

Redress in the Round:

Remedying Maladministration in Central and Local Government

Redress in the Round: Remedying Maladministration in Central and Local Government

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Joint Statement

We are today both publishing reports which set out the results of our investigations into a complaint made by Mr and Mrs Maurice Balchin against the Department for Transport and Norfolk County Council in relation to the Council's refusal to purchase the Balchins' former home in advance of an intended road bypass scheme.

Our investigations have effectively considered the same set of events from our respective perspectives - namely the administrative actions of central and local government - and we have worked in close collaboration throughout. Nevertheless, the legislation covering our respective remits currently requires that we publish separate reports of our findings, which is what we now do here. Although both reports are complete in themselves, it is only when they are read together that the events in question can be seen and understood in their entirety. We have therefore decided to publish them together, and in each case, to attach each other's report as an annex to our own. This is, we believe, the only way in which we can present the full picture in this exceptional case.

The Cabinet Office are currently consulting on proposals to reform certain aspects of public sector Ombudsmen services by means of a Regulatory Reform Order which, if implemented as proposed, would enable us in future to work together even more effectively and produce a joint report where appropriate. Mr and Mrs Balchin's case clearly demonstrates the advantages that such reform would deliver.

Ann Abraham
UK Parliamentary Ombudsman

Jerry White
Local Government Ombudsman
for England

October 2005

Foreword

I am laying before Parliament under Section 10(4) of the Parliamentary Commissioner Act 1967 this report, which contains the results of my investigation into a complaint made by Mr and Mrs Balchin that the Secretary of State for Transport acted maladministratively by confirming road orders in respect of the A1151 Wroxham/Hoveton bypass without seeking an assurance from Norfolk County Council (the Council) that they would be given adequate compensation for the effect of the road on their house.

The history of this complaint is exceptional in several respects. First, it has been a very long-running saga; the events complained about began in July 1986, when the Council first adopted the preferred route for the proposed bypass which abutted Mr and Mrs Balchin's home. The Council refused to buy the property in December 1987, June 1990 and October 1992. Meantime the Balchins had been experiencing extreme financial difficulties as a result of the impact of the proposed bypass on the value of their property and, as a consequence, on Mr Balchin's business, as he had previously used his home as security to raise the working capital for his business. Mr and Mrs Balchin had then moved out in 1991 for both financial and health reasons. Ironically, the Council discovered in early 1996 that they would need to purchase the Balchins' property if the bypass went ahead, but in June 1996 the Council decided to rescind the scheme for the bypass. Although the Balchins were subsequently able to sell the property, by that time their position had worsened to the extent that they only received sufficient to pay off the debts that had accrued in the interim.

Secondly, this is the fourth report by a Parliamentary Commissioner for Administration into the complaint made by Mr (now Sir) Michael Lord MP on behalf of Mr and Mrs Balchin. The complaint was first made on 13 January 1994, and three successive Commissioner's reports issued in December 1994, July 1997 and September 2000 have been the subject of judicial review proceedings in the High Court. In none of those reports did my predecessors find that maladministration by the Department of Transport had led to an unremedied injustice to Mr and Mrs Balchin. In broad terms, this was because they did not believe that the Council would have acted differently, whatever action the Department might or even should have taken to remind the Council of the nature and intention of new powers that had been granted to local authorities to purchase properties in circumstances such as the Balchins found themselves in. In each case, the Court made orders of certiorari and mandamus, which meant that Mr and Mrs Balchin's complaint fell to be reinvestigated in the light of all the relevant factors. I began my own investigation in January 2003.

Thirdly, after we had made our initial enquiries, I took the view that, as the Council were the relevant decision-making body in respect of any purchase of the Balchins' property, a thorough investigation of the Department's actions and their consequences, and the appropriate level of any redress due, could only be properly concluded if there were to be a parallel investigation by my colleague, Jerry White, the relevant Local Government Ombudsman for England, of the Council's part in relation to the events. I therefore referred the Balchins' case to him in April 2004, asking him whether, despite the length of time which had passed since the relevant events, given the considerable injustice I felt had been caused to Mr and Mrs Balchin and the exceptional nature of the case, he would be willing to consider the part played by the Council in these unfortunate events. He said that he would, and Mr and Mrs Balchin subsequently submitted a complaint to Mr White, who began his investigation in May 2004.

We subsequently conducted our respective investigations in parallel. This presented greater challenges than might be immediately apparent, because the strong interdependency of the relevant

actions of the two bodies involved meant that we needed to keep each other regularly updated not only on general progress in our respective investigations, but also on the development of our thinking with regard to maladministration, its consequences and redress. We also had to ensure that we did not unintentionally breach the various restrictions on our working practices placed upon us by our respective legislation, not least with regard to confidentiality and the sharing of information. Those restrictions, of course, also mean that we have had to prepare separate reports on our respective findings.

When I had completed my own enquires, I reached the conclusion, for reasons explained in the report, that there was maladministration in the Department for Transport's handling of the matter. This was on the basis that, in my view, there was a clear onus on the Department to ensure that they did not knowingly allow Councils to mislead themselves as to the intention of any legislation (for which the Department was responsible) to which the Council were obliged to have regard, and to step in to offer a correct interpretation of the current legislative position if the Council clearly misrepresented that. They had not done so here. However, I was unable to ascertain the full impact of that maladministration on the Balchins' position, and the consequences for redress, until Mr White had completed his enquiries. Those were concluded in August 2005, when Mr White found maladministration on the part of the Council also, leading to injustice to Mr and Mrs Balchin. He concluded that the total compensation due to Mr Balchin amounted to £200,000.

We then considered jointly what an equitable share of the responsibility for the considerable hardship caused to Mr and Mrs Balchin by the actions and omissions of the Department and the Council might be. We decided that it would only be fair to conclude that the Department and the Council had to carry an equal share in that responsibility. I am very pleased to be able to report that the Department for Transport immediately agreed to make an ex gratia payment to Mr and Mrs Balchin on that basis. In line with the Local Government Ombudsman's standard practices, the Council now have three months from the date of the report's publication to respond to Mr White's recommendations. I very much hope that they will follow the Department for Transport's commendable example and produce a similarly prompt and positive response, which will bring some long-awaited relief and comfort to Mr and Mrs Balchin and thereby bring this long and most unhappy story of hardship and injustice to a satisfactory close.

Finally, this case has, I believe, demonstrated all too clearly the need for reform of the legislation governing certain aspects of the working arrangements for public sector Ombudsmen, as set out in the consultation being conducted currently by the Cabinet Office. The restrictions on our ability to work together mean that we have not been able to provide the sort of fully-joined up and coherent service for Mr and Mrs Balchin that we should be able to provide to all citizens who have complaints which cross more than one Ombudsman jurisdiction. The removal of those restrictions, by means of the proposed Regulatory Reform Order, would undoubtedly enable us to provide a more efficient and streamlined service to complainants in the future.

Ann Abraham

UK Parliamentary Ombudsman

October 2005

Report into the investigation of a complaint by Mr and Mrs Balchin

Case No. C.57/94

Introduction

1. This is the fourth report by a Parliamentary Commissioner for Administration into a complaint made by Mr (now Sir) Michael Lord MP on behalf of Mr and Mrs Balchin. The complaint was first made on 13 January 1994, and three successive Commissioner's reports have been the subject of judicial review proceedings in the High Court. In each case, the Court made orders of certiorari and mandamus, which meant that Mr and Mrs Balchin's complaint fell to be reinvestigated in the light of all the relevant factors. In view of this background, I concluded that it was appropriate to have the case looked into completely afresh. I also decided that the investigation should begin with an offer to Mr and Mrs Balchin of an interview for them to present their evidence, which had not happened previously. This is my report of the investigation.

Mr and Mrs Balchin's complaint

2. Mr and Mrs Balchin complained of maladministration by the Secretary of State for Transport when confirming road orders in respect of the A1151 Wroxham/Hoveton bypass without seeking an assurance from Norfolk County Council (the Council) that they would be given adequate compensation for the effect of the road on their house.

The statutory background

3. The responsibility for new road schemes is divided between the Department for Transport (DfT) (formerly known as the Department of Transport (DoT)) and local authorities. The Department is the highway authority for trunk road schemes, while local authorities are the highway authority for local road schemes, with County Councils having this responsibility outside the metropolitan areas. The highway authority is responsible for the design and construction of the road and all related matters, including the drawing up of Compulsory Purchase Orders and

Side Road Orders. It also has the statutory responsibility for the purchase of affected properties where appropriate and the payment of compensation in respect of properties which, while affected by the scheme, do not qualify for purchase.

4. In local road schemes the highway authority must submit the Compulsory Purchase Orders and Side Road Orders to the Secretary of State for Transport for confirmation, and the Secretary of State may order a Public Local Inquiry into the confirmation of such Orders. If he does so, the Inquiry is heard by the Inspector appointed via the Planning Inspectorate, and the Secretary of State has a duty to consider the Inspector's recommendations. He may confirm the Orders either without modification or with such modifications as he thinks fit. He can refuse to confirm the Orders but he has no power to confirm them subject to conditions.

5. Consideration of the Orders and any Inspector's report is carried out by DfT's Local Authority Orders Section (LAOS), based in Newcastle. In practice, the Orders, and any related Statutory Instruments, are usually confirmed by officials acting under authority delegated by the Secretary of State.

6. An important issue in any road scheme is the purchase by the highway authority of affected property, and the payment of compensation to owners of property which is affected, but which does not qualify for purchase.

7. Under Part 1 of the Land Compensation Act 1973 a person can claim compensation for the depreciation in the value of his or her property caused by public works such as work on highways. Claims are considered only from the first claim day, which is one year after the first opening of the highway to public traffic. There is no power under this Act to pay compensation to owners of affected properties before this date.

8. Under the Town and Country Planning Act 1990 properties which are required, or parts of which are required, for road schemes are said to be statutorily blighted, and the highway authority is empowered to purchase the property. Such properties are usually the subject of a Compulsory Purchase Order. Further powers of purchase are contained in section 246(2) of the Highways Act 1980, whereby a highway authority may purchase by agreement land the enjoyment of which is (my emphasis) seriously affected by the carrying out of works by the authority for the construction or improvement of a highway or by the use of a built highway. Accordingly this discretion to purchase seriously affected property that does not qualify for compulsory purchase applies only when the property is actually affected, and not before.

9. When Section 62(2) of the Planning and Compensation Act 1991 came into force on 25 September 1991, it added a new power to those described above. The new power (section 246(2A) of the Highways Act 1980) enabled the highway authority to alleviate hardship by acquiring by agreement property the enjoyment of which **will** (my emphasis) in their opinion be seriously affected by the carrying out of works or use of the highway. In other words, the highway authority was, for the first time, given a discretionary power to purchase in advance a property which was likely to be seriously affected but which was not the subject of a compulsory purchase order. In the context of Mr and Mrs Balchin's complaint, this was a significant development.

10. On 4 September 1991, shortly before this new power came into force, DoT (through the Department of the Environment - of which DoT was part) issued a Circular to local authorities.

After describing the new power, the Circular stated '*Authorities will wish to consider exercising their discretionary powers to acquire property seriously affected – or likely to be seriously affected – wherever this is warranted to alleviate associated hardship*'. It gave no further guidance on how local authorities should exercise the new power in respect of local road schemes.

11. On 21 November 1991, in response to a Parliamentary Question, the then Roads and Traffic Minister described DoT's approach to the new power in respect of trunk road schemes promoted by the Department. He said that each case would be considered on its merits, '*but as a guideline we would normally expect qualifying properties to lie within about 100 metres of the centre line of the road*'. On 17 January 1992 DoT issued a press notice to which were attached the guidelines the Department would apply to its own schemes. It said that it would use its discretion to purchase where it judged that it would be intolerable to the occupier to remain in the property during the works or once the road was open, assessed as a forecast noise level of '78 dB(A) Leq (12 hour)'¹ for 6 months.

12. The guidelines went on to describe other circumstances in which the Department would exercise its discretion. They stated:

'Where the above criterion is not met the vendor must show that he has made reasonable efforts to sell. The property must have been on offer for at least 20 weeks at a reasonable price and has been impossible to sell other than at a price substantially lower than that for which it might have been expected to be sold but for the scheme. Normally the difference should amount to not less than 5%.

¹ Decibel (dB) is the unit used for the measurement of sound heard by the human ear. The scale (A) is weighted towards the lower frequency sound typically given off by machinery. Such noise can rise and fall, and Leq gives an equivalent dB(A) level with the peaks and troughs levelled out over a stated period, in this case 12 hours. So the average of the total sound measured over a 12 hour period (usually 7.00am to 7.00pm) would need to be above 78 dB(A). Typical noise levels are 35 dB(A) in a quiet bedroom, 60 dB(A) in an office environment, 70 dB(A) from a car travelling at 60 kph at a distance of 7 metres, and 83dB(A) from a heavy diesel lorry travelling at 40 kph at a distance of 7 metres..

There are a variety of reasons why a vendor might need to move without delay and where they appear cogent they should be accepted.'

The guidelines set out a number of reasons why a vendor might need to move without delay, including:

'The need to realise assets, perhaps because of serious financial difficulties or dissolution of marriage.'

The circumstances surrounding Mr and Mrs Balchin's complaint

13. In 1984 Mr Balchin was anxious to plan for his retirement, and he purchased a property in Wroxham called Swans Harbour with a view to converting it into his private residence. The property had previously been part of the grounds of the home of George Formby, the entertainer, and the work undertaken by Mr Balchin involved turning what had been a games complex into a house. He purchased the property for £80,000, taking out a mortgage for £30,000. He turned it into a residence with private moorings on the River Bure, valued at the time by chartered surveyors at some £435,000.

14. Mr Balchin was in business as a builder and developer, trading in the name of Linfield Investments Ltd. Like many small businessmen, he used the security of his property to raise working capital for his business, and he took a loan from his bank with Swans Harbour as security. The property was charged to the bank in the sum of £375,000. This was, of course, a perfectly legitimate and common way of raising capital for a small business.

15. The searches carried out at the time of purchase had revealed no plans for a bypass, but in July 1986 the Council adopted a preferred route for a bypass which, while passing along the immediate boundary of Swans Harbour, did not require the purchase of any part of the property.

Swans Harbour, therefore, did not qualify for compulsory purchase. Mr and Mrs Balchin learned of this development through their immediate neighbour, whose property was required for the bypass and was purchased by the Council in March 1987. At this time, Mr Balchin was still engaged in converting Swans Harbour into a residence, and was concerned about whether he should continue to spend money on further improvements. He says the Council told him not to worry about the proposals, and that they would 'look after him' if the bypass went ahead. Mr Balchin carried on with the improvements to the property.

16. Mr Balchin told my officials that the Council had subsequently suggested that he and his wife should put Swans Harbour on the market to prove that it was blighted. He had approached virtually every estate agent in the country, but they had all refused to put the house on the market because of the bypass proposals. One agent had said they would do so, but only if Mr and Mrs Balchin paid them £2,000, because they did not anticipate a sale. Mr and Mrs Balchin told my investigators that they could not afford this amount. A local firm of estate agents had eventually taken the initiative to prove that the house was blighted.

17. The local estate agents were unable to sell Swans Harbour, so on 27 April 1987 they asked the Council to purchase the property, which they said was severely blighted by the bypass proposals. On 21 May the Council declined to do so, because no part of the property was needed for the bypass. The estate agents wrote to the Council again, saying that they realised that no part of property was required, but that there was every indication that the proposed route would be adjacent to the Balchin's property at a height of some 6 metres above existing ground level. They added that, from their discussions with DoT

in similar cases, the Department had agreed that a blight notice might be considered where a property was immediately adjacent to a proposed highway, as in this case. They urged the Council to reconsider the matter.

