent the statutory Development Plans, but as they are material considerations, the determination should be made in accordance with those requirements as it was the more comprehensive policy on waste management proposals.

71. I cannot agree with the appellant's submissions on this. As is clearly set out in s.18(2) of the 1961 Act, the Upper Tribunal is to look at the matter afresh, as if the application had been made to it in the first place. Thus it can of course consider all relevant planning policies and guidance whether or not they were referred to in the Local Planning Authority's determination of the s.17 application. Whilst, in the light of *Dacorum*, it must be the case that more weight will be given to the statutory Development Plans (which I also accept in this instance were more up to date than the national guidance), that does not mean in my judgement that PPW and TAN21 can be ignored – especially in circumstances where the provisions of the relevant local or statutory policies may be unclear.

72. The right approach therefore is, in my view, to consider the Local and Replacement Structure Plan Policies first, and to have PPW and TAN21 in mind if and where necessary in any areas where the may be a conflict or the application of the policy might be unclear. I also bear in mind what Mr Hughes said about PPW and TAN21 being more comprehensive guidance on waste management policy, and Mr Walters' counter argument that those policies were more aligned to more major and recycling orientated proposals.

73. Looking firstly, therefore, at the Local and Replacement Structure Plan policies, and Policy en1 – Development in the Countryside, I agree with Mr Forse's arguments that the policy does not demand a specific agricultural justification, and that the proposal would, ultimately, be in the interests of agriculture. Similarly, the proposal clearly could fall within the description of a waste management scheme. I note that in the Delegated Report under the heading 'Residential and Recreational Amenity' it said the Public Health and Protection Division have raised no objections, subject to a number of conditions, and concluded:

> "It is therefore considered that subject to conditions restricting the hours of operation on the site, the submission of a scheme requiring dust suppression measures, and the details of any artificial lighting, the proposed tipping would not have been unduly detrimental to residential or recreational amenity."

Thus, Policy en1 is not, in my view, on its own a ground for refusal even though there may be a question over whether the proposal could come within the description of a land reclamation scheme (due to the parameters relating to derelict land set out in PPW). However, in that regard, I note that there was no objection to the proposal from the council's Land Reclamation Division.

74. Turning to the criteria for development in the countryside under Policy en2, I am satisfied that, subject to compliance with the draft conditions that were set out in the Delegated Report, there would be no unacceptably adverse affect upon the character, visual amenity or nature conservation value of the site, and there was no evidence to suggest that there was likely to be any adverse affect upon quality or quantity of surface water or groundwater sources.

75. It was agreed that under Policy u12 – Waste, only criterion 1 and 3 were in issue. I am satisfied that if the land was ultimately re-graded as set out in the report prepared by Mr Harris, and made available to the council, and its contours were finished in accordance with the plans prepared by Davis Surveys Ltd and provided to me within the trial bundle, then there would be no unacceptable impact upon the landscape. Although, from the Google images and photographs provided, I do not think that the appearance of the land was in any way unacceptable because it was a disused railway cutting, a carefully graded and sown field would be no worse and possibly somewhat better in terms of visual impact from the nearby roads, footpaths and residential properties. I do not agree with Mrs Bowhay's suggestion that the re-graded land would have an unnatural and bland or manufactured appearance. Certainly I agree with Mr Forse that that there would be no unacceptable affect on agriculture and that, to a limited degree at least, there would be an ultimate benefit.

76. I note (paragraph 40 above) that Mrs Bowhay said the council continued to be dependent upon the availability of landfill sites in December 2005. Paragraph 10.43 of the explanatory text to Policy u12 in the Local Plan (published 2003) said:

> "The present situation is that there is no site identified for future landfill within the plan area. Therefore, waste will continue to be disposed of outside the area, by either private companies or by other local authorities' waste disposal companies."

December 2005 was the relevant date for the purposes of this exercise, and her comment that the policies subsequently became out of date is therefore not something for my consideration.

