Neutral Citation Number: [2019] EWHC 3539 (Admin)

Case No: CO/5071/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

Birmingham Civil Justice Centre
33 Bull St, Birmingham, B4 6DS

Date: 19 December 2019

Before :

MRS JUSTICE LANG DBE

- -

Between :

THE QUEEN
on the application of

PETER DAY	**Claimant**
- and -	
SHROPSHIRE COUNCIL	**Defendant**
(1) SHREWSBURY TOWN COUNCIL	
(2) CSE DEVELOPMENTS (SHROPSHIRE) LIMITED	**Interested Parties**

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Alex Goodman (instructed by **Leigh Day Solicitors**) for the **Claimant**
Killian Garvey and Jonathan Wright (instructed by **Legal and Democratic Services**) for the **Defendant**
The **Interested Parties** did not appear and were not represented

Hearing dates: 17 July and 28 November 2019

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Approved Judgment

Mrs Justice Lang :

1. The Claimant seeks judicial review of the decision of Shropshire Council, dated 8 November 2018, in which it granted planning permission with conditions, for a development of 15 dwellings and an access road, on land off Greenfields Recreation Ground, Falstaff Street, Shrewsbury, Shropshire ("the Site").

2. Most of the Site is owned by the Second Interested Party ("IP2"), who made the application for planning permission. Previously, Shrewsbury Town Council ("the Town Council") owned the entire Site, but disposed of it to IP2 on 4 October 2017. A small portion of the Site is still in the ownership of the Town Council. It is part of the car park for the Greenfields Recreation Ground, and the Town Council has granted IP2 an easement across it, to provide a right of way from Falstaff Street.

3. The Claimant resides near the Site and objects to the proposed development, as do many other local residents, who have formed the Greenfields Community Group. The objectors consider the Site to be a part of the Greenfields Recreation Ground, held as open space for public use under a statutory trust. They contend that it was a valued community asset until it was fenced off by IP2 in the summer of 2018.

4. Permission to apply for judicial review was refused on the papers on 31 January 2019 but granted at an oral renewal hearing on 14 March 2019.

History

5. According to the minutes of a meeting of the Council of the Borough of Shrewsbury ("the Borough Council"), held on 10 November 1924, a petition was presented by Mr Councillor Rich on behalf of residents in the Greenfields District seeking the provision of playing fields because of the danger to children from fast moving traffic. The petition was referred to the Estates and Watch Committees respectively for their consideration.

6. The minutes of a meeting of the Estates Committee, held on 12 October 1925, included a report from the Estates Committee to the Borough Council concerning the purchase of land for use as a recreation ground. Item 1 stated:

> "In accordance with the desire of the Council, your Committee have considered the possibility of providing a Recreation Ground for the Greenfields District, and have been in negotiation with Mr. John Barker, the owner of the Broomhall Estate, for the purchase of a portion of the meadow lying to the back of Broomhall, 3.4 acres in extent shown on the plan. The Owner is willing to sell this land to the Council for the sum of £700 …. Your Committee are of opinion that the terms of both purchase and Sale are fair.
>
> ….
>
> Your Committee consequently recommend that the Purchase …. mentioned be effected ….. and that application be made to the

> Ministry of Health for sanction to borrow the sum of £750 in respect of the Recreation Ground provision referred to…"

7. In item 2 of the same report, the Estates Committee recommended that the Borough Council purchase from Mr William Capper a piece of land immediately adjoining the land to be purchased from Mr John Barker, for the sum of £300, so that "by combining the Broomhall land with the [Capper] land a much needed and most useful Recreation Ground will be provided for the Greenfields District". The land was currently let to the Borough Council. It was recommended that an application be made to the Minister of Health for approval to borrow the sum of £300 to fund the purchase.

8. The minutes of the meeting of the Estates Committee dated 8 February 1926 recorded that a loan of £300 was obtained from the Ministry of Health in order to purchase the Capper Land for a recreation ground.

9. The land purchased from Mr Barker (hereinafter "the Barker Land") was conveyed to the Mayor and Alderman Burgesses of the Borough of Shrewsbury by conveyance dated 26 March 1926 for seven hundred pounds. The Claimant's evidence was that the plan attached to the conveyance that the Barker Land included the Site of the proposed housing development. Helpfully, an earlier land valuation map dated 1910 showed the extent of the Barker estate. In my view, this evidence was compelling.

10. An option to purchase the land from Mr Capper (hereinafter "the Capper Land") was exercised on 27 March 1926 and a conveyance was completed. The Barker deed mentions the acquisition of the Capper Land.

11. Thereafter, there is clear evidence that the Borough Council did indeed provide a recreation ground on the Barker and Capper Lands.

12. On 11 February 1929 the minutes of the Estates Committee recorded that the Barker and Capper Lands had been joined as a single recreation ground and that it proposed to allow tipping into a ditch between the original two fields to level them:

> "Greenfields Recreation Ground. Raising the levels.
>
> This Recreation Ground is comprised of two fields. One was bought from the Broomhall Estate [Barker] approached from the end of Falstaff Street, and the other from Mr William Capper lying between the Broom hall field at the footpath leading from Greenfields to Ditherington (see reports 1924-5, p.174, 175).
>
> Between the two fields is a ditch and a generally hollow space, which during the winter especially is very wet at no time is this low part fit for children to play games upon, because of its saucer like formation."

13. The minutes of the Borough Council for its meeting on 27 July 1931 recorded that the Council decided to allow a right of way across "Greenfields Recreation Ground" to allow access by Mr Barker to allotments to the north.