18. The Council's Director of Property and Planning referred the estate agents' letter to the County Surveyor, saying that, if the County Council purchased the property at that point, they would:

'have the same management problem as with [another property], and even if we let the property, the rental income is unlikely to cover loan charges. If the County Council purchases the property at any stage, we will have to pay full open market value. Following the scheme, the property will be substantially less valuable. However, if we do not purchase, our only obligation will be to pay a claim under Part 1 of the Land Compensation Act 1973, which is for loss of value due to physical factors. Compensation under Part 1 will be significantly less than for the loss in value of property on a before and after basis'.

The Director asked whether the matter should be referred to Committee.

19. Mr Balchin also wrote to the Council, and met with a Council official to press his case, and emphasise that the unsaleability of his property would seriously undermine his business. The Council agreed with Mr Balchin that their Planning and Transportation Committee would consider his case, and officials considered the financial implications for the Council in preparation for the meeting. It was noted that, if the Council bought Swans Harbour, it would be very difficult to resist purchasing another property. It was further noted that there was no money in the budget to cover the expenditure and that if the Council were to purchase, they

would have to identify which scheme or schemes would have to be abandoned. Mr Balchin's contention that he would go out of business if the Council did not buy the property, because his bank would reduce the sum on which he could borrow, was also discussed by Council officials, but considered to be unlikely given his evidently successful track record.

20. The Council considered Mr Balchin's case at a meeting of the Planning and Transportation Committee on 17 December 1987. A report prepared by Council officials recognised that the bypass when built would completely alter the character of the house and reduce its value. However, the Council declined to purchase the property on the basis that Mr and Mrs Balchin had no statutory right to insist on the property being acquired.

21. In early 1990, Mr Balchin's bank became aware of the impact of the proposed road scheme, and when chartered surveyors were instructed to revalue Swans Harbour it would seem that they reported adversely. The bank withdrew further loan facilities to Mr Balchin's company and required immediate repayment of their loan. So far as Mr Balchin can recall, he owed the bank about £100,000 at the time. He told my officials that the effect on him and his wife had been disastrous. They had been left penniless and had been forced to rely on their children to help them buy food. Their mortgage had fallen into significant arrears because they simply could not afford to make any payments.

22. In February 1990 the Council submitted a Compulsory Purchase Order for the bypass to the Secretary of State for Transport. On 23 March 1990 Mr Balchin wrote to DoT protesting against the scheme. He said that his house had overnight become unsaleable, and his bankers would no longer extend him credit. He said that the bypass would be within a few feet of his

house, would be six metres high, and would extend along the full length of his garden. It would, he said, be impossible to live in the house.

23. Separately, Mr and Mrs Balchin's solicitors pressed the case for purchase by the Council, saying that they had recently had an offer of £375,000 for the property withdrawn when the prospective purchasers were made aware of the bypass proposals. They stressed that Mr Balchin's bank was at that time seeking repayments which he could not meet because he was unable to sell his property, and they asked the Council to reconsider their decision on hardship grounds.

24. The Council's Planning and Transportation Committee considered the matter on 21 June 1990. The paper prepared for the Committee made it clear that, in the view of the Council's officers, the Council were under no obligation to purchase the property or any part of it. However, it did not suggest that the Council had no power to do so; nor did it suggest that they had no power to make an advance payment of compensation under Part I of the Land Compensation Act 1973. The Council again declined to purchase Swans Harbour on the grounds that they had no legal obligation to purchase.

25. In a letter of 6 September 1990 to Mr and Mrs Balchin's then Member of Parliament, who had taken up the matter, the Council's Chief Executive said that to acquire the property would set a precedent which would have enormous capital and revenue consequences for the Council. He added:

'I suspect that, if the housing market were on an upward cost curve, then the Balchins would have no problem with their bank. However, like many unfortunate people at the moment, they appear to have suffered as a result of the slump in the housing market and the County Council cannot be expected to act as a 'bank of last resort' in those circumstances.'

26. Meanwhile, DoT had written to the Planning Inspectorate on 3 August 1990 asking them to arrange for an Inspector to hold a Public Local Inquiry. A pre-Inquiry meeting was held on 9 October 1990 at which the Inspector explained that, while he could draw attention to any matter he wished in his Inquiry report, the only recommendations he was empowered to make were to confirm, not to confirm, or to confirm with modification, any or all of the Orders.

27. The Inquiry was held between 30 October and 28 November 1990. Mr Balchin again contended that the Council should be directed to acquire Swans Harbour as part of the scheme; the Council reiterated that no part of the property was required. They said that the embankment for the bypass would be 10 metres from the actual house and would at that point be 3.8 metres high, and that they would be prepared to offer any necessary compensation under the Land Compensation Act 1973 in due course when the effects of the bypass could be established.

28. The Inspector sent his report of the Inquiry to the Planning Inspectorate on 27 February 1991. In his conclusions he reported that in his view the bypass would have:

'a somewhat overpowering effect on Swans Harbour even when landscaping measures had taken their full effect, and particularly during the construction phase.'

He reported that the Council, which had declined to purchase the property, considered the problem as predominantly a matter for compensation. He said:

'In all fairness, if the [Council will] not purchase the property then, if the decision is made in favour of the Eastern Route, adequate compensation agreements should be agreed urgently, not least in the light of Mr Balchin's stated financial situation.'

In advocating confirmation of the Eastern Route the Inspector drew attention to the adverse effect that route would have on the owners of Swans Harbour (and the owners of another property nearby) and expressed his hope that their plight would be looked on sympathetically by the Council. The Planning Inspectorate sent the Inspector's report to DoT on 14 March 1991.

29. On 27 April 1991 Mr and Mrs Balchin referred the Council's handling of the matter to the Local Government Ombudsman, who declined to investigate their complaint, setting out his reasons in a letter dated 31 May 1991. They were that the complaint was out of time as regards the Council's refusal to purchase in December 1987, and the Ombudsman could see no fault in the manner in which the Council had taken their decision in 1990.

30. Mr and Mrs Balchin moved out of Swans Harbour in or about September 1991 for both financial and health reasons. Their doctor had suggested that they move away from the house in order to alleviate the stress and impact that the whole saga was having on their health, in particular on Mrs Balchin. They have since lived in rented accommodation. They told my officers that they were forced to sell their boat, their cars, their furniture and personal belongings at reduced prices just to survive financially. They pointed out that overnight their bank had frozen all of their accounts, so it was impossible for them to draw any money for standard housekeeping items. They said that their position was dire in the extreme.

31. The Inspector's report was not considered by DoT until 23 March 1992, by which time the new discretionary power of advance purchase conferred by section 246(2A) of the Highways Act 1980 had come into effect. The reason for the delay was that some of the objectors asserted at the Inquiry that the Council required a consent from the Secretary of State for

construction of the bridge over the River Bure under section 34 of the Coast Protection Act 1949. The Council disputed this, but consulted DoT's Marine General Division. On advice from that Division, the Council made an application after the inquiry was closed. The application applied to works likely to result in obstruction or damage to navigation due to the tidal nature of the river, and the considerations were more stringent than those pertaining to the original Bridge Scheme. As a consequence, consideration of the Inspector's report had to be put into abeyance until the draft decision letter from DoT's Marine General Division was available. That letter was received in DoT's LAOS on 16 March 1992.

32. On 20 May 1992 a case officer in LAOS prepared a detailed submission and recommended that the Orders be confirmed saying, among many other things, that the Inspector had concluded that:

'If the decision is made in favour of this route, adequate compensation arrangements should be agreed urgently in respect of Swans Harbour, particularly in view of the owner's financial situation'.

The case officer had drawn attention earlier in the submission to the objectors' views that:

'the Council should be directed to purchase all the property seriously affected by the proposals'.

33. The necessary Orders were confirmed at Regional Director level under powers delegated by the Secretary of State. The decision letter, which was dated 3 June 1992, stated that the Secretary of State agreed with the Inspector's conclusions, accepted his recommendations and confirmed the scheme and Orders. It went on to state that the Inspector had called for (i) sympathetic consideration by the Council of the plight of the owners of Swans Harbour (and the

owners of another property nearby), (ii) a footbridge over the bypass, and (iii) a tarmac road surface to reduce noise. It said that those matters were not for the Secretary of State's consideration, but added that he was:

'confident that your Council will give those matters early consideration'.

34. The letter included a standard text to the effect that matters of compensation were for negotiation with the Council and not the Secretary of State. At that point the Secretary of State had discharged his legal obligation. The decision letter was sent to the Council on 9 June 1992.

35. While the Inspector's report was under consideration at DoT, Mr Balchin had written to his MEP on 1 May 1992. He described his acute financial difficulties flowing from the reduction in equity in Swans Harbour which had caused his bank to require him to repay his business overdraft, and from meeting his legal costs. The MEP wrote to the Secretary of State on 14 May 1992 enclosing a copy of Mr Balchin's letter.

36. DoT officials submitted a draft reply to the MEP's letter on 11 June 1992, after the Orders for the bypass scheme had been approved and the approval letter sent out. Their submission prompted the Minister for Roads and Traffic (the Minister) to comment on 17 June:

'This all seems very tough. How can we ensure that Norfolk County Council helps?. As his business has been destroyed by the scheme, should he not receive compensation?'

Officials produced another draft reply to the MEP and a background note on 26 June. The background note emphasised that the question of compensation was strictly a matter between Mr Balchin and the Council. It also said that Mr Balchin might be entitled to claim under Part I of the Land Compensation Act 1973 but that

such claims were not normally made until 12 months after the date on which the new road was opened. It made no mention of the new discretionary power of advance purchase under sub-section 246(2A) of the Highways Act 1980.

37. The Minister replied to the MEP on 2 July 1992, enclosing a copy of the decision letter and the Inspector's report. He explained that, as none of the property was directly the subject of compulsory purchase, the Secretary of State was not empowered to consider Mr Balchin's dilemma when making the decision. He said that, in view of the Inspector's comments about the property and his hope that Mr Balchin's plight would be reviewed sympathetically by the Council, the Secretary of State had also drawn attention to the situation and expressed his confidence that the Council would give the matter early consideration. He said that Mr Balchin would need to pursue the question of compensation with the Council and that he might at the very least be able to claim under Part I of the Land Compensation Act 1973 (paragraph 7). He went on to say that, given the somewhat exceptional circumstances, *'one might hope that [the Council] would treat his situation with the utmost sympathy, not to mention urgency'*. He copied the correspondence to the Chief Executive of the Council.

38. In June and July 1992 senior council officers exchanged views about the new power of discretionary advance purchase conferred by sub-section 246(2A) of the Highways Act 1980 (paragraph 9) in relation to Swans Harbour and recognised the need to seek further advice. During June the Director of Planning and Property and the Director of Legal Services discussed the matter and the Director of Legal Services explained the County Council's new discretionary power. He also advised that the Secretary of State's decision letter did not impose a legal obligation on the Council to

reconsider their position with regard to Swans Harbour and another property similarly affected, but suggested that it might be appropriate to do so. The Head of Property Services, commenting on the Secretary of State's letter, pointed out in a note to the Assistant Chief Executive that acquisition would create a precedent with other cases of which the Council were aware. He noted that there was no easy basis for deciding whether to acquire property by voluntary purchase where no land was needed and wrote that:

'... if we purchased now on a discretionary basis we would not get [transport supplementary grant] on the acquisition price and it would all count against our very limited capital budget'.

39. On 16 July 1992 the Chief Executive wrote to the Minister. He said that there were legal obligations on the Council to consider the acquisition of blighted property, but they did not have a legal duty to buy houses on a 'sympathy' basis even though they might have the power. He argued that Parliament had determined that a line should be drawn at what he described as 'the 'direct impact' concept', and that to concede this particular case would 'undermine that legal principle' and add to the cost of this scheme and others. He considered the request to the Council to consider sympathetically the impact on Swans Harbour to be misleading and out of place in a decision letter. He added that compensation under the Land Compensation Act 1973 would not come into play for, at best, four years and that the reference to urgency in the Minister's letter to the MEP of 2 July 1992 was somewhat misleading. He said, however, that the Inspector's report and the decision letter would be reported to the Council's Highways Sub-Committee in September when the position of Swans Harbour (and the other property nearby) would be reconsidered.

40. Later in his letter, the Chief Executive addressed the question of valuation. He argued

that Mr and Mrs Balchin had been affected by a decline in property prices generally and said:

'I would venture to suggest that Mr Balchin has been more affected by the recession and the decline in house prices than by the impact of the bypass. Prior to 1989 East Anglia experienced (in percentage terms) a significant rise in property values but that has now been more than lost in the years since the 1989 collapse of the housing market: it is the position of over-borrowing against which no longer cover of the capital secured (sic). This is not unique to Mr Balchin which has placed him, and others like him, in a very difficult position.'

41. Following this letter, the County Surveyor sent a memorandum to the Chief Executive on 28 July 1992 in which he referred to the outstanding items raised by the decision letter and by the Inspector. He said:

'I propose to take a short item to Highways Sub-Committee in September to see these off'.

42. The Chief Executive copied his letter of 16 July 1992 to the MEP, who wrote to the Minister on 21 July seeking advice on how he could best help Mr Balchin. DoT officials submitted advice on both a reply to the Chief Executive and a reply to the MEP on 7 August. They described the Chief Executive's reply as '*not very encouraging*', but said '*we can have no quarrel with its legal and financial basis*'. They made no mention of the new power of advance discretionary purchase under section 246(2A). They noted, however, that the Chief Executive had promised reconsideration of the matter in September, and suggested that the Minister should ask to be informed of the outcome. As regards the letter from the MEP, they stated that there was little the Minister could usefully add to his previous correspondence.

43. When the Minister replied to the Chief Executive on 14 August 1992, he duly asked to be

informed of the Council's decision on Swans Harbour. His letter crossed with one of the same date from the Leader of the Council to the Secretary of State enclosing a copy of the Minister's letter to the MEP and the Chief Executive's letter of 16 July 1992. The Leader of the Council said:

'This includes a firm reply from [the Chief Executive] to [the Minister] with which I agree. It does make life very difficult if a Minister suggests we should use utmost sympathy when in fact to do so would create a precedent and an escalation in our costs.'

44. Meanwhile, the Minister had also agreed to write to the MEP as advised, but on 18 August 1992 he asked for further advice on *'Mr Balchin's possible eligibility for compensation under Part 1 of the Land Compensation Act'*. When LAOS provided this further advice on 2 September, they said that, under Part 1 of the Land Compensation Act 1973, it was open to the Council to buy Mr and Mrs Balchin's property if its enjoyment was seriously affected by construction noise or the use of the road. They went on to say, however, that the matter was very much one for the local authority, and although they were in favour of that course of action, they could not foist it on the Council. [LAOS subsequently agreed that the reference to the Land Compensation Act 1973 was incorrect. If the papers are read in context, it is clear that the power being described was the power of discretionary purchase **after** a property was affected, which is contained in section 246(2) of the Highways Act 1980. It was not the new discretionary power of **advance** purchase conferred by section 246(2A).]. LAOS also advised (correctly) on compensation for depreciation under the Land Compensation Act 1973.

45. On 24 September 1992 the DoT sent copies of booklets explaining land compensation to the

MEP for information. The booklets contained information about the power of advanced discretionary purchase (that is section 246(2A) of the Highways Act 1980), but did not state that the power had only recently been enacted.