77. Mrs Bowhay also referred to paragraph 10.44, and the requirement for planning permission only to be granted to sustainable schemes. The relevant part of the paragraph reads:

> "The purpose of the policy is to ensure that planning permission is only given to sustainable schemes, not those that simply store up problems for the future. There is an important requirement for monitoring and aftercare of landfill sites, to encourage good practice during operations and to ensure early response is made to any problems such as subsidence, leachate pollution, gas migration and landscaping failures."

I am entirely satisfied that the appellant's proposals would be sustainable within the terms of the requirement.

78. Policy EV 1 in the Replacement Structure Plan, dealing with restrictions on development in the countryside, lists as exceptions developments that are (amongst others) in the interests of agriculture and land reclamation. Mrs Bowhay said that any application for development in the countryside had to demonstrate an overriding need, and whilst she accepted in cross-examination that the wording of the policy itself did not say that, the supporting text in paragraph 6.2.4 did. It reads:

> "The remainder of the Environment section introduces a series of policies by which other developments proposed for a countryside location can be assessed in addition to the general restriction of EV1. These policies may strengthen the basic restriction on development in the countryside, where it leads to detrimental effects on other important features. In order to overturn this and any specific restriction referred to in any of the relevant policies, it will be necessary to establish that there is an overriding need for a development at that location compared to the needs for site protection."

My understanding of that paragraph is that overriding need has to be established in proposals that would lead to "unacceptable detrimental affects," and I do not think that applies to this proposal.

79. Within the statement of agreed facts and issues signed by the parties to this appeal, it was stated that, subject to my conclusions on the relevance of the national policies upon which the council sought to rely, the key determinant of the acceptability of the appellant's proposal would be "dependent upon an assessment of whether or not such a proposed development would have been justified development in the countryside with regard to the visual and landscape impact of the proposals especially with regard to whether or not it would '*not unacceptably adversely affect the character or visual amenity of an area"* (en2) or *"have no unacceptable affect on the appearance of the landscape."*(u12)" In his conclusions, Mr Forse said, at paragraph A4.1 of the addendum to his statement of case that:

> "On the basis of the additional photomontages, these confirm that there was no reason to reject the agricultural land reclamation scheme on the basis of adverse visual impact. The proposals would readily assimilate into the countryside and would not have any detrimental impact on the character and appearance of the area as the council claim."

80. It will be seen from my conclusions above that I agree with that summary, and that the proposed development, although not specifically included within the Development Plan, would be acceptable in planning terms under those policies. It was the three policies with which I have dealt above that were relied upon by the council in issuing its negative certificate, but as I have said, that should not, and does not, preclude me from considering the national guidance which the parties have in any event agreed to be a material consideration.

81. However, as I said in paragraph 72 above, reliance upon the national guidance comes into play if there appears to be a conflict in the local policies, or if any of them are unclear in terms of determining this matter. I do not think they are, and following the judgment in *Dacorum* I am satisfied that despite being a material consideration, there is nothing in any of the policies that Mrs Bowhay in particular has highlighted that circumvent the clear guidance set out in the three local policies to which I have referred.

82. Nevertheless, if I were to be found wrong on that conclusion, I would make the following points. Firstly, the question of whether or not the appeal site could accurately be described as "previously developed land". I have to confess, this is a very difficult question to answer. On the one hand, the site of the former railway cutting clearly fell within this category. However, Mrs Bowhay pointed out that, under Figure 2.1 – 'Definition of previously developed land', in Chapter 2 of the PPW listed as an exclusion "*land where the remains of any structure or activity have blended into the landscape over time so that they can reasonably be considered part of the natural surroundings*". I note (see paragraph 28 above) that Mr Forse says this point is arguable, but that whilst he had described it as previously developed land in the application, he was not relying upon the specific definition per Figure 2.1 and said he was using it purely as a generally descriptive comment. Having considered the aerial photographs of the land as it was, I agree that the point is arguable. Whilst it is clear that the existence of trees, shrubbery and other natural foliage appears to have allowed the land to blend in with the landscape, the fact remains that there remained a deep cutting which served to break up the otherwise gently sloping nature of the land on each side. On balance therefore, I do not think it would fall within that exclusion.