14. A plan by the Borough Surveyor at the Council, dated March 1935, attached to a deed dated 31 July 1935 relating to a neighbouring parcel of land proposed for school use, labelled the whole area of what had been the Barker and Capper Land as "Public Recreation Ground". The Claimant's submission that the area marked as "Public Recreation Ground" included the Site was, in my view, compelling.

15. The minutes of a meeting of the Estates Committee on 23 February 1942 recorded an agreement to allocate a "small portion of Greenfields Recreation Ground" for 10 to 12 allotments on a temporary basis "subject to its reinstatement within six months of the end of the war".

16. The evidence shows that the land allocated for allotments was not reinstated as part of the Recreation Ground within six months of the end of the war. In the 1950s the Borough Council was still seeking to re-locate the allotments. The minutes of the Allotments Committee, in 1954, stated (*semi-illegible text in italics*):

> "The Borough Surveyor has been asked by the County Council whether the Corporation would be interested in purchasing a piece of the land containing approximately [*18*] acres. The matter has been referred to the Allotments Committee because there are 13 temporary allotments still being cultivated on the Recreation Land adjoining under powers contained in the Defence Regulations which had expired in October 1953. Alternative accommodation would therefore have to be found for the 13 tenants."

17. The County Council had earlier purchased land adjacent to the Greenfields Recreation Ground for education purposes, namely, to build a school. The Estates Committee minutes in 1956 recorded that thirteen acres of education land adjacent to the recreation ground were to be acquired "partly for use as a public open space partly to provide alternative sites for several temporary allotments which are still being [cultivated?] on the nearby Recreation Ground".

18. The Claimant's evidence, by reference to the 1954 Ordnance Survey Map which identified an area as "Allotment Gardens", was that the Site appears to have been in the portion of the recreation ground which was allocated for allotments in 1942. In my view, this evidence was compelling.

19. The allotments fell into disuse, and by the late 1970s that area was being used as a Council tree nursery. However, the 1983 Ordnance Survey map still marked the area as "Allotment gardens".

20. Gary Farmer, who is employed by the Town Council as an Operations Manager, made a witness statement giving an account of the use of the Site since 1978, based on his experience as a gardener working in the Council Parks Department of Shrewsbury and Atcham Borough Council, in the late 1970s and 1980s. He said that from 1978 the Site was separate from Greenfields Recreation Ground, divided by a hedge, and there was no public access to it. It was an overgrown wilderness that showed signs of previously having been cultivated during the World War II dig for victory campaign. The Council established a tree nursery on the Site, growing trees which were then transplanted to provide new woodlands on borough council greenspaces. The area was gated and

secured to prevent unauthorised access. After many years the requirement for tree nurseries diminished as all the new woodland had been created. The nursery was left to run down and the area became overgrown. The fencing was not maintained and so the public was able to gain access.

21. Mr Michael Banks, who is employed by the Town Council as Outdoor Recreation and Asset Manager, made a witness statement in which he stated that he had been aware of the Site since 1984 when he was responsible for checking the trees in the nursery. He confirmed that the land was secured to protect the stock and the public did not have access to it.

22. In contradiction to the evidence of Mr Farmer and Mr Banks, local residents claim that they could and did access this area when the tree nursery was in operation. Local residents enjoyed the trees and overgrown wilderness. It was a place used for dog walking, children playing hide and seek, gathering flowers and observing wildlife.

23. It was unclear when the tree nursery ceased operations, it appears that it was at some point in the late 1990s or 2000.

24. In 2005, the Borough Council registered the Barker and Capper Lands with the Land Registry as "Land at Greenfields". The Claimant's evidence was that the two parcels of land purchased in 1926 were clearly marked on the plans lodged at the Land Registry, and they included the area once allocated for allotments and subsequently used as a tree nursery and the Site. In my view, this evidence was compelling.

25. The Barker and Capper Lands, by then known as the Greenfields Recreation Ground, were transferred to the Town Council as part of local government reorganisation in 2010. There is an entry in the Land Register recording the transfer, which refers to the "Greenfield Recreation Ground & Allotments".

26. Minutes of a meeting of the Town Council on 18 October 2010 recorded that the Council considered a report from the Town Clerk on "Land at Greenfields", in particular regarding the future use of the former tree nursery adjacent to the Greenfields Recreational Ground. The Report said that during the 1990s the Borough Council had undertaken an extensive programme of tree planting in public open spaces and parks within its ownership. A tree nursery was developed on redundant allotment land where trees were grown until they were strong enough to be planted out onto council land, but it had since fallen into disuse. The Council was considering either re-introducing allotments on the land or allowing the land to be used for an eco-housing scheme promoted by the Shropshire Constructing Excellence Partnership. In order to proceed with the eco-housing scheme, the Town Council was considering a land swap arrangement with Shropshire Council for "land at Bowbrook to be utilised for allotment/recreational use" and a resolution was made that officers continue formal discussions with the County Council for the release of the land at Bowbrook for recreational/allotment purposes. Planning advice at the time in paragraph 13 of Planning Policy Guidance Note 17 was that development may provide an opportunity to exchange the use of one site for another to substitute for any loss of open space.