46. The Council's Planning and Transportation Committee considered a report about both Swans Harbour and the property nearby on 1 October 1992. The report noted the Inspector's call for sympathetic consideration by the Council of the owners' plight, as the properties were so close to the bypass. It went on to explain that the land was not required and that compensation was *'properly assessed for these types of cases under the Land Compensation Act 1973'*. It referred to the Secretary of State's decision letter, but it did not report his comments in respect of Swans Harbour. Nor did it make any reference to the new power of advance discretionary purchase under Section 246(2A) of the Highways Act 1980 or the DoT guidelines. The Committee were reminded that they had considered reports in December 1987 and June 1990 (which were attached to the report under consideration) and that on those occasions the Committee had resolved against purchasing the property and *'presumably maintains that view'*. It said there was no legal requirement to purchase.

47. The report's recommendation was that the Council should deal with the effect of the bypass on Swans Harbour and the property nearby under the time scale dictated by the Land Compensation Act 1973, that is after the scheme had been in operation for one year. The Committee accepted this recommendation. On the same date the Assistant Chief Executive conveyed that decision to the Minister, saying that, in effect, the Council did not accept any change to the previous decisions that it had taken as to the acquisition of the properties.

48. After receipt of the letter from the Assistant Chief Executive, DoT officials provided advice on 5 October 1992 both on that letter and the letter from the Leader of the Council of 14 August. After describing the history of the case, they again stated that they could have no quarrel with the legal and financial basis of the Council's decision. They added that the Council's desire not to set a dangerous precedent for the future was also perfectly understandable.

49. The Secretary of State replied to the Leader of the Council on 19 October 1992. He said he fully appreciated that the Council had no legal obligations towards Mr Balchin, and their desire not to set a dangerous precedent for the future was understandable. He added that he fully took the point about the wording of the Minister's reply to the MEP. The Minister replied to the Assistant Chief Executive on 21 October, noting that the Council had reaffirmed the decision not to purchase Swans Harbour or the other property.

50. Mr and Mrs Balchin did not refer the Council's decision of 1 October 1992 to the Local Government Ombudsman. When my officials asked why they had not done so, Mr Balchin said that he and his wife had been concentrating on survival. They were effectively bankrupt and had watched Swans Harbour deteriorating about them, which they had found devastating. Mrs Balchin had fallen ill, partly due to the stress caused by these events, and her doctor had advised them to move away from Swans Harbour. They had boarded up the house in 1991 and moved away.

51. On 14 December 1992 Mr Balchin's bank wrote to the Council asking whether consideration had been given to acquiring Swans Harbour under section 62 of the Planning and Compensation Act 1991 (the power of discretionary advance purchase introduced in 1991). Four days later a

council officer replied that, as far as he was aware, that had not been considered. But in view of the refusal to make an advance payment of compensation to Mr Balchin, the Council's agreement to exercise their powers to make such an acquisition would be most unlikely.

52. On 18 February 1993 solicitors acting for Mr and Mrs Balchin wrote to the then Secretary of State for Transport at his constituency address in Norfolk asking him to do all he could to alleviate their difficulties. In his role as a constituency MP he made enquiries of the Council, who advised him of their decision of 1 October 1992. On 5 May 1993 he replied to the solicitors, referring to the Inspector's statement that the adverse effects of the bypass were not a matter for the Secretary of State and to the Council's decision not to acquire the property. He said there was nothing he could add to the Minister's letter of 2 July 1992 to the MEP. On 27 May 1993 he referred the matter to Mr Michael Lord MP, who wrote to Mr and Mrs Balchin's building society and pressed the matter with the Chief Executive of the Council and with the leaders of each political party group on the Council.

53. The Chief Executive wrote to Mr Lord on 10 December 1993, and said he had consulted with the spokespersons for the three principal parties on the Council. All had indicated that they saw no reason for the matter to be put back before the full Planning and Transportation Committee. He went on to say:

'Mr Balchin, like many others in the country, is suffering from the slump in the housing market having borrowed on the equity which previously existed. It is that which makes the property unsaleable in his terms. Mr Balchin apparently blames the County Council entirely for his predicament, this is totally unjustified'

54. Mr Lord pressed his case, and the Chief

Executive wrote to him again on 10 January 1994. He said that all three group leaders did not wish the matter to be put before the Committee again, adding that the decision not to purchase Swans Harbour had been taken without dissent by agreement across all of the parties.

55. Meanwhile, the Council had begun the preparation of guidelines for the exercise of the new discretionary power of purchase under section 246(2A). Work began in 1993, but was held up pending the outcome of relevant litigation that had gone to the Court of Appeal. On 3 November 1995 the Council agreed 'Guidelines for the Discretionary Purchase of Property under Section 246(2) of the Highways Act 1980'. The guidelines stated that the decision to purchase would depend on whether the applicant:

- bought the property having knowledge of the proposed road scheme
- had made reasonable efforts to sell the property
- had a pressing need to move or otherwise sell the property

In addition, before offering to buy, normally the Council would need to be of the opinion that the enjoyment of the property would be seriously affected by both a diminution in value and by noise arising from the proposed road scheme. The guideline figures were a diminution in value of around 15%, and a noise level greater than 70dB(A) (12 hour Leq) during construction, or 68dB(A)(18 hour L10)² after the road was open. There was a further provision that an exception could be made when the accepted reason for moving was based on medical grounds, but usually only related to the physical effects of the scheme. This might mean, for example, a breathing or hearing condition that was, or was likely to be, severely affected by the effects of

the construction scheme or the use of the highway.

56. The Council issued a public notice about the guidelines in which they invited fresh applications from people who had previously applied to have their property purchased, but had been turned down. They apparently did not write to individual property-owners, and Mr and Mrs Balchin were unaware of the invitation. But the owners of a property near to Swans Harbour that had been similarly affected made an application to the Council for the purchase of their property under the new guidelines.

57. Mr and Mrs Balchin say that the Council telephoned them in January 1996 to say that the Broads Authority had made a mistake in their calculation of the tidal flows. They had discovered that they would therefore need to buy Swans Harbour to ensure that the Authority had adequate moorings. The Council said that that meant that, if the bypass went ahead, they would want to purchase the property at the original market value. Mr Balchin described this development, with a measure of understatement, as ironic. He told my officials that he would have settled for the offer if the bypass had gone ahead, even though it would have still meant a significant loss in terms of loss of increased market value and of loss of interest. He would have taken the offer and *'just walked away'*.

58. In April 1996 the Council decided to purchase, using their discretionary powers, a property affected by a completed bypass on the grounds of the poor health of the occupant. In that case, the property did not fully meet the guidelines for purchase, in that the projected noise level after the bypass was opened was calculated as 66.3 dB(A) (see footnote to paragraph 11 for an explanation).

59. In July 1996 the Council decided to rescind

² In other words, the noise level was greater than 68 dB(A) (see footnote to paragraph 12) for 10% of the time during an 18 hour period.

the scheme for the bypass, and the application from the owners of the other property affected in a similar manner to Swans Harbour was withdrawn. The Orders in respect of the bypass were revoked on 5 November 1997.

60. Mr and Mrs Balchin eventually sold Swans Harbour in May 1998 for around £240,000, which was just sufficient to pay off most of their debts. Mr Balchin says that instead of the reasonably comfortable retirement that he and his wife had planned for, they had had to spend all their time fighting for justice, and struggling to make ends meet.

Investigation by the Parliamentary Ombudsman

61. Mr Lord referred the complaint to the then Ombudsman on 13 January 1994. Mr Balchin had meanwhile obtained an opinion from Counsel that the Secretary of State had been maladministrative in confirming the Order in the face of the Inspector's advice without first seeking an assurance that realistic compensation would be available. On 9 February 1994 my predecessor agreed to an investigation.

62. When asked to comment on Mr and Mrs Balchin's complaint, the then Permanent Secretary of DoT said that it was the Department's view that the Secretary of State had acted properly and within his authority. He explained the discretionary purchase powers available to highway authorities, and said that on 1 October 1992 the Council had decided not to exercise that discretion in this case.

63. The then Ombudsman produced a report on 21 December 1994, but Mr and Mrs Balchin made an application for judicial review and obtained orders of certiorari and mandamus, which meant that their complaint fell to be reinvestigated. Following this judgment, the then Ombudsman offered DoT, the Council, and, through Mr Lord,

Mr and Mrs Balchin, the opportunity to provide further comments and evidence. In his reply the then Permanent Secretary of DoT corrected an error in the response his Department had originally given. He accepted that there was no direct evidence that the Council's Planning and Transportation Committee had decided on 1 October 1992 not to exercise the discretion by then available to acquire Mr and Mrs Balchin's property under the power newly conferred by section 246(2A) of the Highways Act 1980. But he said it was DoT's view that it had been reasonable and proper for them to assume that the Council were aware of the extension to their previous powers. DoT had informed local authorities of the new legislative provision through the Circular issued on 4 September 1991, which had included an annex drawing specific attention to the extended powers. In addition, the press notice issued in January 1992 had been widely reported at the time.

64. The then Permanent Secretary said that DoT saw it as the duty of the Council to ensure that they were aware of the statutory powers available to them. It was reasonable for DoT to expect the Council to be aware of both the Circular and the press notice. He considered that DoT had discharged their duty to provide advice and guidance; that DoT had acted properly and within statutory authority; and that there was no case of maladministration for them to answer.

65. For their part the Council provided a chronology of their dealings with Mr and Mrs Balchin. They acknowledged that between the dates of the Inspector's report to the Secretary of State and the Secretary of State's decision letter (February 1991 and June 1992 respectively) the legal position had changed. However, the Council had reviewed the case in October 1992, following the Secretary of State's decision letter, without changing their position.

66. In a letter of 6 December 1996 to the then Ombudsman, Mr Lord identified the principal issues which, in his view, arose from the High Court's judgment. They were, first, that Mr and Mrs Balchin's objections were not directed at matters of compensation, but concerned with the impact of the scheme upon their property and whether that could be mitigated or assuaged by variation of the route or acquisition; secondly, that the complaint of maladministration was not directed to matters of compensation, but to whether the Secretary of State took proper and adequate steps to achieve the objective of dealing with Mr and Mrs Balchin's plight; and, thirdly, the adequacy of the Secretary of State's action in calling for 'sympathetic consideration' by the Council in his decision letter.

67. My predecessor issued a report on 14 July 1997, but it became the subject of further judicial review proceedings in the High Court. Mr and Mrs Balchin obtained an order of certiorari, which again meant that their complaint fell to be reinvestigated. Following this judgment, my predecessor obtained further comments from the Permanent Secretary and from some of the officers who had been involved with the case. He asked the Permanent Secretary whether there was anyone in DoT who had had dealings with the case in the spring, summer and autumn of 1992 who was then aware of the existence and relevance of the new power of discretionary advance purchase conferred by section 246(2A); if so, who; and for any supporting evidence. The Permanent Secretary said that the same three officers who had originally been interviewed about the complaint were still with DoT. One officer recalled being advised, in general terms, in mid-1992, by colleagues in the then DoT Northern Regional Office Lands Branch who were responsible for compensation matters relating to regional trunk roads, of discretionary powers being available to local highway authorities to

purchase properties such as Swans Harbour. There was no documentary evidence to support this recollection.

68. My predecessor also asked the Permanent Secretary about any perceptions held at the time by DoT officials about the Council's attitude. He replied that all three officers had been aware of Mr and Mrs Balchin's failed attempts to persuade the Council to purchase their property. They had also been aware of the care the Council had taken to ensure that none of Mr and Mrs Balchin's property fell within the scope of the compulsory purchase order for the bypass proposal. In addition, through their general dealings with the Council, they had gained the strong impression that the Council were not inclined to purchase any of the properties, such as Swans Harbour and the other property nearby, adversely affected by the bypass proposal.

69. The officers concerned added that, on the question of advance purchase by the Council using the discretionary power newly conferred by section 246(2A) of the Highways Act 1980, they had been concerned not to be seen to be overstepping the mark in terms of DoT's involvement with a local authority matter. They had also considered that it could have been inappropriate to refer only to one of a number of discretionary measures available to the Council to address Mr and Mrs Balchin's position or, more importantly, to provide advice on powers which they had had no reason to believe the Council had not already considered and rejected. They were unable to explain the incorrect reference to Part 1 of the Land Compensation Act 1973 in their submission to the Minister of 2 September 1992.

70. My predecessor also wrote to the Director of Law and Administration at the Council. The reply on his behalf from the Director of Legal Services included the following:

'... I have reviewed the files and it is clear that there were people within Norfolk County Council in the Spring, Summer and Autumn of 1992 who were directly involved in the Balchin case and who were aware of the existence of the new powers in the Planning and Compensation Act.

*That said, neither of the reports to the County Council's Planning and Transportation Committee in December 1987 and June 1990 took the point that the County Council did not have the power – under the law pre-section 246 (2A) – to **acquire** the property. The first report concluded that Mr and Mrs Balchin had no statutory right to insist on the property being acquired and the second report stated that the County Council were under no obligation to purchase it. However, neither indicated there was no power to acquire at that time. Rather, the tenor of both reports seemed to be that the County Council had a discretion to purchase but that they were not willing to exercise it in this case. The report to the Planning and Transportation Committee in October 1992 also was written on the basis that there was no legal requirement for the County Council to purchase the property but again it appears to be implicit in that report that the County Council had a discretion.*

None of these Committee reports referred to the statutory basis of acquisition. In this respect, the position before 1992 was governed by section 246(2) which provide that a Highway Authority could acquire by agreement land, the enjoyment of which is seriously affected either by the construction or improvement of a highway, or by the use of a highway which has been constructed or improved. As I have already indicated, it seems to have been implicit in the County Council's approach in 1987 and 1990 that this provision did not necessarily prevent the

*acquisition of a property which would be seriously affected by the carrying out of works in the future even though the **specific** power to acquire in these circumstances was not introduced until 1992. Indeed, I believe the County Council would have been justified in taking this broad approach to the interpretation of section 246(2) not least because, for the power to acquire property affected by the carrying out of construction works to be exercised effectively, the decision needs to be taken **before** the works begin.*

I am conscious of the letter written (by me) to [Mr Balchin's bank] on 18 December 1992 saying that, as far as I was aware, the County Council had not given consideration to acquiring the property under section 62 of the 1991 Act. It is difficult now to recall the basis for that statement but I believe it was to reflect that the report to the Planning and Transportation Committee in October 1992 had not expressly referred to the possibility of acquisition under the new powers.'

71. Officials from this Office also visited the Council and examined their relevant files. Those files confirmed that the Council did not turn down Mr and Mrs Balchin's request that their property be purchased in December 1987, June 1990 and October 1992 on the grounds that they did not have the necessary powers. On the contrary, the Council had assumed that they had a discretion to purchase at all material times, but were unwilling to exercise it, both for budgetary reasons and to avoid setting a precedent. The files further confirmed that the owners of the other property featuring in the Inspector's report as deserving compensation had had their requests for purchase and compensation turned down for similar reasons.

72. My predecessor issued a further report on 19 September 2000, but it also became the subject of an application for judicial review and an

adverse finding by the High Court. Following my decision to take a fresh look at the case, my investigators interviewed Mr Balchin on 4 March 2003. He was accompanied by his son and by a legal representative. He set out the background to his complaint, and the additional information he provided has been incorporated into my description of the circumstances surrounding his complaint.

73. In summing up his complaint, Mr Balchin said that DoT should have required the Council to consider exercising the new power of advance discretionary purchase under section 246(2A) of the Highways Act 1980. He said the whole point of the new power was to help people in the plight faced by him and his wife; if DoT were not going to require councils to consider exercising the power, then what was the point in having it? It was not enough for DoT to say to the Council that they ‘hoped’ they would do something; they should have drawn attention to the new power and required them to do something. As it was, DoT officials either did not know about the power, or had failed to draw it to the Council’s attention; or else they had deliberately ignored it. Either way, that was not good enough.