83. As to the other national guidance policies relied upon by Mrs Bowhay, I agree with Mr Forse that they were aimed more at recycling and major waste management facilities, which would be expected to remain operational for considerable periods of time. In this case, I am mindful that the waste management aspect would only last in the region of 12 months, before the land was reinstated to its, original (pre-railway) form.

84. Under paragraph 10.6 of Chapter 10 of TAN 21 to PPW dealing with demolition and construction waste, it says: "Planning applications for the landfill of inert waste material should be considered carefully by local planning authorities to ensure that there are no practicable recycling opportunities, or that such landfill would result in significant improvement to ground conditions to enable more beneficial use of the land…. Those proposals not genuinely needed for agriculture should be refused." There is no doubt in my mind that the proposal would have resulted in a more beneficial agricultural use of the land.

85. For the reasons given above, I allow the appeal, cancel the negative certificate issued by the Local Planning Authority pursuant to section 17(4)(b) of the 1961 Act, and issue a positive certificate (Attached at Appendix A). It is also accompanied by a site plan (Appendix B).

86. In respect of conditions, for the purposes of this appeal I am mindful of the fact that the purpose of the CAAD system is to provide valuers (and ultimately the Upper Tribunal) with a context within which to value. The certificate is not a detailed planning consent, and the circumstances of any particular development scenario will vary. The National Assembly considers in paragraph 8 of Appendix L to CPO Circular NAFWC 14/2004 (Revised Circular on Compulsory Purchase Orders 06/2004 (Compulsory Purchase and the Crichel Down Rules) which says;

> "The (Secretary of State) considers it important as far as possible that the [CAAD] system should be operated on broad and common sense lines; it should be borne in mind

that a certificate is not a planning permission but a statement to be used in ascertaining the fair market value of the land."

I do not consider it necessary to provide a set of specific conditions and parameters to define further the particular form of the development. Suffice to say that the draft conditions provided within the Delegated Report are considered to be broadly in line with what a 'real' planning consent would include.

87. For the avoidance of doubt, this decision relates solely to the appeal made under section 18 of the Land Compensation Act 1961, and should not be taken to imply any consideration of, or conclusion on, the question of compensation that may be due to the appellant under the provisions of section 5 of the 1961 Act, on either part or the whole of the land to which this appeal relates.

88. Section 17 of the 1961 Act is a purely hypothetical exercise created solely to assist in the assessment of compensation for the compulsory acquisition of land, and a CAAD is an indication of what development would have been allowed if it had not been acquired compulsorily. Having now determined this issue in respect of Mrs Edwards's land, the question of value at the relevant date can be determined with the assistance, if necessary, of this CAAD.

89. This decision is final. The question of costs will now be considered, and a letter setting out the procedure for making submissions, together with details of the appeal procedures, accompanies this decision.

DATED 14 October 2014

P R Francis FRICS

[2014] UKUT 0435 (LC)
UTLC Case Number: ACQ/58/2013

APPENDIX A

LAND COMPENSATION ACT 1961 (As Amended)

CERTIFICATE OF APPROPRIATE ALTERNATIVE DEVELOPMENT

LAND TO THE EAST OF TY ISAF FARM, CHERITON GROVE, TONTEG, PONTYPRIDD CF38 1ST

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 14 October 2014:

Planning permission would have been granted for a tipping/land reclamation scheme in accordance with the application made by Harmers Ltd on behalf of Mrs Olive Edwards to Rhondda Cynon Taf County Borough Council dated 18 May 2012 (ref:12/0576/02) and for any development for which the land is to be acquired, but would not have been granted for any other development.

DATED: 14 October 2014

Signed: P R Francis FRICS
Member, Upper Tribunal (Lands Chamber)