The Town Council's application for planning permission

27. On 10 February 2012, the Town Council applied to Shropshire Council for outline planning permission at "Land off Greenfields Recreation Ground" for the erection of 8 dwellings to include allotment space and means of access. The application site was on a part of the Site in issue in this claim. When the application was first considered in 2012, the officer report described the site as "a vacant piece of land opposite Greenfield recreation land to the East and was formerly rough woodland that has been cleared with the exception of a few trees on its boundaries….". Local residents objected to the loss of open green space and ecological habitat. However, there was no consideration of the possibility that the land was part of a protected open space. On 23 March 2016, Shropshire Council granted outline planning permission on conditions, and subject to a subsequently executed section 106 agreement. However, the Town Council did not develop the Site. Shropshire Council submitted that the application remained extant.

28. On 4 October 2017, the Town Council disposed of the site to IP2. The transfer comprised the area edged red on the plan with a right of access granted over the part of the retained land marked in blue. The need for exchange land, recognised in 2010, was not considered, nor did the Town Council follow the procedures required for disposal of an open space.

The current application for planning permission

29. On 27 October 2017, IP2 applied for planning permission for the development of 17 dwellings. The Site included the area of land purchased in October 2017 and also an area in the south east corner which continued to be owned by the Town Council but over which IP2 was granted a right of access.

30. The Officer's Report ("OR") described the Site as "a vacant piece of land opposite Greenfield recreation land and was previously owned by Shrewsbury Town Council and was formerly used as a tree nursery. The woodland that remained was cleared prior to submission of a planning application by the Town Council in 2012 for residential development of the site…". There was no mention of the possibility that the Site was protected open space. The OR recommended the grant of planning permission on conditions.

31. On 15 February 2018 the Central Planning Committee of Shropshire Council ("the Committee") deferred consideration of the application for development of 17 dwellings to a further meeting held on 30 August 2018 during which time the application was amended to 15 dwellings.

32. Objections were made by the Claimant and the Greenfields Community Group that the Site should be treated as open space and part of the recreation ground when the application for planning permission was considered. Documentary evidence was supplied in support of the objection.

33. A revised OR was prepared for the meeting of 30 August 2018 which again recommended the grant of planning permission on conditions. The revised report set out the objectors' submissions and then addressed the open space issue, at section 6:

"6.1.4 The land has been owned by Shrewsbury Town Council (or its predecessors) since 1926 when it was acquired by "The Mayor Aldermen and Burgesses of the Borough of Shrewsbury", and has had various uses over the years including allotments and tree nursery. The land was transferred to the Town Council in 2010 following Shropshire becoming a unitary authority. The SABC Local Plan Urban Area map dated November 1997 indicates the land to be 'white land' and not protected green or open space. The adjacent land labelled 'playing field' is allocated as both 'Greenspace' and 'Recreational Open Space'. Ordnance Survey maps since the 60s have always referred to the land as allotments.

6.1.5 The SABC Local Plan was subject to public consultation and was an adopted plan. The application site was clearly not shown as designated public open space or recreational ground within the SABC Local Plan. When the land was transferred to the Town Council from SABC the use of the land was not restricted and there was no covenant attached to the land. Reference has been made to "2005 and 2010 Land registry documents". Consideration of the Land Registry titles for the site and the adjacent land still held by the Town Council indicates entries in the register dated 2005 and 2010. That does not mean that there are specific documents of those dates, just that the relevant entry was made or amended on that date. With regards to the 2005 entry in the register this is the date that the land was first registered by SABC with the Land Registry. As it had been held since 1926 it would have been unregistered until voluntarily first registered by SABC. The available documents submitted with the registration would have been those referred to on the title which have been considered by officers and do not add anything further to consideration of the land's status. The 2010 date relates to the entry in the register when the land comprising the site and the adjacent recreation land, together with other land in the town, was transferred to Shrewsbury Town Council.

6.1.6 Similarly the original Conveyance (John Baker to the Borough Council 26 March 1926) includes the application site but there are no restrictions on the land or mention of the purposes the land is to be used for. The site is now held by the applicant under a separate title number SL248991 and there is no covenant attached to this title restricting the use of the land. If there had been any covenants attached to the original conveyance or subsequent title documents these would have been recorded on the latest title for this site.

6.1.7 The operations manager (Gary Farmer) for Shrewsbury Town Council has worked for SABC and the Town Council for over 40 years and for most of these years and in various roles has been responsible for the maintenance of Greenfields Recreation

Ground. Mr Farmer has submitted the following statement with regard to a request for the land to be registered as an asset of community value (AVC) which outlines his knowledge of the site over that time:

To the best of my knowledge when I started in 1978 this area was derelict overgrown land and never part of the recreational facilities. The Parks Superintendent James Beardall was a keen Arboriculturalist and saw an opportunity for the Parks Department to grow our own trees from saplings. This area was cleared and for many years the site was an active tree nursery with no access to the public. This was managed for many years until such time that many of the green spaces had been planted with now standard trees from this nursery site. Also it should be noted that this was just one of many tree nurseries that we developed. James retired in 2000 and with him the need for tree nurseries expired as he had completed his vision of green Shrewsbury with a new tree stock.

As for this area it remained secure but was left unmanaged until it was disposed of by STC. To be clear only in recent times was this area used as an unauthorised short cut as the boundary fences and access gates were damaged and never repaired. This damage has been more recent when permission was granted to create a cycle way that links through the recreation ground but does not encroach on this area.

The request relating to the application site being registered as an asset of community value has been refused.

6.1.8 That some residents have used the site informally to walk their dogs, or that children have used it to play on at different times does not make the land public open space or recreation land. There are also some residents in addition to officers of the Town Council that disagree with this claim that the land has been available as public open space for the periods when it was not in use as allotments or tree nursery.

