HS2, compensation and the assumption of planning permission

Great swathes of land have now vested in the Secretary of State for the purposes of the construction of HS2, and compensation disputes are beginning to be heard by the Upper Tribunal (Lands Chamber). The basis of compensation, for the acquisition of land, is the open market value assessed in accordance with the rules in the Land Compensation Act 1961. The open market value may reflect any development value, and one set of rules addresses the prospects of planning permission for development on certain assumptions: see section 14 of the 1961 Act. The purpose of the rules is to determine the prospect of a planning permission for development on the assumption that the underlying scheme has been cancelled on, what is called, the "launch date". In most cases the "launch date" is the date of first publication of the notice of the making of a CPO, or in other cases, the date of first publication of certain notices required to be given at the commencement of the process.

The rules then provide for, inter alia, a case where it may be assumed that planning permission would be granted (either on the valuation date or at a later date) for "appropriate alternative development". "Appropriate alternative development" is development for which planning permission could reasonably have been expected to be granted, in the circumstances known to the market on the relevant valuation date, on the assumption of the scheme cancellation rule. It is development on the relevant land, the land being acquired, or that with other land.

An application can be made by either or both parties to the local planning authority for the grant of a positive or negative certificate of appropriate alternative development (CAAD): see section 17 of the 1961 Act. The applicant for a positive certificate believes that there would have been a prospect of planning permission, whereas the applicant for a negative certificate believes otherwise. An appeal from the determination of a CAAD lies to the Upper Tribunal. In respect of a real world application for planning permission for, say, Site A, the local planning authority may have regard to an earlier permission granted for an adjoining site, say, Site B. The authority might justify the refusal of planning permission for Site B where, for example, a planning policy would restrict the grant of permissions that go beyond some demonstrable need for the particular form of development in circumstances where that need has already been met by the permission for Site A. Does this approach apply where several applications are made for CAADs, in respect of adjoining sites subject to compulsory acquisition?

In the recent decision in *Secretary of State for Transport v Curzon Park Ltd and others* [2020] UKUT 37 (LC), the Tribunal was concerned with four separate owners owning adjoining land required for the new HS2 Curzon Street station at Birmingham. Each owner sought a CAAD for a mixed use scheme including student accommodation. In the real world, planning permission would been limited to the site or sites that satisfied the demonstrable need for student accommodation, with subsequent applications for permission, in respect of other sites, being refused once the need had been satisfied by the earlier permission or permissions. Should that approach apply to the applications for four separate CAADs in respect of the adjoining sites? No, decided the Tribunal. It held that, in determining the

development for which planning permission could reasonably have been expected to be granted for the purposes of section 14(4)(b), the decision-maker is not required to assume CAAD applications or decisions, arising from the compulsory acquisition of land for the same underlying scheme, had never been made. The decision-maker must treat such applications and decisions as what they are, and not as notional applications for, or grants of, planning permission. They are not material planning considerations. Subject to those boundaries, it is for the decision-maker to give the applications and decisions such evidential weight as they think appropriate.

In meeting HS2's submission, that if four positive CAADs were granted, there would be over compensation, as not all the owners could expect planning permission for student accommodation, and the consequential development value, in the real world, and therefore applications for CAADs should be treated as notional applications for planning permission, the Tribunal said that the assumed factual context was dealt with comprehensively in section 14(2) and (3) of the Act. The application referred to in section 14(4)(b) notionally results in the grant of permission for appropriate alternative development of the relevant land alone or that and other land. The owners' freedom to develop their lands was taken away on the launch date of HS2 in November 2013, and from that date to the date of acquisition any application for permission would have been determined in the shadow of the scheme.

Since the reform of these rules under the Localism Act 2011, and with the larger projects like HS2 coming on stream, much more use is being made of the CAAD procedure, and of the appeal arrangements to the Tribunal.

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