74. Sir Michael Lord subsequently came to see me to press the Balchins’ case. He wrote to me on 4 April 2003 to set out why he believed that there had been maladministration on the part of DoT that had resulted in injustice to Mr and Mrs Balchin, and the issues he wanted me to take into consideration in my investigation.

75. Following the interview with Mr Balchin, I made further inquiries of DfT. I asked them to clarify whether the Orders in respect of the bypass had been approved by the Secretary of State for Transport personally or under delegated authority, and for details of any relevant delegation of authority. I also sought further information about the state of knowledge of the

DoT officials involved in respect of the Council’s dealings with Mr and Mrs Balchin over Swans Harbour. I asked whether the officials had considered whether the Council’s reasons for declining to purchase Swans Harbour might have amounted to an unlawful fettering of discretion, either at the time that they considered the Inspector’s report or when preparing advice on a reply to the letter of 16 July 1992 from the Chief Executive. Finally, I sought confirmation of the precise sequence of events within DoT in 1992.

76. The Permanent Secretary of DfT replied on 11 April 2003, explaining that many of the officials who had dealt with the case were no longer with the Government Office. She said officials had looked through the papers and had spoken to the remaining person who had dealt with the case and was still employed by the Government Office.

77. The Permanent Secretary confirmed that delegated authority for undertaking the Secretary of State’s quasi-judicial role in decisions on Bridge Schemes, Side Road Orders and Compulsory Purchase Orders had been given to the Local Authority Orders Section. Ministers normally only became involved when they received correspondence from Members of Parliament. In this particular case, the decision letter had been signed at Principal level and the confirmation documents of the Bridge Scheme, Side Road Orders and Compulsory Purchase Orders had been signed at Regional Director level.

78. The Permanent Secretary went on to say that officials had looked through the papers on file and had found only correspondence from, or on behalf of, Mr and Mrs Balchin regarding the refusal of the Council to purchase Swans Harbour. They had found nothing from the Council with regard to their reasons for refusal to purchase. They were not surprised by this

because, as the papers from the time confirmed, the issue of whether or not the Council purchased Swans Harbour had always been considered to be one of compensation and not to be a matter for consideration in the confirmation of the Scheme and Orders. As such, it was considered to be a matter between Mr and Mrs Balchin and the Council. The reasons for the Council's refusal to purchase Swans Harbour had not been known to officials, other than the factual circumstances of there being no proposal for compulsory purchase of any part of it in the Compulsory Purchase Order as a necessity for the bypass proposals.

79. The Permanent Secretary argued that the acquisition of Swans Harbour, or any other property not directly affected by the bypass plans and outside the provisions of the Compulsory Purchase Order which the Secretary of State was asked to, and subsequently did, confirm was a matter for the discretion of the promoting authority, the Council. The decision as to how the Council chose to exercise its discretion was a matter for them and them alone, and was not one in which the Secretary of State, or officers involved in the decision on the Scheme and Orders, had jurisdiction. The Government Office did not have any need to establish or to question with the Council the legal and financial basis of the Council's decision not to purchase Swans Harbour.

80. As to any unlawfulness of the Council's decision not to purchase Swans Harbour, the Permanent Secretary argued that this would not have been a matter for the Department's officials to take a view upon. If the Council had acted unlawfully, she said, it would be a matter for the courts to determine.

81. Finally, the Permanent Secretary confirmed the chronology of events involving DoT as set out in the description of events above.

82. I subsequently sent a draft of the factual part of my report to interested parties for comment. The comments I received from Mr and Mrs Balchin's solicitors and from the DfT have, where appropriate, been incorporated above. I record the comments from the Council and the Broads Authority below.

83. The Council said that the Broads Authority had not made a mistake in the calculation of the tidal flows (as Mr Balchin had suggested – paragraph 57). They said that the letter they had sent Mr and Mrs Balchin on 4 January 1996 had come about because the original consent required under the Coast Protection Act 1949 for the new road bridge comprised in the bypass scheme expired in March 1995. The Broads Authority were a statutory consultee in respect of the renewal application, and the outcome of their Navigation Committee's consideration of the matter was to write to DoT objecting to the renewal of the consent on the grounds of the inadequacy of the mooring provision proposed by the Council.

84. The Council said that the requirements of the Broads Authority's Navigation Committee were new. Although the Authority had previously been concerned about the bypass proposals, they had not initially raised an objection as to the inadequacy of the moorings proposed by the Council in the vicinity of the new bridge. At the time the Council had consulted about the bypass proposals in the late 1980s, the River Bure was still under the navigation jurisdiction of the Great Yarmouth Port and Haven Commissioners, who had not raised any objection.

85. The Council said that the effect of the Broads Authority's requirements in 1995 – which they accepted – was that land would be required from Mr and Mrs Balchin's property. They had so informed Mr and Mrs Balchin in their letter of 4 January 1996. The Council explained that the

Broads Authority had changed the navigation view (from that held by the Great Yarmouth Port and Haven Commissioners) as to what were adequate moorings in the vicinity of the bridge.

86. The Broads Authority broadly confirmed what the Council had said. They confirmed that, as navigation authority, they had taken a different view to that which had been held by the Great Yarmouth Port and Haven Commissioners as to what constituted adequate moorings in the vicinity of the bridge.

87. Both the Council and the Broads Authority suggested that the reference to a mistake in the calculation of the tidal flows may have been because the Council had originally assumed that this part of the River Bure was non-tidal, and therefore that consent under the Coast Protection Act 1949 was not required. It had later become clear – by the start of the October/November 1990 public Inquiry into the proposed bypass – that the River Bure was tidal at this point, and as a result an application under the Coast Protection Act 1949 had been made by the Council.

Further developments

88. After I had established what I considered to be the key facts relating to the Department of Transport's part in these events, I reached the view that, as the Council were the relevant decision-making body in respect of any purchase of the Balchins' property, a thorough investigation and analysis of the Department's actions and their consequences, and the appropriate level of any redress due, could only be properly concluded if there were to be a parallel investigation by my colleague, the relevant Local Government Ombudsman for England, of the Council's part in relation to the events. I therefore referred the Balchins' case to him in January 2004, asking him whether, despite the length of time which had passed since the

relevant events, given the considerable injustice I felt had been caused to Mr and Mrs Balchin and the exceptional nature of the case, he would be willing to consider the part played by the Council in these events. He said that he would, and Mr and Mrs Balchin subsequently submitted a complaint to the Local Government Ombudsman in March 2004. The Local Government Ombudsman began his investigation in May 2004. We subsequently conducted our respective investigations in parallel.

Findings

89. The essential issues before me as Parliamentary Ombudsman have not changed from those addressed by my predecessors. They are whether what DoT did or did not do amounted to maladministration; and, if it did, whether Mr and Mrs Balchin sustained injustice as a consequence.

90. I consider that the issue of possible maladministration by DoT first arises on 4 September 1991. That was the date on which DoT issued a Circular to local authorities about, amongst other things, the new power of discretionary purchase conferred by Section 246(2A) of the Highways Act 1980. Whilst the power was described in an annex, it was not referred to in the main body of the Circular. Nor did the Circular offer any guidance as to how local authorities might apply the new power to local road schemes.

91. I consider that DoT should have given clearer guidance to local authorities about the exercise of the new power. I do not think it was sufficient merely to draw the power to their attention. One way to give guidance would have been to draw the attention of local authorities to DoT's own guidelines in respect of trunk road schemes (paragraphs 11 and 12). Whilst those guidelines would not have been binding on local authorities, they would have signalled the need for local

authorities to develop a coherent policy and provided a starting point for their thinking. DoT might thereby have gone some way to ensuring a broad consistency in approach, to reduce the possibility of inequity arising from decisions taken by different highways authorities. Nor do I consider that setting out the DoT guidelines in a press notice was a sufficiently certain way of ensuring that the information reached local authorities. It should not have been left to the chance that they would pick up the relevance of the press notice and give this development the consideration it deserved.

92. I have therefore concluded that the DoT should have issued fuller guidance to local authorities on the approach to be taken to application of Section 246 (2A) of the Highways Act 1980, and that their failure to do so amounted to maladministration.

93. The issue of possible maladministration next arises in March 1992, when officials at DoT began to consider the recommendations in the Inspector's report. The function of the Secretary of State at that point was to decide whether to confirm the Orders for the bypass, with or without modification. It was not to decide the issue of compensation for, or the purchase of, Swans Harbour and the other affected property identified by the Inspector. Under the law, that was a matter for the Council. I accept, therefore, that the Secretary of State could not have directed the Council to purchase their seriously affected property, as Mr and Mrs Balchin had urged at the Inquiry: he did not have the statutory power to do so. Nor could he have made confirmation of the Orders conditional on the Council purchasing Swans Harbour, or agreeing compensation with Mr and Mrs Balchin. (Indeed the High Court has confirmed that I am entitled to accept DoT's view that it was not open to them to go so far as to make the

Secretary of State's confirmation of the various Orders conditional upon the Council deciding to exercise their powers of compensation in a particular way.)

94. The starting point for the Secretary of State's consideration was the Inspector's report produced following the Public Local Inquiry at which the Inspector had heard the competing arguments surrounding issues such as the effect of the bypass on Swans Harbour. The Inspector expressed the hope that the plight of the owners of the two properties affected would be looked on sympathetically by the **County Council** (my emphasis). But he did not conclude that the adverse effect on Swans Harbour was such that, in the overall context, the route should not be confirmed.

95. I am not persuaded that confirmation of the Orders in the face of such a recommendation from an independent Inspector could be said to be maladministrative. Nor do I consider that it was maladministrative of DoT to make no prior inquiries of the Council about their intentions as regards the purchase of Swans Harbour or the payment of compensation to Mr and Mrs Balchin. The decision was entirely a matter for the Council, and such inquiries would have carried the implication that confirmation of the Orders was likely to be conditional on how the Council intended to exercise a power granted to it by Parliament.

96. In this regard, Mr and Mrs Balchin's representatives have drawn my attention to a passage in 'The Encyclopedia of Compulsory Purchase and Compensation' which states:

'It is believed that Government departments adopt the practice of informing acquiring authorities that they are preparing to confirm orders and will do so subject to satisfactory undertakings being given; any failure to carry out

such undertakings might result in loan sanction being refused, but no such undertaking would be enforceable by third parties’.

But in its full context the statement appears to me to form part of a discussion of whether the confirming authority has the power to impose conditions upon **the use of land** when an acquiring authority seeks approval to the exercise of powers of compulsory purchase. As such, I am unable to conclude that it is relevant to the present case.

97. DoT had nonetheless to consider whether any action was called for on their part in respect of the Inspector’s comments about the need for urgency in addressing the effect on Swans Harbour. Anything that the DoT did in this regard was a matter for the Secretary of State’s discretion. In considering whether and how to exercise that discretion, DoT had to balance conflicting considerations. They had to be careful not to seek to usurp or unduly influence the Council in a matter in which the Council had the statutory responsibility. Against that was the recognised plight of Mr and Mrs Balchin, a plight that had arisen through no fault of their own.

98. In the event, the Secretary of State drew the Council’s attention to the Inspector’s comments and expressed his confidence that the Council would give the matter early consideration. I regard this as a not unreasonable exercise of the Secretary of State’s discretion in view of the seriousness of Mr and Mrs Balchin’s situation. Despite the protests from the Council’s Chief Executive, I do not consider that that amounted to DoT putting undue pressure on the Council. Indeed, in the circumstances I would have considered it remiss of the Secretary of State not to pass comment.

99. Another question is whether, in considering the Inspector’s report, DoT should have given

active consideration to the means by which the Council might have alleviated Mr and Mrs Balchins’ plight. Whilst DoT officials were aware in general terms that the Council had previously considered the purchase of Swans Harbour, and had decided against it, they did not know the specific reasons. But the issue they were addressing at the time was whether or not the Secretary of State should confirm the Orders. The mechanism by which the Council might purchase the property or provide early compensation was not directly relevant to the decisions facing the Secretary of State. The absence of any consideration by DoT of the nature of the powers available to the Council could not, in my view, be said to amount to maladministration. I have therefore concluded that there was no fault on the part of DoT in the decision to confirm the Orders in respect of the bypass.

100. The position was, however, somewhat different when, on 17 June 1992, the Minister asked how DoT could ensure that the Council helped Mr and Mrs Balchin. The terms in which he asked for advice demonstrated his concern for the situation that they faced. Moreover, the need was to provide as full and as helpful a reply as possible to the MEP. The focus had accordingly shifted, and advice on the powers of purchase and compensation available to local authorities became directly relevant, notwithstanding that the statutory power lay with the Council.

101. Initially, officials advised the Minister only about the power to pay compensation, and not the discretionary power to purchase. When the Minister wrote to the MEP on 2 July 1992 (paragraph 37), he similarly mentioned only compensation under the Land Compensation Act 1973 (paragraph 7), which in practice could only have been assessed after the bypass was open. He made no mention of the new power of

discretionary advance purchase. When the Minister asked for further advice on 18 August 1992 (paragraph 44), officials advised the Minister of the possibility of purchase, but they referred only to the position prior to the coming into force of section 246(2A) of the Highways Act 1980. There was again no mention of the new power. It follows that the briefings did not provide the Minister with the full picture.

102. I consider that on both occasions DoT officials should have briefed the Minister about the new power under section 246(2A) of the Highways Act 1980 and the DoT's own published guidelines in respect of trunk road schemes, and advised him to pass that information on to the MEP. That could not, in my view, be said to amount to putting unfair pressure on the Council, or of drawing attention to one power out of many. It was a matter of giving the MEP information about a new statutory power that was directly relevant to his concerns, and which had not existed when the Council had last decided not to purchase Swans Harbour. Moreover, copying the Minister's letter to the Council would have served to ensure that they were aware of the new power and the DoT guidelines.

103. I have concluded that this failure by DoT to identify the relevance of the new power when advising the Minister amounted to maladministration. What caused this failure? The inaccurate reference to the Land Compensation Act when briefing the Minister on 2 September 1992 suggests that there was some confusion in the mind of officials as to the powers available to the Council. After considering the evidence, my predecessor concluded that, on the balance of probabilities, DoT officers were not aware of the existence of the new power conferred by section 246(2A) of the Highways Act 1980 and its availability to the Council. Although the matter is

not free from doubt, the references in the briefings to other statutory powers, but not to the one that was arguably most relevant, strongly supports that view.

104. The letter from the Council's Chief Executive on 16 July 1992 raises a further issue, which was whether DoT should have questioned whether the Council's subsequent decision not to purchase Swans Harbour was soundly based. In this context, I accept DoT's argument that it was not for their officers to take a view on the lawfulness or otherwise of the Council's decision. I do not see it as the role of departmental civil servants to scrutinise decisions taken by local authorities under statutory powers granted to those authorities by Parliament. And it is by no means unusual for public authorities to decline to exercise a discretionary power on the ground that it would set an unwelcome and expensive precedent. I therefore accept DoT's view that any challenge to the Council's decision not to purchase was a matter for the courts.

105. On the other hand, the Chief Executive's **description** of the law was open to challenge. His reference to Parliament having '*drawn the line at the "direct impact" concept*' (paragraph 39) uses an expression which is not to be found in the legislation. Moreover, Parliament had recognised two quite distinct situations. One was where the authority promoting a road scheme required part of a property for the purpose of the scheme, and the other was where a property was, or was likely to be, severely affected. The Chief Executive did not seek to distinguish between these two situations, and made no reference to the new power of discretionary advance purchase. Indeed, his letter might be read as suggesting that he considered the new power to be at odds with Parliament's real intention, and not therefore a matter for serious consideration.