6.1.9 Minutes of various meetings over the years potentially indicate that the land was acquired for use as public open space or for recreational purposes as part of a larger piece of land but this evidence is not conclusive as there are no clear plans or maps to identify what land is being referred to. The application site is bounded by Town Council owned allotments to the North and Greenfield Recreation ground to the East and even if it was originally acquired in 1926 (as part of the larger area) for the purposes of recreation this part has never been maintained or formally used as such. There is no evidence the land forming the site was ever designated as public open space.

6.1.10 The current title document (and previous title documents) contain no covenant restricting the use of the land or the future sale of the land. The land was not and is not considered to be public open space or recreation ground by either SABC, Shrewsbury Town Council, or Shropshire Council. Even if the title had a covenant restricting its use, a covenant can be applied to be lifted and planning permission can be decided irrespective of this.

6.1.11 With regards to the Town Council following the correct procedures and processes with regards to acquiring or appropriating land for planning purposes under section 232 of the Town and Country Planning Act (TCPA) 1990, section 232 (4) states the following:

(4) Before appropriating under this section any land which consists of or forms part of an open space, a local authority—

(a) shall publish a notice of their intention to do so for at least two consecutive weeks in a newspaper circulating in their area; and

(b) shall consider any objections to the proposed appropriation which may be made to them.

Open space is defined within section 336 of the TCPA 1990 as '*any land laid out as a public garden, or used for the purposes of public recreation, or land which is a disused burial ground*'.

The Town Council were quite rightly of the view that the application site was not public open space and they were therefore not required to follow the procedures outlined in section 232 (4) of the TCPA 1990 prior to making their application for planning permission or prior to selling the land.

6.1.12 It is the Councils opinion that this site is separate to and is not part of the Greenfields Recreation ground. The development would not result in the loss of public open space and the provision of 15 smaller family homes rather than the previously approved 8 large 'eco' homes will make efficient use of this vacant site and help boost housing supply in a sustainable location. The proposal is therefore considered acceptable in principle.

6.1.13 The request to revoke the previous planning permission has been refused. Since the request to revoke the previous planning application was considered, comments have been made that additional documents should be considered, however there do not appear to be any other documents which address the status of the site as set out above. Currently the land is in private ownership and whilst there is an adjacent recreation ground the

> site has been treated separately for many decades and as such it is considered that suggestions that the land was or is public open space are unsubstantiated and therefore cannot be given weight in the planning decision making process."

34. At its meeting on 30 August 2018, the Committee heard objections to the proposed development, and resolved to grant planning permission. On 8 November 2018, Shropshire Council granted full planning permission, on conditions, for the erection of 15 dwellings, including 2 affordable dwellings, and a new access road and associated parking.

35. Local residents have applied to register Greenfields Recreation Ground as a Town Green. The Town Council has objected on the basis that local residents do not use it "as of right" within the meaning of section 15(2) of The Commons Act 2006 i.e. there is a public right to use the land and the rights have not been acquired by prescription.

Grounds of challenge

36. The Claimant's grounds for judicial review were that, in considering the application for planning permission Shropshire Council adopted and acted upon the flawed advice in the OR that the Site was not part of Greenfields Recreation Ground, and was not held under a statutory trust for local residents pursuant to the Open Spaces Act 1906 ("OSA 1906") or the Public Health Act 1875 ("PHA 1875"), and thereby acted unlawfully by failing to:

    i) Ask itself the right questions to establish the Site's history and status, in particular, whether the land was open space and subject to a statutory trust, and failing to take reasonable steps to acquaint itself with the relevant information to enable it to answer those questions correctly; and/or

    ii) Take account of material considerations, including the existence of the statutory trust, and national and local planning policy on open spaces (paragraph 97 of the National Planning Policy Framework ("the Framework") and Core Strategy CS 6), which Shropshire Council failed properly to interpret and apply;

    iii) Give adequate or intelligible reasons for its conclusions.

37. The Claimant contended that the Town Council failed to comply with the advertising and consideration of objections requirements in sections 127(3) and 123(2A) of the Local Government Act 1972 ("LGA 1972") before disposing of the land to IP2, and so the land was not freed from the statutory trust under subsection 2B of section 123. By virtue of section 128 LGA 1972, this did not render the sale invalid, but the Site remained subject to the statutory trust and could not be developed.

38. The Defendant's response was that the Site was not part of Greenfields Recreation Ground, it was not open space, and it had never been held under a statutory trust for local residents pursuant to the OSA 1906 and/or the PHA 1875. In the alternative, even if such a statutory trust once existed, it ceased to have effect once the Town Council sold the Site to IP2 in 2017.

Statutory and policy framework

(i) Judicial review of planning decisions

39. In a claim for judicial review, the Claimant must establish a public law error on the part of the decision-maker. The exercise of planning judgment and the weighing of the various issues are matters for the decision-maker and not for the Court: *Seddon Properties Ltd v Secretary of State for the Environment* (1981) 42 P & CR 26. An application for judicial review is not an opportunity for a review of the planning merits: *Newsmith v Secretary of State for the Environment, Transport and the Regions* [2001] EWHC Admin 74.

(ii) Decision-making

40. The determination of an application for planning permission is to be made in accordance with the development plan, unless material considerations indicate otherwise. Section 70(2) of the Town and Country Planning Act 1990 ("TCPA 1990") provides that the decision-maker shall have regard to the provisions of the development plan, so far as material to the application.

41. Section 38(6) of the Planning and Compulsory Purchase Act 2004 ("PCPA 2004") provides:

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

(iii) National Policy Planning Framework

42. National policy, as expressed in the Framework, is a material consideration.

43. Paragraph 97 of the Framework (July 2018 edition, in force at the date of the decision) provides:

> "Existing open space, sports and recreational buildings and land, including playing fields, should not be built on unless:
>
> a) an assessment has been undertaken which has clearly shown the open space, buildings or land to be surplus to requirements; or
>
> b) the loss resulting from the proposed development would be replaced by equivalent or better provision in terms of quantity and quality in a suitable location; or
>
> c) the development is for alternative sports and recreational provision, the needs for which clearly outweigh the loss."

44. In *Turner v Secretary of State for Communities and Local Government* [2015] EWHC 375, Collins J., at [37], interpreted paragraph 74 of the 2012 edition of the Framework (which was in the same terms as the 2018 edition), as meaning that where open space is lost, the Framework does not mandate that a precisely similar quantity be provided in replacement, but it does require and equivalent quantity and quality.

(iv) Shropshire Local Development Framework Adopted Core Strategy March 2011

45. *Policy CS6: Sustainable Design and Development Principles* provides, so far as is material, as follows:

> "….ensuring that all development:
>
> …..
>
> Contributes to the health and wellbeing of communities, including safeguarding residential and local amenity and the achievement of local standards for the provision and quality of open space, sport and recreational facilities."

46. The explanation to Policy CS6 states, at paragraph 4.84:

> "Open spaces can provide a number of functions such as formal and informal recreation or amenity space, they can also have a number of benefits; for example allotments which can improve health and well-being, combat obesity and increase opportunities for social inclusion…."

47. *Policy CS17: Environmental Networks* refers in the explanation at paragraph 7.9 to Shropshire Council's Open Space, Sport and Recreation Study and observes that:

> "To be of importance, an area of open space need not have a formal use or be accessible to the general public, as long as it contributes to the character and appearance of its locality."

Grounds 1 and 2

48. It is convenient to consider Grounds 1 (failure to inquire) and 2 (failure to have regard to material considerations) together.

(i) Legal principles

49. When reaching a decision, a local planning authority is under a legal duty to ask itself the right questions, acquaint itself with the relevant information, and consider it. These principles were recently confirmed by the Supreme Court in *R (CPRE Kent) v Dover District Council* [2017] UKSC 79, [2018] 1 WLR 108, per Lord Carnwath, at [62]:

> "62 The Model Council Planning Code and Protocol …. contains …. the following advice:
>
> > "Do come to your decision only after due consideration of all of the information reasonably required upon which to base a decision. If you feel there is insufficient time to digest new information or that there is simply insufficient information before you, request that further information. If necessary, defer or refuse."
>
> This passage not only offers sound practical advice. It also reflects the important legal principle that a decision-maker must not only ask himself the right question but "take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly": *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014, 1065B. That obligation, which applies to a planning committee as much as to the Secretary of State, includes the need to allow the time reasonably necessary, not only to obtain the relevant information, but also to understand and take it properly into account."

50. The principles to be applied when reviewing an officer's report were summarised by the Court of Appeal in *R (Mansell) v Tonbridge & Malling BC* [2019] PTSR 1452, per Lindblom LJ, at [42]:

> "42. The principles on which the court will act when criticism is made of a planning officer's report to committee are well settled. To summarise the law as it stands:
>
> > (1) The essential principles are as stated by the Court of Appeal in *R. v Selby District Council, ex parte Oxton Farms* [1997] E.G.C.S. 60 (see, in particular, the judgment of Judge L.J., as he then was). They have since been confirmed several times by this court, notably by Sullivan L.J. in *R. (on the application of Siraj) v Kirklees Metropolitan Borough Council* [2010] EWCA Civ 1286, at paragraph 19, and applied in many cases at first instance (see, for example, the judgment of Hickinbottom J., as he then was, in *R. (on the application of Zurich Assurance Ltd., t/a Threadneedle Property Investments) v North Lincolnshire Council* [2012] EWHC 3708 (Admin), at paragraph 15).
> >
> > (2) The principles are not complicated. Planning officers' reports to committee are not to be read with undue rigour, but with reasonable benevolence, and bearing in mind that they are written for councillors with local knowledge (see the judgment of Baroness Hale of Richmond in *R. (on the application of Morge) v Hampshire County Council* [2011] UKSC 2, at paragraph 36, and the judgment of Sullivan J., as

> he then was, in *R. v Mendip District Council, ex parte Fabre* (2000) 80 P. & C.R. 500, at p.509). Unless there is evidence to suggest otherwise, it may reasonably be assumed that, if the members followed the officer's recommendation, they did so on the basis of the advice that he or she gave (see the judgment of Lewison L.J. in *Palmer v Herefordshire Council* [2016] EWCA Civ 1061, at paragraph 7). The question for the court will always be whether, on a fair reading of the report as a whole, the officer has materially misled the members on a matter bearing upon their decision, and the error has gone uncorrected before the decision was made. Minor or inconsequential errors may be excused. It is only if the advice in the officer's report is such as to misdirect the members in a material way – so that, but for the flawed advice it was given, the committee's decision would or might have been different – that the court will be able to conclude that the decision itself was rendered unlawful by that advice.
>
> (3) Where the line is drawn between an officer's advice that is significantly or seriously misleading – misleading in a material way – and advice that is misleading but not significantly so will always depend on the context and circumstances in which the advice was given, and on the possible consequences of it. There will be cases in which a planning officer has inadvertently led a committee astray by making some significant error of fact (see, for example *R. (on the application of Loader) v Rother District Council* [2016] EWCA Civ 795), or has plainly misdirected the members as to the meaning of a relevant policy (see, for example, *Watermead Parish Council v Aylesbury Vale District Council* [2017] EWCA Civ 152). There will be others where the officer has simply failed to deal with a matter on which the committee ought to receive explicit advice if the local planning authority is to be seen to have performed its decision-making duties in accordance with the law (see, for example, *R. (on the application of Williams) v Powys County Council* [2017] EWCA Civ 427). But unless there is some distinct and material defect in the officer's advice, the court will not interfere."