106. I therefore consider that DoT officials were mistaken when they said that they could have no quarrel with the legal and financial basis of the Council's decision. The effect of that mistake was to lose a further opportunity to draw the Council's attention to the relevance of the new power of discretionary purchase under section 246(2A) of the Highways Act 1980, and to the Department's own guidelines for the exercise of that power. It follows that a similar opportunity was lost when the Leader of the Council wrote to the Secretary of State in support of the Chief Executive. I am not persuaded that sending the MEP explanatory leaflets mitigated that error to any significant extent. Neither the leaflets nor the covering letter brought out the key consideration that the law had changed since the last time the Council had considered the purchase of Swans Harbour.

107. I have therefore concluded that there was maladministration at DoT both before and after the confirmation of the Orders for the bypass. The first occasion was when the Department failed to take adequate action properly to advise local authorities regarding the exercise of the new power conferred by section 246(2A) of the Highways Act 1980. The second occasion followed the confirmation of the Orders, when, in correspondence with the MEP and the Council, the Department failed to bring out the relevance and the significance of the new power.

108. It seemed to me, therefore, that whilst it could not be argued that DoT were solely responsible for the significant injustice suffered by Mr and Mrs Balchin, there was a strong case for arguing that, had they taken appropriate

action, the Council might well have felt obliged to reconsider the matter. However, I could not, in advance of the outcome of the Local Government Ombudsman's investigation (paragraph 88), reach a considered view on the full impact of the Department's maladministration on the Balchins' position, and therefore on the Department's contribution to the injustice caused and the consequences for redress. I therefore asked the Permanent Secretary if, in the light of my findings so far, he would agree in principle that the Department should make them an ex gratia payment. The Permanent Secretary confirmed his agreement in principle to making such a payment in May 2005.

109. The Local Government Ombudsman concluded his investigation in August 2005. A copy of his report is attached. This reaches a finding of maladministration on the part of the Council leading to injustice to Mr and Mrs Balchin, and concludes that, for reasons set out in detail in the report, the total compensation due to Mr Balchin amounts to £200,000.

110. The Local Government Ombudsman and I then considered jointly what an equitable share of the responsibility for the considerable hardship caused to Mr and Mrs Balchin by the actions and omissions of the Department and the Council might be. We decided that it would only be fair to conclude that the Department and the Council had to carry an equal share in that responsibility. I am very pleased to be able to report that the Department for Transport immediately agreed to make an ex gratia payment to Mr and Mrs Balchin on that basis. I have asked the Department to make

arrangements directly with Mr Balchin for an ex gratia payment to him and his wife in the sum of £100,000.

Conclusion

111. I have found that maladministration on the part of the former DoT contributed to the considerable injustice suffered by Mr and Mrs Balchin, and that that injustice had a prolonged and severe impact on their lives and well-being. I very much welcome the Department's prompt agreement to my recommendation for redress, which I hope will bring some long-awaited relief and comfort to Mr and Mrs Balchin's position. I regard the Department's offer as a most satisfactory outcome to a justified complaint.

112. The history of Mr and Mrs Balchin's complaint, which relates to events which began almost twenty years ago, is an exceptional one and is, of course, not yet complete, as my investigation and report effectively present only half of the picture. I cannot therefore say what the final overall outcome will be for the Balchins; that now rests in the hands of the Council.

113. There is, however, one final observation that I would like to make. Mr and Mrs Balchin's case has served to demonstrate very clearly to me the considerable complications which currently arise when cases cross more than one Ombudsman jurisdiction. Whilst the Local Government Ombudsman and I have collaborated closely throughout our respective investigations, the restrictions on our ability to work together have nevertheless meant that we have not been able to provide the sort of fully-joined up and

coherent service for Mr and Mrs Balchin that we should be able to provide to all citizens who have such complaints. The removal of those restrictions, by means of the proposed Regulatory Reform Order, on which the Cabinet Office are currently consulting, would in my view undoubtedly enable us to provide a more efficient and streamlined service to complainants in the future.

Ann Abraham

UK Parliamentary Ombudsman

October 2005

Appendix A. Local Government Ombudsman's report into his investigation into the complaint by Mr and Mrs Balchin against Norfolk County Council

Key to names used

Mr and Mrs Balchin - The complainants

Officer A - Legal Officer

Officer B - Valuation Officer

Officer C - Legal Officer

Officer D - Valuation Officer

Officer E - Valuation Officer

Officer F - Highway Officer

Officer G - Highway Officer

Sir Michael Lord MP - Constituency MP for
Mr Balchin's former address

Swans Harbour - Mr and Mrs Balchin's home

Eels Cottage - A neighbour's home

Waders - A neighbour's home

Oystercatchers - A neighbour's home

Moorhens - A neighbour's home

Oulton Building Society - A Building Society
involved

Hickling Building Society - A Building Society
involved

The Bank - A Bank involved

Report Summary

Highways

In 1992, the complainants' then home was adjacent to the line of a bypass the Council intended to build. He asked that it should buy his home but it declined to do so. In so declining the relevant Committee failed to take into account new legislation and his changing circumstances. Had it done so, the Ombudsman concluded that it would have bought his home and greatly improved his financial circumstances as a consequence.

Finding

Maladministration causing injustice.

³ Local Government Act 1974.

Recommended remedy

The Council to pay the complainant £100,000.00.

Introduction

1. Mr Balchin complains that there were failings between 1992 and 1996 in the way the Council dealt with requests from him and his advisers for the Council to purchase Swans Harbour, his home at Wroxham, in advance of an intended road scheme. He says that as a consequence of the Council's failure he lost an established profitable business, his home and his assets, and that both he and Mrs Balchin have suffered from stress, worry, anxiety and ill health as a consequence.

2. For legal reasons, I do not normally use the real names of the people or places concerned. But in this report I have decided to reveal the true names of the complainant, and the referring MP (with their permission) and for Mr Balchin's property. I have done so because of the considerable public interest shown in Mr Balchin's case over the years; and because the Parliamentary Ombudsman's report to Parliament will in any case put these names in the public domain.

3. One of the Commission's officers has examined the Council's files, interviewed officers of the Council and has met the complainant.

Legal and Administrative Background

Time

4. Section 26(4) of the Act³ provides that:

'a complaint shall not be entertained unless it was made to a Local Commissioner or a member of any Authority concerned within 12 months from the day on which the person aggrieved first had notice of the matters alleged in the complaint, but a Local Commissioner may conduct an investigation pursuant to a complaint not made within that period if he considers that it is reasonable to do so.'

5. In this case Sir Michael Lord MP, Mr Balchin's then MP, complained on his behalf to the Leaders of the then political groups of the Council during 1993. I have therefore taken the view that this restriction on my jurisdiction does not apply to Mr Balchin's complaint.

The Road Scheme

6. The Council had, for many years, contemplated proposals for a bypass for Wroxham. In July 1986 the Council adopted a preferred route for a bypass immediately along the boundary of Swans Harbour. The plan at Appendix one shows the relationship between Swans Harbour and the proposed route.

Previous Complaint

7. On 27 April 1991 Mr Balchin referred the Council's handling of the matter to the then Local Government Ombudsman, who declined to investigate the complaint, setting out his reasons in a letter dated 31 May. He was told that the complaint was out of time as regards the Council's refusal to purchase in December 1987, and that the Ombudsman could see no fault in the manner in which the Council had taken its subsequent decision not to purchase in June 1990.

Legal Provisions

8. Under Part 1 of the Land Compensation Act 1973 a person can claim compensation for the depreciation in value of his property caused by public works such as work on highways. Claims are considered only from the first claim day, which is one year after the first opening of the highway to public traffic. There is no power under this Act to pay compensation to owners of affected properties before this date.

9. Under the Town and Country Planning Act 1990 properties which are required, or parts of which are required, for road schemes are said to be statutorily blighted, and the Council is empowered to purchase the property. Such properties are usually the subject of a

Compulsory Purchase Order. Where a property was directly affected by a road scheme (that is, land take was required) the owner can serve a Blight Notice on the Council which obliges it to purchase his home at a valuation which did not take into account the diminution in value caused by the road scheme. Where a blight notice is accepted the owner also receives a home loss payment, surveyors fees and removal costs.

10. Further powers of purchase are contained in Section 246(2) of the Highways Act 1980, whereby a Council may purchase by agreement land the enjoyment of which is (my emphasis) seriously affected by the carrying out of works by the Council for the construction or improvement of a highway or by the use of a built highway. Accordingly this discretion to purchase seriously affected property that does not qualify for compulsory purchase applies only when the property is actually affected, and not before.

11. When Section 62(2) of the Planning and Compensation Act 1991 came into force on 25 September 1991, it added a new power to those described above. The new power (Section 246(2A) of the Highways Act 1980) enabled the Council to alleviate hardship by acquiring by agreement property the enjoyment of which will (my emphasis) in its opinion be seriously affected by the carrying out of works or use of the highway. In other words, the Council was, for the first time, given a discretionary power to purchase in advance a property which was likely to be seriously affected but which was not the subject of a Compulsory Purchase Order. In the context of Mr Balchin's complaint, this was a significant development.

12. On 4 September 1991, shortly before this new power came into force, the Department of Transport (DoT) issued a Circular to Councils. After describing the new power, the Circular stated:

‘Authorities will wish to consider exercising their discretionary powers to acquire property seriously affected - or likely to be seriously affected - wherever this is warranted to alleviate associated hardship.’

It gave no further guidance on how Councils should exercise the new power in respect of local road schemes.

13. On 21 November 1991, in response to a Parliamentary Question, the then Roads and Traffic Minister described the DoT’s approach to the new power in respect of trunk road schemes promoted by the Department. He said that each case would be considered on its merits:

‘but as a guideline we would normally expect qualifying properties to lie within about 100 metres of the centre line of the road.’

14. On 17 January 1992 DoT issued a press notice to which were attached the guidelines the Department would apply to its own schemes. It said that it would use its discretion to purchase where it judged that it would be intolerable to the occupier to remain in the property during the works or once the road was open, assessed as a forecast noise level of ‘78 dB(A) Leq (12 hour)’⁴ for six months. This noise level might be present at varying distances from the road, depending on the topography and intervening factors. The guidelines are set out at Appendix Two to my report.

15. Officer G, a highways engineer, told the Commission’s Officer that 103 properties in Wroxham were within 100 metres of the road and would therefore qualify for discretionary consideration for purchase. Of these, six, including Swans Harbour, would sustain high visual impact and varying levels of traffic noise. Three properties were purchased by agreement

without the service of a Blight Notice because part of each property would have been required as part of the Scheme.

Property	Date	Price	Distance from Highway
Moorhens	June 1989	£550,000	18 metres
Oystercatchers	July 1993	£290,000	16 metres
Waders	c1987	Not known	Under highway line

The Colonel Owen case

16. The application of Section 246(2A) was considered by the Court of Appeal in 1994. The Court quashed the DoT’s decision not to purchase Colonel Owen’s home, noting that the Department’s guidelines (paragraph 14) had been characterised as ‘ineptly drawn’ but confirming that diminution of value is a significant factor to consider when making a judgement as to whether a property was adversely affected.

17. The Council became aware of the judgement in March 1995. Officer A (a senior legal officer) advised that the Council should have proper guidelines for deciding when and when not it would exercise its discretion to acquire properties which are seriously, but not directly, affected by road schemes and that by considering such requests, they must properly consider them in the light of those guidelines. Officer A went on, on 14 March 1995, to draw up a provisional set of criteria. The Council decided to seek Counsel’s opinion to aid it in drawing up guidelines and this opinion was received on 28 June 1995. The copy of the opinion was sent to the Council’s then Director of Planning and Transportation in August 1995 and on 3 November 1995 the Planning and Transportation Committee agreed a set of guidelines for dealing with requests.

⁴ (A) level with the peaks and troughs levelled out over a stated period, in this case 12 hours. So the average of the total sound measured over a 12 hour period (usually 7.00am to 7.00pm) would need to be above 78dB(A). Typical noise levels are 35 dB(A) in a quiet bedroom, 60 dB(A) in an office environment, 70 dB(A) from a car travelling at 60 kilometres per hour (kph) at a distance of 7 metres, and 83dB(A) from a heavy diesel lorry travelling at 40 kph at a distance of 7 metres.

18. The Council decided to advertise the existence of the guidelines and did so in several newspapers circulating in the area on 3 May 1996.

The abandonment of the bypass scheme

19. In February 1996 the Council's Planning and Transportation Committee considered the DoT's response to the previous year's Transport Policies and Programme (TPP) submission. It decided to remove the proposal for the bypass which affected Swans Harbour from the consultation document it intended to publish. The Council adopted the TPP submission without the bypass on 8 July 1996 and the proposal was, at that point, effectively abandoned. Officer G told the Commission's Officer that the Council had taken this position because of difficulties in obtaining relevant consents; the need for further expensive land take to comply with the requirements of another authority; and because it was perceived that Government funding for the road was unlikely to be made available.

Involvement of the Parliamentary Ombudsman

20. Sir Michael Lord MP referred to the Parliamentary Ombudsman a complaint about alleged failings on the part of the DoT, in connection with the road scheme, on 13 January 1994. The then Parliamentary Ombudsman agreed to investigate the complaint. He produced a report on 21 December 1994 but Mr and Mrs Balchin made an application for judicial review. Their application succeeded, which meant the complaint had to be reinvestigated. As part of his judgement of 25 October 1996, Mr Justice Sedley, as he then was, said the County Council's response [to Mr Balchin's request] was:

'on the face of it highly questionable. Although the County Council was duly served it has understandably taken no part in the proceedings, and I hesitate to criticise it in its absence; but the intransigence of its stance towards the Balchins will have been as apparent to the Commissioner as it is to this Court. In 1990, when it first

declined to acquire Swans Harbour, the Planning and Transportation Committee must have been considering the power contained in S.246(1). When at the end of 1992 the Balchins' bank finally drew the Council's attention to its new S.246(2A) power, the Council appears to have given no consideration to its exercise; instead it seems to have treated the question as having been effectively foreclosed by its decision not to purchase in 1990. Yet the question in 1992 revolved around a new power which the Council had never entertained; and the decision in 1990, assuming it now had any bearing (which I doubt) had been based upon a reason which, if it were admissible, would justify all public bodies in refusing ever to exercise a discretion to make a payment for fear that other applicants would want to be similarly treated - a textbook example of a "fettered discretion".'

21. The then Parliamentary Ombudsman issued a further report on 14 July 1997, but it too became the subject of further judicial review proceedings in the High Court. Mr and Mrs Balchin again succeeded and their complaint fell to be reinvestigated.

22. The then Parliamentary Ombudsman reported again on 19 September 2000, but that report also became the subject of an application for judicial review and permission was granted in the High Court for a full hearing. Mr and Mrs Balchin again succeeded in the High Court. Accordingly, the complaint fell to be re-investigated a further time.

Consultation by Parliamentary Ombudsman

23. In January 2004 the Parliamentary Ombudsman, used her powers under Section 33(3) of the Local Government Act 1974 to consult me in connection with her investigation. She asked me to consider whether there might be issues associated with Mr Balchin's complaint to her that I could investigate. I considered that I was not barred from investigating events that had

occurred subsequent to my predecessor's decision of 31 May 1991 (paragraph 7); and that in the interests of justice I should do so.