51. Whether or not a particular consideration is material is a matter for the court: Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR. 759, per Lord Keith at p.764. In R (Kides) v South Cambridgeshire District Council [2003] P & CR 19, the Court of Appeal addressed what was a material consideration in the planning context in the following terms, per Jonathan Parker LJ at [121]:

> "In my judgment a consideration is 'material', in this context, if it is relevant to the question whether the application should be granted or refused; that is to say if it is a factor which, when placed in the decision-maker's scales, would tip the balance to

> some extent, one way or the other. In other words, it must be a factor which has some weight in the decision-making process, although plainly it may not be determinative. The test must, of course, be an objective one in the sense that the choice of material considerations must be a rational one, and the considerations chosen must be rationally related to land use issues."

(ii) The OR's assessment of the Site as part of the Greenfields Recreation Ground

52. Shropshire Council's initial OR, prepared for the Committee's meeting on 15 February 2018, did not consider the possibility that the Site was part of the land purchased and allocated for the Greenfields Recreation Ground. However, because of the objections made by the Claimant and the Greenfields Community Group, the revised OR, prepared for the Committee's meeting on 30 August 2018, did consider this issue. In my judgment, it was correct to do so, since whether or not the proposed development was on land held in trust for public recreational use was plainly a material consideration in deciding whether to grant planning permission.

53. The OR concluded, at paragraph 6.1.9, that minutes of meetings "potentially indicate that the land was acquired for use as public open space or for recreational purposes as part of a larger piece of land but this evidence is not conclusive as there are no clear plans or maps to identify what land is being referred to". Although recognising that the Site was potentially acquired for use as public open space or for recreational purposes, the planning officer did not enter into any further consideration of how such plans might be obtained. Instead, she went on to conclude, at paragraph 6.1.12:

> "It is the Council's opinion that this site is separate to and is not part of the Greenfields recreation ground."

54. In my judgment, before reaching this conclusion, the planning officer failed to take reasonable steps to ascertain the extent of the recreation ground which was created by the Borough Council, following the purchase of the Barker and Capper Lands for that purpose in 1926. Whilst there were no plans attached to the Borough Council Minutes, there was a plan attached to the Barker conveyance. There was also a plan lodged at the Land Registry when the Borough Council registered "Land at Greenfields" in 2005, which clearly referenced the two parcels of land purchased in 1926. In my view, these plans provided compelling evidence that the Site was part of the Barker Land which became the Greenfields Recreation Ground. When this land was transferred to the Town Council in 2010, as part of a local government reorganisation, there was an entry in the Land Register recording the transfer of "Greenfield Recreation Ground & Allotments".

55. I was unable to accept Shropshire Council's submission that it was unreasonable to expect the planning officer to obtain these documents. The planning officer had the considerable advantage of the initial research undertaken by the Claimant in the Shropshire and Shrewsbury Archives, which disclosed the minutes of the relevant meetings. The Claimant made it clear that his research was not comprehensive. As the OR noted in paragraph 6.1.3, he specifically identified the Land Registry documents

dated 2005 and 2010 as relevant but explained that he had been unable to obtain these. In my view, it was reasonable to expect Shropshire Council to have carried out its own investigations, including Land Registry searches, as well as checking the former Borough Council and Town Council records, for evidence of the conveyance of the Barker and Capper Lands and subsequent creation of the Recreation Ground. I also consider that such records would have been more easily accessed and navigated by an officer of Shropshire Council than by the objectors.

56. I note that, in January 2019, as part of the litigation disclosure, the planning officer disclosed the plan by the Borough Surveyor, dated March 1935, which marked out the "Public Recreation Ground" very clearly, providing further evidence that the Site was included within the recreation ground. In my view, this was a relevant document which could have been revealed by further investigations prior to the completion of the OR.

57. If the planning officer had undertaken a proper inquiry and obtained the plans and other documents, the compelling evidence that the Site was part of the Barker Land and the original Greenfields Recreation Ground would have triggered an obligation to inquire further into the legal status of the Site, and the effects of its later use as allotments, as a tree nursery, and then sale to IP2. None of these issues were adequately addressed in the OR. They were plainly material considerations which should have been taken into account. In my view, the planning officer and the Committee should have sought more detailed legal advice on the legal status of the Site from its Legal Services department before making its decision.

58. It is necessary for me to go on to consider the legal status of the Site because Shropshire Council submitted that the Site had never been held under a statutory trust for local residents, or, in the alternative, even if such a statutory trust once existed, it ceased to have effect once the Town Council sold the Site to IP2 in 2017.

(iii) Legal status of the Greenfields Recreation Ground established on the Barker and Capper Lands

59. The Borough Council's power to purchase the Barker and Capper Lands had to be derived from express statutory powers, since a local authority is a creature of statute and has no inherent common law powers to purchase or own land. The conveyance did not include any covenants concerning use as a recreation ground, but the Borough Council Minutes disclosed the purpose of the purchase.

60. Despite the absence of clear evidence spelling out under what statutory authority the land was acquired or held, it has been held that it is proper to assume that the acquisition and holding was lawful, provided the use to which the land is put is permitted by some appropriate enabling legislation: see *Attorney-General v Poole Corporation* [1938] Ch 23, cited by Lord Scott in *R (Beresford) v Sunderland City Council* [2004] 1 AC 889, at [30]. This principle was applied in *R (Malpass) v Durham County Council* [2012] EWHC 1934 (Admin), per HH Judge Kaye QC, sitting as a Judge of the High Court, at [41].

61. In the 19th century, Shrewsbury Borough Council was awarded the newly created status of a municipal corporation by the Municipal Corporations Act 1835. A general power

to acquire land was conferred on all municipal corporations by section 107 of the Municipal Corporations Act 1882, which provided:

> "107 Power to acquire land with the approval of the Treasury"
>
> (1) Where a municipal corporation has not power to purchase or acquire land, or to hold land in mortmain, the council may, with the approval of the Treasury, purchase or acquire any land in such manner and on such terms and conditions as the Treasury approve, and the same may be conveyed to and held by the corporation accordingly.
>
> (2) The provisions of the Lands Clauses Consolidation Acts, 1845, 1860, and 1869, relating to the purchase of land by agreement, and to agreements for sale, and conveyances, sales, and releases of any lands or hereditaments, or any estate or interest therein by persons under disability, shall extend to all purchases of land under this section.

62. However, there was no evidence of any Treasury approval for the purchase of the Barker and Capper lands. It appears from the minutes of the Estates Committee in respect of other transactions that it was the practice to record such approvals. Section 107 was a fall-back power where there was no other power to purchase or acquire land. By the 1920s there were specific statutory powers available for the purchase of recreation grounds. Therefore, it seems unlikely that the purchase was made under the Municipal Corporations Act 1835.

63. Section 175 PHA 1875 conferred a general power on local authorities to purchase or lease or exchange lands "for the purposes and subject to the provisions of" the Act. More specifically, section 164 PHA 1875 authorised urban authorities (such as the Borough Council) to purchase or maintain land for recreational use by the public. It provided:

> "164. Urban authority may provide places of public recreation"
>
> Any [local authority] may purchase or take on lease lay out plant improve and maintain lands for the purpose of being used as public walks or pleasure grounds, and may support or contribute to the support of public walks or pleasure grounds provided by any person whomsoever."

64. Sections 233 PHA 1875 conferred powers on local authorities to borrow money to defray the costs incurred by them in the execution of their powers under the PHA 1875 "with the sanction of the Local Government Board" to do so. By the time the Barker and Capper Lands were purchased, section 3 of the Ministry of Health Act 1919 had transferred the Local Government Board's powers to the Minister of Health. The report of the Estates Committee submitted to the meeting on 12 October 1925 recommending the purchase of the Barker Land also recommended that "application be made to the Ministry of Health for sanction to borrow the sum of £750 in respect of the Recreation Ground provision referred to…". The same report, which also recommended the purchase of the Capper Land, recommended that "an application be made to the

Minister of Health for sanction to borrow the sum of £300 in connection with such purchase…". These references to obtaining the "sanction" of the Minister of Health are, in my view, an indication that the Borough Council was exercising powers under sections 164 and 233 PHA 1875.

65. The Town Council, in its recent submissions opposing the Claimant's application to register Greenfields Recreation Area as a Town or Village Green, submitted that "it is likely that the Recreation Ground was purchased under [the Public Health Act] 1875 as this continues to be the defining legislation for the purchase, layout and maintenance of Recreation Grounds". The Town Council provided a copy of the Byelaws for Greenfields Recreation Ground, dated 4 October 1971, which were made under section 164 PHA 1875. These are further indicators that the Borough Council was exercising powers under PHA 1875.

66. The Borough Council also had power to purchase land for use as an open space under section 9 OSA 1906 which provides:

> "A local authority may, subject to the provisions of this Act, —
>
> (a) acquire by agreement and for valuable or nominal consideration by way of payment in gross, or of rent, or otherwise, or without any consideration, the freehold of, or any term of years or other limited estate or interest in, or any right or easement in or over, any open space or burial ground, whether situate within the district of the local authority or not; and
>
> (b) undertake the entire or partial care, management, and control of any such open space or burial ground, whether any interest in the soil is transferred to the local authority or not; and
>
> (c) for the purposes aforesaid, make any agreement with any person authorised by this Act or otherwise to convey or to agree with reference to any open space or burial ground, or with any other persons interested therein."

67. Section 10 OSA 1906 provides:

> "10. Maintenance of open spaces and burial grounds by local authority.
>
> A local authority who have acquired any estate or interest in or control over any open space or burial ground under this Act shall, subject to any conditions under which the estate, interest, or control was so acquired—
>
> (a) hold and administer the open space or burial ground in trust to allow, and with a view to, the enjoyment thereof by the public as an open space within the meaning of this Act and under proper control and regulation and for no other purpose: and

> (b) maintain and keep the open space or burial ground in a good and decent state and may inclose it or keep it inclosed with proper railings and gates, and may drain, level, lay out, turf, plant, ornament, light, provide with seats, and otherwise improve it, and do all such works and things and employ such officers and servants as may be requisite for the purposes aforesaid or any of them."