Investigation

Events Relevant to the Complaint

24. Mr Balchin told the Commission's Officer that in 1984 he had been running a successful business from which he was able to draw up to £50,000 per year, sufficient to provide a comfortable lifestyle, including the private education of his children. Mr Balchin said that he had long sought a property in Wroxham. In 1984 the opportunity arose to purchase land in what he regarded as 'the finest road in Norfolk'. He bought the land and turned an existing games building on it into Swans Harbour, a five bedroomed house complete with 40 foot long boat house for his cruiser. The property was largely completed in 1986 and he had valuations done, the highest of which was £435,000. Mr Balchin said he continued to prosper in this period and in addition to Swans Harbour owned a holiday cottage and a block of flats. He and Mrs Balchin had been very happy at Swans Harbour and had been looking forward to their retirement there.

25. At this point Swans Harbour was subject to a conventional domestic mortgage of £30,000 with Oulton Building Society, which Mr Balchin said that he took out to maximise the tax advantages of such a loan (at the time income tax relief was given against interest payments). In addition, the overdraft which funded his business activities was secured against Swans Harbour. His business was as a builder and developer and as he encountered each project he would seek funding from his bank. If the bank agreed, the overdraft would be increased to cover the new project. As each project was completed, the bank would be repaid and the overdraft would reduce in size. The size of the overdraft therefore varied over the period. The result of searches carried out against his long-since dissolved two companies

shows that from the second half of the 1970s until 1985 there was a regular pattern of borrowing against a substantial and wide-ranging portfolio of properties in Essex, Suffolk and Norfolk. To protect its investments, Mr Balchin says that every twelve months or so the bank would carry out a search against Swans Harbour to see if it still provided security for the overdraft.

26. In 1987 Mr Balchin said that he was told by his neighbour that the neighbour's property was affected by a Council road proposal and that the Council was to buy it. Mr Balchin asked the Council to purchase his home. He says that the Council had suggested that he and his wife should put Swans Harbour on the market to prove that it was blighted. He had approached virtually every estate agent in the county, but they had all refused to put the house on the market because of the bypass proposals. One agent had said they would do so, but only if Mr and Mrs Balchin paid them £2,000, because they did not anticipate a sale. Mr and Mrs Balchin have said that they could not afford this amount.

27. A local firm of estate agents had eventually taken the initiative to prove that the house was blighted. The local estate agents were unable to sell Swans Harbour so on 27 April 1987 Mr Balchin asked the Council to purchase the property, which he said was severely blighted by the bypass. On 21 May the Council declined to do so, because no part of the property was needed for the bypass. The estate agents wrote to the Council again, saying that they realised that no part of the property was required, but there was every indication that the proposed route would be adjacent to the Balchins' property at a height of some six metres above existing ground level. They added that, from their discussions with DoT in similar cases, the Department had agreed that a Blight Notice might be considered where a property was adjacent to a proposed highway, as

in this case. They urged the Council to reconsider the matter.

28. The Council's Director of Property and Planning referred the estate agent's letter to the County Surveyor, saying that, if the County Council purchased the property at that point, it would:

'have the same management problem as with Waders, and even if we let the property, the rental income is unlikely to cover loan charges. If the County Council purchases the property at any stage, we will have to pay full open market value. Following the scheme, the property will be substantially less valuable. However, if we do not purchase, our only obligation will be to pay a claim under Part 1 of the Land Compensation Act 1973, which is for loss of value due to physical factors. Compensation under Part 1 will be significantly less than for the loss in value of the property on a before and after basis.'

The Director asked whether the matter should be referred to Committee.

29. Mr Balchin again contacted the Council and was visited on 4 September 1987 by Officer B, a Valuation Officer. Mr Balchin's notes record that Officer B said that he would go back to the Council and put to them strongly that they should consider purchasing Swans Harbour, especially because it was held as security for Mr Balchin's bank overdraft which enabled him to stay in business. Officer B's notes do not support this, but do show that Mr Balchin did make clear to Officer B the difficulty of his position and the impact on Swans Harbour of the road proposal.

First Committee consideration

30. The Council's Planning and Transportation Committee considered Mr Balchin's request for it to purchase his home on 17 December 1987. The report recorded that Mr Balchin used his property as security for his business loans and that any decrease in the value of Swans Harbour

would reduce the amount he could borrow and therefore adversely affect his business. The report stated that:

'the bypass when built will completely alter the character of the house'.

31. The report said that it was believed that the value of the property would be in the region of £325,000 to £375,000 including costs. The Council would be able to sell the property after the bypass had been constructed for a considerably reduced price, then valued at £150,000 to £175,000. The report observes that it might be difficult for the Council to resist purchase of another property if it purchased Swans Harbour. The County Treasurer's comments in the report indicated that no government grant would be payable were the Council to purchase and that other savings would have to be found were the Committee to agree to Mr Balchin's request:

'If the Council purchases Swans Harbour, it may be difficult to resist a request to purchase another property. Similar cost implications would apply to this property. It is possible that a similar case could be made for other properties.'

32. The Committee resolved that:

a) as Mr Balchin had no statutory right to insist on the property being acquired, he be informed that the Council did not agree to purchase it and;

b) a similar policy be applied in other cases where the owners' properties are unaffected by the scheme.'

33. Mr Balchin told my Officer that in January 1990 he had gone to the bank to draw some money to fund his domestic activities. The bank had refused him the money and had frozen all his business and domestic accounts. He was therefore left without money to live. He said that he had learned that the bank had conducted a search (paragraph 25) which had revealed for the

first time the existence of the bypass. It had realised that Swans Harbour would not provide security for the overdraft and had therefore decided to lend him no more money. After this point, he had not been able to make interest payments on the mortgage.

34. Mr Balchin's Solicitors wrote to the Council on 30 April 1990. The letter says:

'Due to the burden of high current interest rates and general financial constraints, our clients are being forced to realise their capital invested in Swans Harbour and utilise such funds to reduce their borrowings and to purchase an alternative residence in a lower price range.'

35. The letter said that a sale had been agreed at £375,000 but then fell through because the purchaser became aware of the bypass scheme. The letter asked the County Council to open negotiations for purchase.

36. The Solicitors wrote again on 12 June 1990, this time to the Chair of the Property and Transportation Committee. The letter recorded that Mr Balchin's bank required that his borrowings, secured on the property, had to be reduced by £100,000 immediately. The Solicitors again asked the Council to purchase Swans Harbour. Officer A agreed to place the letter before the Planning and Transportation Committee.

37. I have not been able to ascertain exactly when Mr Balchin ceased trading, but it seems to have been some time between December 1987 and June 1990.

Second Committee consideration

38. The Planning and Transportation Committee considered the request to purchase on 21 June 1990. The report recorded the importance of the property to Mr Balchin's business and the fact that a sale had recently fallen through. The legal position recorded in the report states that the County Surveyor is satisfied that the property is

not directly affected by the scheme and as a result the Council is under no obligation to purchase it or any part of it. It also records the provisions for compensation (paragraph 8). It says that the reduction in value payable by way of compensation could be up to 40% but because of the limitations imposed by the statutory code it was doubtful if the claim could be more than 20%. The report also observes that there was no financial provision so if the Council wished to purchase the property it would have to be done from savings in other parts of the County Surveyor's budget. Paragraph six of the report says:

'Precedent

If the County Council were to acquire the property or provide some other assistance for the Balchins that could precipitate claims from owners of other properties indirectly affected by the scheme. The only difference between this case and other cases would be with regard to the degree of hardship and the extent to which the scheme indirectly affected the property.'

39. The report states:

'Conclusion

Mr and Mrs Balchin face the possibility of bankruptcy or homelessness and the road scheme is a contributory factor to this. Your officers therefore sympathise with the position in which the Balchins find themselves. On the other hand we do not consider it is in the County Council's interest to acquire the property or to make any substantial advance payment of compensation because of the implications for the Highways budget and the precedent it would create.'

40. Officer C, a Senior Legal Officer, wrote to Mr Balchin's Solicitors on 25 June 1990. The letter says that Members 'unanimously' rejected the request for assistance on the basis that

'the Council do not regard the situation to warrant the authority to have any legal obligation to purchase.'

41. The Solicitors wrote again to the Council on 25 October 1990 and Officer A replied the same day to set out how the construction would be carried out in such a way as to minimise the effect on Swans Harbour.

42. Mr and Mrs Balchin moved out of Swans Harbour in or about September 1991 for both financial and health reasons. Their doctor had suggested that they move away from the house in order to alleviate the stress and impact that the whole saga was having on their health, in particular on Mrs Balchin. They have since lived in rented accommodation.

Approval of the Road Scheme

43. The Council had to defend a Public Inquiry into objections to the proposal. The Secretary of State sent his Inspector's report to the Council on 3 June 1992. He upheld the Council's scheme. Mr Balchin had objected to the proposal and drawn the Inspector's attention to his difficult circumstances. The Inspector said

'having heard Mr Balchin's evidence, and having during my site inspection studied a mock up of the profile of the road on embankment in close proximity to Swans Harbour, it is my view that the Route, even when landscaping measures have taken their full effect, and particularly during the construction phase, would have a somewhat overpowering effect on this property.'

He continued

'The County Council has declined to purchase this property and considers that the problem is predominantly a matter for compensation. I can only say that in all fairness, if the County Council will not purchase the property, then, if the decision is made in favour of the Eastern Route, adequate compensation arrangements should be

agreed urgently, not the least in the light of Mr Balchin's stated financial situation.'

He concluded

'In advocating confirmation of the Eastern Route, however, I would draw attention to the particularly adverse effect which in my opinion it would have on Swans Harbour for reasons I have described earlier. I would hope that the plight of the owners of [this property] would be looked on sympathetically by the County Council.'

44. Officer G told the Commission's Officer that on completion of the road the entire southern boundary of Swans Harbour would have been faced with an embankment between 3.2 and 6.1 metres above ground level and with a 1.8 metre noise reduction fence at the top. The first 2 metres of the embankment would have been a retaining wall, used in part to ensure the embankment did not require any land take from Swans Harbour. Although extensive landscaping would be provided, it would take up to 20 years to be fully established. The plans show a distance of approximately 6 metres from the wall of Swans Harbour to the start of the embankment and some 22 metres to the mid point of the road.

45. In a memorandum of 18 June 1992, Officer D, a Valuer, drew Officer A's attention to the references to Mr Balchin in the Inspector's decision. He observed that the new powers arising from the Planning and Compensation Act 1990 (paragraph 11) allowed the Council to acquire properties not specifically required but that he was not aware of any situation when such a purchase could be forced upon the Council.

46. Officer A replied on 23 June 1992. He set out the contents of Section 246(2A) of the Highways Act 1980 (paragraph 11) and observed that the Secretary of State's decision letter did not impose a legal obligation on the Council to reconsider its position regarding Swans Harbour.

He went on to say that nevertheless the County Surveyor might feel it appropriate to do so. He observed that the Secretary of State's letter simply referred to 'adequate compensation arrangements' which could be interpreted to mean that the Council try to agree quickly with Mr Balchin the compensation for disturbance (paragraph 8).

47. On 1 May 1992 Mr Balchin wrote to his MEP. He told him:

'the bank overdraft has accrued to £108,902.27 on the Business Account, £46,470.13 on my private account and £130,000 with Hickling Building Society. This is just interest upon interest piling up.

It is clearly apparent that the ability to realise invested equity in the property from the sale of Swans Harbour has been denied to me by NCC and all our savings of some £18,000, have been swallowed up in legal costs. This, together with the fact that I have been put out of business through no fault of my own is, I feel, disgusting to say the least. All our hopes and dreams were put into Swans Harbour and to lose everything at a late stage of my working life is hard to swallow. I would also mention that my wife is now being treated by the doctor for high blood pressure and will be taking pills for the rest of her life.'

He continued:

'The bank have now issued their formal demand for repayment of the overdraft, as have Hickling Building Society. It is now apparent that we face the distinct possibility of bankruptcy and homelessness, clearly avoidable had my home not been blighted by NCC proposals.'

He concluded:

'I believe the County Council should be made to purchase Swans Harbour'

48. On 14 May 1992 the MEP wrote to the Minister for Roads and Traffic pressing Mr Balchin's case. In his reply to the MEP of 2 July 1992 the Minister says:

'clearly Mr Balchin will need to pursue the question of compensation with the Council as he may at the very least be able to claim under Part One of the Land Compensation Act 1973. Given the somewhat exceptional circumstances one might hope that the Council would treat his situation with the utmost sympathy, not to mention urgency.'

49. The Minister sent a copy of his letter; of the MEP's letter; and of Mr Balchin's letter of 1 May 1992 to the Council's then Chief Executive on 2 July 1992.

50. Officer C sent a copy of this correspondence to the County Surveyor on 6 July 1992, saying:

'I attach a copy of correspondence from the Department of Transport, the contents of which are self-explanatory. It raises again the question of the so called 'Blighting' of Swans Harbour. I suspect that it will be necessary to review yet again the position of Swans Harbour to see whether there is anything that this authority are prepared to do in terms of this property. I have to say if that one is accepted then, of course, there will be pressure from others although the Inspector's report did make specific reference to Swans Harbour and also to [another property]. Now that the report has come through and the other arrangements are now proceeding, I think it necessary that we readdress this issue if only to have a further decision from the members on this particular problem. You will see that the Minister for Roads and Traffic does indicate that we should look at this as a matter of urgency. No doubt, you will let me have your observations on this as soon as possible.'

51. Officer E, a Valuer, replied to Officer C on 8 July 1992. He observed that Swans Harbour was not statutorily blighted and any decision to buy should be made in the conscious knowledge that:

'a) There is no easy cut off point where no land is taken. We could justify one, two or half a dozen properties at £400,000 each. We have refused point blank to consider acquisition at the boundary where people were very severely affected.

b) These cases will always be quoted against us in other schemes.

c) If we purchase now on a discretionary basis, we will not get [grant] on the acquisition price and it would all count against our very limited capital budget.'

He went on to record that:

'in these circumstances I must say I find the Minister's letter extremely misleading and at best disingenuous on two counts. He emphasises that it is all down to Norfolk County Council to make the decision but he clearly would be sympathetic. If he was involved there would clearly be no problem. He therefore makes no mention or allowance for the difficulties set out above, one of which at least he actually controls.'

52. Officer E also observed that the Minister's reference to urgency, in respect of compensation under the Land Compensation Act 1973, indicated that he and his civil servants 'have clearly never read' Part 1 of the Act. He pointed out that the earliest he believed the Council could look at the claim was four years away (see paragraph 8).

53. Officer E concluded by observing that property prices had dropped in the area and as Mr Balchin already had £300,000 owing he probably had no equity in Swans Harbour at all. Officer C then went on to draft a reply to the

Minister. The Chief Executive annotated the draft response:

'my belief is that we have from time to time exercised our discretion to acquire adversely affected property which falls outside the definition of that we are obliged to buy. If that is so, when do we and what are the particular reasons we have chosen not to in this case?'

It has not been possible to trace the properties he refers to, nor is there evidence of a reply to his questions.

54. The Chief Executive formally replied to the Minister on 16 July 1992:

'Swans Harbour is not touched physically by the scheme. To concede this particular case and therefore undermine the legal principle will add to the costs not only of this scheme but of all road improvements/construction schemes not least the trunk road network run by your own Ministry!'

He says that:

'a line has to be drawn somewhere and Parliament has determined that line to be very tight to the 'direct impact' concept: I suspect any other line would be impossible to set in legislative form and even more impossible to fund from the public purse.'

55. Officer F sent a memorandum to Officer C on 28 July 1992. He says that he believes that Officers C and D 'appear to have dealt admirably with matters raised by the Minister and that he has nothing to add'. He does though propose to take a short item to the Highways Sub-Committee in September to 'see these [matters] off'.

Third Committee consideration

56. In the event, Mr Balchin's position was reported to the Planning and Transportation

Committee on 1 October 1992. The report makes no reference to the changes in the law (paragraph 11) or the DoT guidelines (paragraph 14) or to Mr Balchin's letter of 1 May 1992 (para 47) with the new information about his circumstances. In its comments on the factual part of my report the Council notes that Mr Balchin had not, at that particular point, again asked the Council to buy Swans Harbour.

57. I have extracted the relevant parts of the report at Appendix three. In addition, Members were given copies of the 1987 and 1990 reports (paragraphs 30 and 38 respectively). In its written comments on the factual part of my report the Council says that Mr Balchin's circumstances were covered by the 1990 report and it was not then aware of any change in his circumstances.

58. The Committee accepted the recommendation to deal with compensation after the road was built and so not acquire Swans Harbour in advance. The Council's present Director of Planning and Transportation told the Commission's Officer that he clearly recalled the debate. Financial matters had been considered, as had Mr Balchin's circumstances. But in the end, the key question had been 'where to draw the line'. The Committee had decided on the logical one of the highway boundary. Officer A told the Commission's Officer that he believed the Committee had evidence about Mr Balchin's circumstances before it when it reached its decision. And he noted that the Committee was not being told it could not buy Swans Harbour; rather, Members recognised that they could buy it but chose not to do so.

Events after the October 1992 Committee consideration

59. On 14 December 1992 Mr Balchin's bank wrote to Officer A. It asked whether final approval had been given for the works to proceed with the road scheme and drew his attention to Section 246(2A)(see paragraph 11). It says:

'it is our understanding that Swans Harbour stands immediately adjacent to the site of the scheme: please confirm whether consideration has been given to an acquisition of the property on this basis.'

60. Officer A replied on 18 December 1992. He observed that objectors were judicially reviewing the Secretary of State's decision to confirm the Council's bypass proposal and it was unlikely that this would be heard until 1993. In addition the Council did not have grant approval. He said that the Council:

'have not, so far as I am aware, considered the acquisition of Swans Harbour [under S246(2A)]. The Planning and Transportation Committee have previously considered Mr Balchin's request for an advance payment of compensation but rejected it. I therefore believe it would be most unlikely that the Council will be prepared to exercise their powers under [Section S246(2A)] in this case.'

61. Officer A told the Commission's Officer that he could not recall what he had in mind and he did not understand why he had replied in this way. He may have been unaware of the detail of the report considered by Committee on 1 October 1992 (paragraphs 56 to 58). He had not regarded the letter as a formal request to purchase and so had not reported it to Members. He noted that neither the bank nor Mr Balchin had responded to his letter with a formal request to purchase.

62. Correspondence continued during 1993 with Mr Balchin's Solicitors and Sir Michael Lord MP writing both to the Council and to Hickling Building Society. Sir Michael Lord MP wrote to the Council's Chief Executive on 26 October 1993 to urge that the Council propose reparation to Mr Balchin for the damage it had done to his home, his business and his life.

63. Officer C replied on 1 November 1993 to say that the legislation did not require the Council to acquire land where no part of the land involved is taken for the bypass. He recorded that the Council:

'does have a discretion to purchase [the] property. The Council's committees had considered this issue on a number of occasions and on each occasion had rejected the approach. The voting in those issues had neither been close nor on party lines. Mr Balchin and those representing him have set out his circumstances fully and the Members have taken those matters into consideration. I do not think the members of the relevant committee would want to consider the matter again.'

64. Sir Michael Lord MP wrote again on 2 November 1993 urging that the case be put before appropriate elected Members as a matter of urgency. The Chief Executive's note on this letter records:

'you can send a more terse reply this time. Don't agree to put it to Committee - say you will ask the Committee Chair'

65. Officer C sent a copy of Sir Michael Lord MP's letter to the Director of Planning and Transportation. His covering memorandum says:

'[The MP] seems to think we have a totally bottomless purse and does not seem to appreciate the public sector bill which would follow from indirect blight which may impact upon the saleability of properties in respect of road or other public sector projects.'

He offered to share the MP's letter with the three party spokesmen if it was felt appropriate.

66. In the event he did this in a letter to the Committee Chairs of 13 November 1993. His letter says that:

'personally I do not think that the matter needs

to be reopened again and that regrettably Mr Balchin is the subject of having over mortgaged his property to support various business activities and that he has suffered from the recession and the general fallback in house prices as well as having an indirect implication from the bypass route. You will be aware that we have acquired other properties which are directly affected and have spent £0.75 million plus on those properties. We do not receive transport supplementary grant for such purchases ahead of the approval of the scheme for those purposes.'

67. None of the Members thought the matter should go back to the Committee and Officer C wrote to Sir Michael Lord MP along those lines on 10 December 1993.

68. Sir Michael Lord MP then wrote directly to the Leaders of the political groups on 16 December 1993. He said that Mr Balchin:

'is asking them in the name of natural justice to look at this matter again. There is no doubt in my mind that the sole cause of Mr Balchin's financial ruin is the action of Norfolk County Council. It cannot be too much to ask that even at this late stage further thought be given to his plight.'

The Group Leaders' meeting

69. It was decided that the issue should be raised at a Group Leaders' meeting on 6 January 1994. The note of that meeting records that it was agreed that the Chief Executive would prepare a draft letter for the Leader of the Council to respond further to Sir Michael Lord MP on behalf of the Council; and that the matter should not go back to Committee because it had already been fully considered and rejected by all parties. The Chief Executive wrote to Sir Michael Lord MP on 10 January 1994. His letter concludes:

'The decision not to purchase Mr Balchin's house was taken without dissent by agreement across all parties and they do not see any good and

sufficient reason to raise the matter again.'

70. On 15 November 1995 an interested member of the public wrote to the Council's Chief Executive to ask that the appropriate Committee be asked to pay compensation to Mr Balchin. Officer C replied on 23 November 1995. He told her that the

'matter had been looked at by the County Council several times and on each occasion the Members have (usually unanimously) determined that it is not a case where they would wish to exercise their discretion.'

He continued:

'having said that the County Council has been re-reviewing its policy and the criteria for exercising its discretion in the light of recent judicial pronouncements and if that causes us to rethink the case for Mr and Mrs Balchin then they will be informed accordingly.'

71. On 8 December 1995 Officer G wrote to Mr Balchin at his new address to indicate that, as a consequence of changes to the Coastal Protection Act Consent, it might now need to purchase his home as it might need to purchase land in his ownership to enlarge the riverside moorings. He wrote finally on 4 January 1996 to indicate that if the Council was now to go ahead with the scheme, it would have to purchase Swans Harbour. But this was subject to consideration of the road scheme's future at a Committee meeting in February 1996. He wrote again on 22 February 1996 to indicate that the Council's provisional view was that the bypass would not proceed. The scheme was formally abandoned in July 1996 (see paragraph 19).

72. Mr Balchin said that he finally sold his home on 15 May 1998. He was forced to sell it at very short notice by Hickling Building Society. The property had sold for £240,000. All this had gone to repay the mortgage with its attendant

compounded arrears, agent's fees and legal costs. A small amount of agent's fees remained outstanding. The bank holding the overdraft received no payment as a consequence of the sale and had had to write off the money owing under the overdraft.

73. At interview, Mr Balchin said that Hickling Building Society had not initially been pressuring him to sell Swans Harbour because it knew his legal advice was that his legal proceedings (paragraph 20) had a good chance of success and that they would be paid off then. It was only when the Building Society formed the view that the legal action would not succeed that it decided that Swans Harbour should be sold. At the time of sale, Swans Harbour had been empty for some time. Although Swans Harbour had at that point only been built for about ten years the sale agent's particulars say the property 'merits further improvement and modernisation'.

Mr Balchin's Solicitor's general comments

74. In their written comments on the factual part of my report Mr Balchin's Solicitors say:

'We consider that it is worth stating in the factual part of the report that in April 1996 the Council were willing to purchase another property which had been indirectly affected by another scheme even though it did not fully meet the criteria for the exercise of their power.'

Mr and Mrs Balchin's position in December 1992

75. Mr Balchin believed that had the Council purchased Swans Harbour at this point he could have resumed his business interests anew. He had experience in various areas of business and had been successful. All that was owing at that point would have been the domestic mortgage. In addition, the remains of the overdraft would have had to be repaid. But he believed that he could still have purchased a smaller property with the remaining money which could then have formed security for a new business overdraft

enabling him to restart his business activities.

76. As part of my investigation I decided to ask the District Valuer to advise me of the value of Swans Harbour had it been sold to the Council on 1 December 1992. He valued the property at that date as being worth £300,000.

77. I have obtained a Hickling Building Society statement dated 31 January 1993. The statement shows that Mr Balchin owed £148,063 on mortgage on Swans Harbour as at 1 February 1992. After the addition of interest and an insurance premium the debt was £158,183 as at 31 January 1993.

78. In addition, I asked Mr Balchin's former accountant to make an assessment of Mr Balchin's debts and assets as at the same date based on his knowledge of Mr Balchin's financial affairs and on whatever documentary evidence existed.

79. He has told me that after the bank froze Mr Balchin's trading accounts it demanded repayment of £152,586 and agreed to accept the value of the commercial properties held by both companies, together with a further £100,000 to clear the indebtedness. This had been raised by increasing the mortgage debt on Swans Harbour. Both companies were subsequently dissolved. He also considered that at this time Mr Balchin had access to some £90,000 equity in antiques and a boat.

The County Council's comments on my draft Conclusions and Findings

80. In April 2005 I shared with the Council on a private basis my provisional Conclusions in respect of Mr Balchin's complaint. The Council took legal advice on them and it has shown me the advice it received. In July 2005 I met the Council's Chief Executive, the County Solicitor and Leaders of the Council's party groups to discuss my draft Conclusions. I am very grateful

for all the Council's careful consideration here. I believe it genuinely reflects its willingness to do what it considers appropriate in putting right any adverse effects on Mr and Mrs Balchin that may have arisen as a result of its administrative fault.

81. The Council is not minded to dispute the generality of the maladministration I indicated in my draft conclusions. It does, though, believe that it is unsafe for me to conclude that the Council would have acquired Swans Harbour at the end of 1992, given that it retained discretion not to do so. It also considers that in reaching a view on appropriate compensation for Mr Balchin, significant regard should be had to:

- a) the risk he took in financing so much of his business activities by using Swans Harbour as security;
- b) the fact that he could have reorganised his finances to permit the business to continue;
- c) the fact that any deterioration in the property which might have affected the sale price at that time was as a result of his own choice in moving out and failing to maintain it.
- d) the Guidelines adopted by the Council in 1995;
- e) the fact that he received £240,000 for the property in the summer of 1998;

82. Accordingly, while accepting that some compensation is due to Mr Balchin, it has asked me to review my provisional Conclusions in the light of its representations.

83. I have reflected on all these points before producing my final recommendation for the Council's consideration.

Conclusions

84. No one can help sympathising with Mr Balchin for the invidious position in which he found himself once the Council had determined that the line of a bypass should immediately

adjoin the boundary of his property. Had the bypass required any of his property for its construction then the Council would have bought his home at full market value and the security for his successful business would have been safe. But because the line of the road fell outside his boundary, the law at that time gave the Council no specific power to acquire his property or compensate him in advance of the road having been built and having been in operation for a year.

85. Once the line of the new road became public knowledge the value of Swans Harbour fell away. On the Council's own estimate of December 1987 the value had declined by around 50%. And in 1990 a sale fell through as soon as the existence of the bypass was discovered by the purchaser. Mr Balchin made his position clear to the Council almost at the outset. In 1987 he explained his financial and business difficulties to the Council and asked it to buy Swans Harbour at full market value so that he could recover his equity in it. In December 1987 the Council declined, and in June 1990 it declined again, even though by this time Mr Balchin's financial circumstances were such that it proved impossible for him to raise any more borrowing on the depleted market value of Swans Harbour. He had also ceased trading as a builder.

86. It is important to recognise that Mr Balchin was in a desperate position long before the critical events of October 1992, which I discuss below, had occurred. A complaint was made of maladministration following the Council's refusal to purchase Swans Harbour in June 1990. But my predecessor rejected that complaint on 31 May 1991, giving Mr Balchin reasons. Accordingly, up to that time, I cannot say there was maladministration in the way the Council had responded to Mr Balchin's request for assistance.

87. But when the Council came to consider the matter again in October 1992 a number of

changes had occurred in the previous two years that significantly affected Mr Balchin's position. First, an addition to the Highways Act 1980 (paragraph 11), in force from September 1991, gave the Council the power to acquire property in advance of a road scheme where it would be seriously affected by construction work or the use of the road, and where purchasing the property would alleviate hardship. This new power seemed almost designed to meet the circumstances in which Mr and Mrs Balchin found themselves. Second, guidelines had been set out by the Department of Transport in January 1992 which indicated where the Department would be minded to exercise its discretion in favour of potential applicants. Again, those guidelines incorporated qualifying criteria which Mr and Mrs Balchin's circumstances substantially met. Third, the Secretary of State's Inspector had reported in some detail, when confirming the road scheme, on the effect it would have on Swans Harbour, and advised the Council to give sympathetic consideration to urgent compensation for Mr Balchin. Fourth, the Minister for Roads and Traffic had copied to the Council correspondence with Mr Balchin's MEP showing Ministerial sympathy with Mr Balchin's plight. The letter could have been more precise as to the Council's powers, but it also ended by exhorting the Council to treat Mr Balchin's 'situation with the utmost sympathy, not to mention urgency.' Fifth, Mr Balchin's hardship had worsened over the previous two years; he was now in rented property and his and his wife's health had suffered through stress and worry. This information, too, had been passed to the Council by the Minister.

88. There were serious shortcomings in reporting these new matters to Members at the meeting of October 1992. The officers' report did not mention the new power under the Highways Act at all: indeed, it appears from the Chief Executive's letter to the Minister of 16 July 1992, that he did not know of the new power.

Consequently the Department of Transport Guidelines were not mentioned either. Nor was the letter from the Minister of Roads and Traffic referred to. The Inspector's views were reported but without telling Members just what the Inspector had asked them to do. And there was no up-to-date appraisal of Mr Balchin's continuing and worsening hardship, so relevant to the Council's consideration of whether it should apply its new powers in any particular circumstances. The new information about the family's worsening financial situation and Mrs Balchin's health was simply not given to Members. The absence of these highly relevant considerations from the report submitted to Members in October 1992 was maladministration.

89. In addition, and compounding these faults, Members were provided with advice previously offered them by officers in December 1987 and June 1990. The advice in the latter report included the paragraph on 'Precedent' that was underlined in its 'Conclusion'. This argued that exercising a discretion in favour of Mr Balchin would encourage others in potentially similar situations also to make claims. It seems to me that, in considering whether to exercise a discretionary power, generalised concerns that doing so for one applicant may lead to claims from another have no place. That is a reason never to exercise any discretionary power the Council might have in favour of any individual. In fact, of course, the Council has to be in a position to have full regard to individual circumstances and to respond accordingly. This advice effectively deterred Members from giving any proper consideration to Mr Balchin's true circumstances. It fettered the Council's discretion, and that was maladministration.

90. It seems too that at the debate at Committee, Members may have misled themselves further, along the lines of the Chief Executive's misunderstanding of the current state of the law. The evidence of the debate (paragraph 58) is compelling. The decision on 'where to draw the line' on properties to be acquired was to draw it along the highway boundary. But any person owning property within the highway boundary could already serve a blight notice and so oblige the Council to buy him out. And where a blight notice was accepted, the person would also get a home loss payment, surveyor's fees and removal costs. No one who could serve a blight notice would instead sensibly ask the Council to make a less favourable discretionary purchase. And so for a discretionary purchase to take place it had to be outside the highway boundary and not within it. It was maladministration for the Council to allow this irrelevant consideration to be taken into account.

91. These failings in reporting Mr Balchin's position to Members in October 1992 were fatal. They vitiated the decision not to offer any assistance in advance of the road having been built and in use for a year.

92. But what decision would have been made in the absence of the maladministration I have identified? After all, the Council did retain a discretion here. It is, clearly, possible that the Council might have found good reason not to use its discretion in Mr Balchin's favour. It might, for instance, have wanted to help but not be able to afford to do so. There were no doubt competing financial demands on the Council's roads and transport budget, though this in itself (apart from the 'precedent' point) was not specifically held up as a bar preventing the Council acceding to Mr Balchin's 'demand' that the Council buy Swans Harbour; and I note that some purchases

along the line of the scheme were made without the necessity of serving blight notices first (paragraph 15).

93. There would, though, have to be good reason not to use its powers, I think, because here was a case that matched precisely the new powers the Council had been given. The line of the road *had* drastically devalued Swans Harbour and rendered it practically un-saleable; the devaluation *had* caused Mr Balchin catastrophic financial difficulties; his financial difficulties *were* taking a toll on Mrs Balchin's mental and physical health. No Council could set these considerations lightly to one side and successfully defend itself against the charge of 'intransigence' (see paragraph 20), of setting its face against assisting Mr and Mrs Balchin whatever the circumstances of their case.

94. Of course, these circumstances were not considered properly at all. And the reasons put forward by the Council for not purchasing the property, at the end of 1992 and subsequently, were all flawed by the failure to have regard to relevant considerations and by the impact of irrelevant matters. On the face of it, there was no good reason not to accede to Mr Balchin's request to buy Swans Harbour.

95. So, on balance, and while acknowledging that there must be another possibility, I conclude that the Council could not reasonably have refused to buy Swans Harbour had the matter been considered properly - as it should have been - in October 1992. I have accordingly chosen the notional date of 1 December 1992 on which to base a reconstruction of Mr and Mrs Balchin's financial circumstances to assess how the purchase of Swans Harbour by the Council at that time would probably have affected them.

96. I have found it impossible precisely to reconstruct his financial position as at December 1992. I have established that £150,000 was owed on mortgage and that would have had to be

redeemed. It is clear that one or more overdrafts were secured against Swans Harbour but, on balance, I accept the view of Mr Balchin's accountant that Mr Balchin had available some resources that could have offset the overdraft to some extent. And it seems reasonable to assume that the remainder could have been accommodated or extended had Mr Balchin come away from the sale with significant equity capable of investment in property as security for building another business. So I conclude that in December 1992 Mr Balchin lost access to £150,000 that he should have had from the Council's purchase of his home.

97. I have considered carefully how the question of interest should apply to this sum. It is 13 years since Mr Balchin was deprived of money that in my view he should have had. And it is some seven years since he sold Swans Harbour, by which time however it was more encumbered with debt than in 1992. So there are arguments that interest should accrue from 1992 either until 1998, when the house was sold, or to date, when I have concluded that restitution was long overdue.

98. On balance, however, I believe that interest should run from December 1992 to July 1996, when the Council abandoned the road scheme and when Mr Balchin was in a position to take advantage of the fact and sell the property. In taking this as a proportionate cut-off point I bear in mind that Mr Balchin was in serious financial difficulties before the maladministration occurred; that he might have pursued a complaint against the Council with the Local Government Ombudsman after the Council's decision in October 1992 to offer him no assistance; and that the precise nature of his financial difficulties in December 1992 remain obscure. Letting interest run to 2005 in these circumstances would, I believe be disproportionately onerous on the Council's purse.

99. On the other hand, there were opportunities during the period from October 1992 until early 1996 for the Council to put things right, and really it should have done. So I conclude that Mr Balchin is due £150,000 plus 44 months' interest at the County Court rate, a total of some £194,000. I also believe that some recognition needs to be given to the effect of the Council's maladministration on the lives of Mr Balchin and his wife. I believe that proportionate acknowledgement of the stress and anxiety caused by the decision of October 1992, and the failure over some four years to put it right, is appropriately reflected by raising the total compensation to be paid to £200,000.

100. I have carefully considered the points the Council raises over Swans Harbour and Mr Balchin's financial circumstances. I should stress that my calculations cannot be exact. But I believe that they provide a fair and reasonable basis on which to make a recommendation to the Council. And I do not feel that the Council's concerns should lead me to abate the sum I was minded to recommend in April 2005.

101. I say this for a number of reasons. First, I accept that, as a businessman, there may have been other courses open to Mr Balchin than putting so many of his eggs in the Swans Harbour basket. But I have seen no evidence at all of culpable imprudence in that regard that would lead me to believe he was the architect of his own misfortune here. Indeed, I do not believe he was. Second, I do not accept that Mr Balchin's business could have recommenced trading had he reorganised his finances. The major part of his net assets was the value of Swans Harbour which, as an effectively blighted property, was probably unsaleable at the time. Third, the property appears to have been in better condition in 1992, and so a purchase then would have been more beneficial financially than later on. The Council says that Mr and Mrs Balchin contributed to this

deterioration by moving out and failing to maintain it. But, in all the circumstances, I find it hard to blame Mr and Mrs Balchin here. Mr Balchin says the move away was to safeguard the mental wellbeing of Mrs Balchin and was on her doctor's advice. The move itself was to their financial disadvantage and it is hard to see why it would have taken place without pressing health reasons. So I think it unfair to reduce for this reason the sum I recommended. Fourth, I consider it is not appropriate to take into account the Guidelines adopted by the Council in 1995. The only contemporaneous published Guidelines relevant to Mr Balchin's circumstances were those established by the DoT in 1992 and I cannot reasonably assume that the Council would have applied guidelines which were not adopted until some three years after the event. Fifth, Mr Balchin did indeed receive £240,000 for the property once sold in 1998. But by then it was virtually totally encumbered by mortgage debt and he retrieved no equity from the sale. And I believe that the worsening of his financial position from the end of 1992 until at least July 1996 (see paragraph 18) was a direct consequence of the Council's failure to acquire the property at the appropriate time.

102. The final question I need to consider is who should pay? Mr Balchin has been complaining for 11 years to the Parliamentary Ombudsman about the role of the Secretary of State for Transport in the events that have caused him so much hardship. The Parliamentary Ombudsman and I have shared the results of our separate investigations, as the law says we can, and have considered jointly what an equitable share of responsibility might be. We have decided that it would only be fair to conclude that the Council and the Department for Transport must carry an equal share in that responsibility. I should make it quite clear that this is not to say that the Council was not, in law, the appropriate decision-making

body in this matter. However, in her report the Parliamentary Ombudsman reached the view that there must be, nevertheless, an onus on the Department for Transport to ensure that they do not knowingly allow Councils to mislead themselves as to the intention of any legislation (for which the Department is responsible) to which they are obliged to have regard, and certainly to step in to offer a correct interpretation of the current legislative position if a Council clearly misrepresents that. In this instance, had the Department for Transport fulfilled that responsibility, they would have replied appropriately to the Chief Executive's letter to the Minister of 16 July 1992. As I see it, that response, pointing out the Council's clear misinterpretation of the true legislative position and the self-evident fettering of its discretion, should have been sufficient to have prompted proper consideration of the case by the Council. As I have already explained, it is my view that had the Council done so, it would have exercised its discretion to purchase Mr Balchin's property.

Finding

103. For the reasons given in paragraphs 88 to 90 I find maladministration by the Council causing the injustice described in paragraphs 96 to 99.

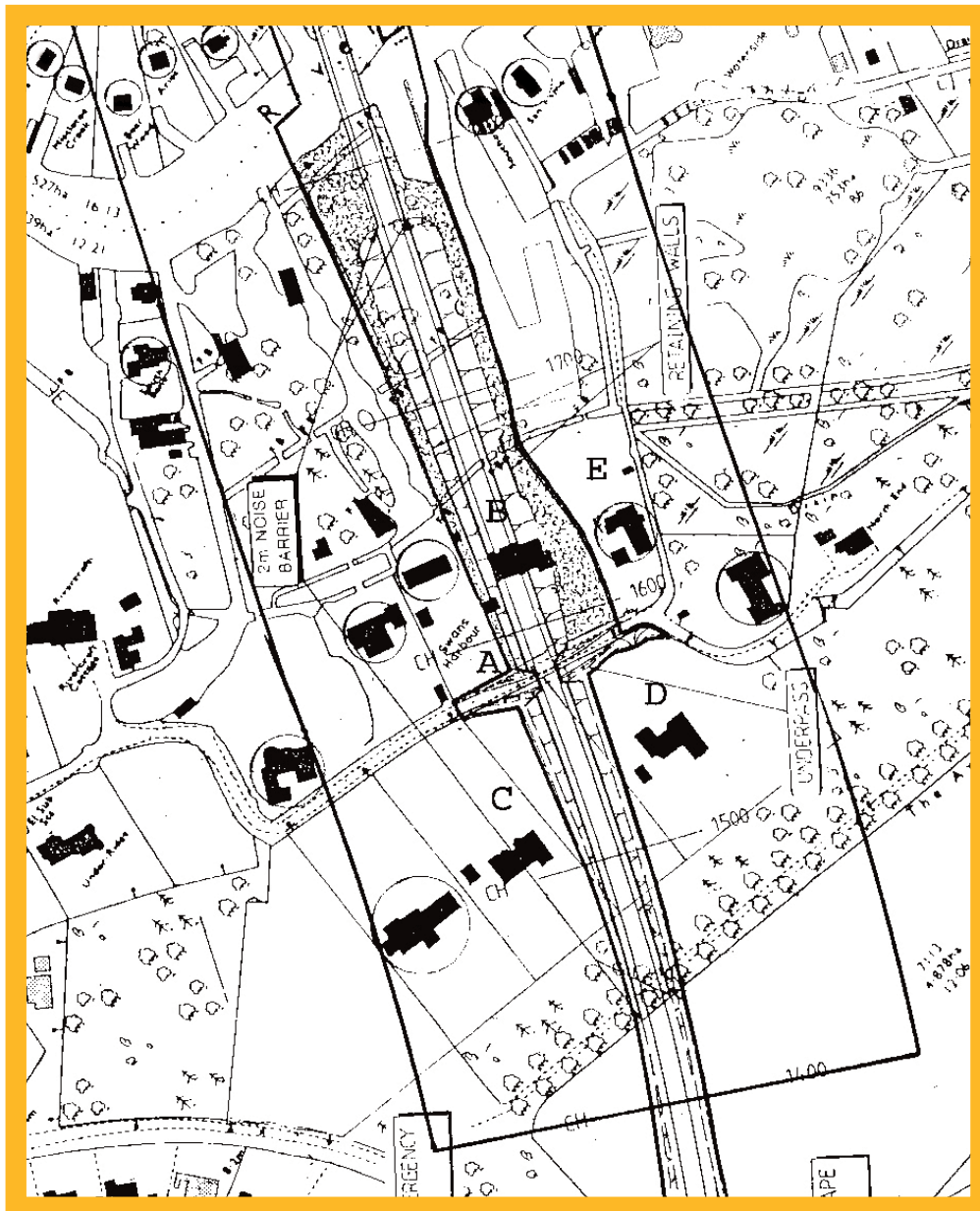
104. To remedy that injustice I recommend that the Council makes Mr Balchin an ex gratia payment of £100,000.

J R White

Local Government Ombudsman

Coventry

Annex A. Map of Area



KEY

- A Swans Harbour
- B Waders - Purchased C1987 - Under highway Line
- C Oystercatchers - July 1993 - £290,000 - 16m
- D Moorhens - June 1989 - £550,000 - 18m
- E Reeding House - Not Purchased - 34m

Annex B. Department of Transport January 1992 Guidelines

1. The Department will use its discretion to purchase in any case where it judges it would be intolerable for the occupier to remain in the property during works or once the road is open. (Assessed as forecast noise level of 78 dB(A) LEQ' - '(12 hour) for 6 months).
2. Where the above criterion is not met the vendor must show that he has made reasonable efforts to sell. The property must have been on offer for at least 20 weeks at a reasonable price and has been impossible to sell other than at a price substantially lower than that for which it might have been expected to be sold but for the scheme. Normally the difference should amount to not less than 5%.
3. There are a variety of reasons why a vendor might need to move without delay, and where they appear cogent, they should be accepted. In the case of owner-occupiers of dwellings guidelines set out the following main types of reason which should be accepted:-
 - Acquisition of a job outside reasonable commuting distance when unemployed (what is reasonable under this and the next head will vary with the circumstances, including the means of the individual);
 - Acquisition of a different job outside reasonable commuting distance (it is undesirable for blight to impede job mobility);
 - Need to move for medical reasons, including need to look after an elderly relative in a different sort of house;
 - Need to provide for a growing family (primarily to be considered in relation to bedrooms - it is undesirable for growing children of different sexes to share);
 - Need to realise assets, perhaps because of serious financial difficulties or dissolution of marriage.
4. While each case must be considered on its merits, acquisition will only rarely be approved under the new power outside the 100m zone, after start of works.

Annex C. Extract Report to the Planning and Transportation Committee 1 October 1992

2.3.2 The effect of an eastern bypass on adjacent properties 'Swans Harbour' and 'Eels Cottage'

The Inspector's Report refers to these two properties which are situated close to the proposed bypass. Swans Harbour is adjacent to Waders (Please see Para 3.2), a house the County Council have already acquired under 'Blight' procedures and which will be demolished since it lies in the path of the road. Swans Harbour and Eels Cottage will be considerably affected by the scheme and the Inspector calls for sympathetic consideration by the Council of the owners' plight, so close to the bypass.

In neither case does the County Council require land from the property and compensation is properly assessed for these types of cases under the Land Compensation Act 1973 to take account of physical factors such as noise, lights and vibration. Compensation is not assessed under the Act until one year after the scheme is in operation.

The Committee considered a report in December 1987 and again in June 1990 in respect of Swans Harbour, copies included as exempt Appendix B. The Committee resolved against purchasing the property and presumably maintains that view. There is no legal requirement for it to be purchased.

3. Other matters for Members' information

3.1 Oystercatchers

This property is directly affected by the Bypass in that an area of the garden is required for the scheme.

The owner has served a Blight Notice on the County Council requiring the Council to acquire the whole property now. It is considered that the owner has a strong case and that the sensible course of action is to seek to agree terms and acquire the property, with a view to subsequent disposal of that part not required for the scheme, on completion of the Bypass.

3.2 Waders

This large detached residential property, was purchased by the Council following a Blight Notice in 1987 and is currently empty.

The property was let until October 1990 and has been maintained and kept wind and water tight to ensure that it would be suitable for letting if the need arose or indeed, so that it could have been resold had the Secretary of State not confirmed the Bypass line in the County Council's favour.

4. Financial Implications

The acquisition of Oystercatchers has been budgeted for and is included in the County Council's 1992/93 Capital Programme, in relation to the Wroxham Bypass.

It is RECOMMENDED that the County Council deal with compensation effects at Swans Harbour and Eels Cottage under the timescale as dictated by the Land Compensation Act 1973, in relation to the physical factors evident after the scheme has been in operation for one year.

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