68. Section 20 OSA 1906 defines open space as follows:

> "The expression *"open space"* means any land, whether inclosed or not, on which there are no buildings or of which not more than one-twentieth part is covered with buildings, and the whole of the remainder of which is laid out as a garden or is used for purposes of recreation, or lies waste and unoccupied." (*emphasis added*)

69. The Claimant emphasised the final words "or lies waste and unoccupied" in response to Shropshire Council's point that the Site was rough and uncultivated, unlike the remainder of the recreation ground.

70. In *R (Beresford) v Sunderland City Council* [2004] 1 AC 889, Lord Walker said, *obiter*, at [47]:

> "….where land is vested in a local authority on a statutory trust under section 10 of the Open Spaces Act 1906, inhabitants of the locality are beneficiaries of a statutory trust of a public nature…."

71. The effect of a statutory trust of this nature was considered in a series of rating cases which turned upon earlier legislation governing parks and open spaces held by local authorities.

72. In *The Churchwardens and Overseers of Lambeth Parish v London County Council* [1897] AC 625, Lord Halsbury held that the Council did not occupy Brockwell Park, they were "merely custodians and trustees for the public" and "there is no possibility of beneficial occupation to the county council; they are incapable by law of using it for any profitable purpose; they must allow the public the free and unrestricted use of it". The mansion house and refreshment rooms remained part of the park and the same principles applied to them.

73. In *Mayor of Liverpool v Assessment Committee of West Derby Union* [1908] 2 KB 647, which concerned Stanley Park, Sir Gorrell Barnes, President, described Liverpool Corporation as "not occupiers, but mere custodians or guardians of the property for the public, who are themselves the occupiers" (at 663). Farwell LJ said (at 669):

> "I very much doubt whether on the true construction of these by-laws the corporation are entitled to use the park for the purpose of making a profit for themselves…."

74. These authorities were applied by the Court of Appeal in *Burnell v Downham Market Urban District Council* [1952] 2 QB 55, which concerned the local authority's liability to rates in respect of seven acres of land which it held under the OSA 1906. The Master of the Rolls held that the land was held on a statutory trust, imposing on the local authority the duty of allowing it to be used by the public for the purposes of recreation (at 65), and the case was indistinguishable from the *Brockwell Park* case. However, he qualified Lord Halsbury's reference to "free and unrestricted use" by the public, saying (at 66):

> "It is not suggested that "free and unrestricted use" by the public means that the public, that is any member of the community who chooses to do so, must be free to go upon the land at any time of the day or night. A right for a local authority, or for any other body charged with the duty of holding and managing an open space or park for the public use, to close such a place at night, for example, must clearly be ancillary to, if not indeed essential for, good regulation. The terms of the Open Spaces Act 1906, themselves indicate that a right of closure as such is not inconsistent with dedication for public recreation. In the Brockwell Park case itself there were certain portions of the land from which the public was necessarily excluded – those portions occupied by a keeper's lodge, the bandstand, and refreshment building. But those exclusions were manifestations of the duty and exercise of management, and their total area compared with the whole park was of course negligible."

75. The same principles have been applied to land held under section 164 PHA 1875 and its predecessor legislation. In *Attorney-General v Sunderland Corporation* (1876) 2 Ch D 6334, which concerned section 74 of the Public Health Act 1848, the Court of Appeal, per James LJ at 641, held that the corporation was in the position of a trustee and so the proposed buildings in the park had to be conducive to the primary object of the trust, namely, to provide a place of enjoyment and recreation. In *R (Barkas) v North Yorkshire CC* [2012] EWCA Civ 1373, which concerned the question whether recreational use was 'by right' or 'as of right' for the purposes of commons registration, Sullivan LJ compared the powers in section 164 PHA 1875 with those in the OSA 1906, at [27] – [34], and concluded that there was no basis for distinguishing between open space held under either provision.

76. In *Hall v Beckenham Corporation* [1949] 1 KB 716, the park was established as a recreation ground under section 164 PHA 1875. Finnemore J. said, at 724-726:

> "The first point taken for the corporation is that in the strict sense the corporation are not the occupiers of the park at all, certainly not occupiers for rating purposes; and in support of this proposition, counsel cited *Lambeth Overseers v. London County Council* [[1897] A. C. 625]. London County Council, under the London Council (General Powers) Act, 1890, had acquired Brockwell Park for the perpetual use by the public for exercise and recreation, and it was held that they were not liable to the poor-rate in respect of the park. Lord Halsbury L.C. stating the grounds on which he arrived at that conclusion, said [Ibid. 630]:

> "The fact that the park is vested in the county council does not make them the occupiers. It would be absurd to contend that wherever the legal estate is there is occupation. A road is vested in someone, but, if a public road, there is no occupation of it any more than of a milestone or a direction-post. I have hitherto dealt only with the question of occupation, and, as I have said, I think there is no occupation at all, the county council being merely custodians and trustees for the public .... Once it has been found, as in this case, that the occupation cannot as a matter of law be a beneficial occupation, there is an end of the question. I say as matter of law, because that it does not give a beneficial occupation as matter of fact is nothing to the purpose. Here there is no possibility of beneficial occupation to the county council; they are incapable by law of using it for any profitable purpose; they must allow the public the free and unrestricted use of it."

The contention for the plaintiff is that by s. 163 of the Local Government Act, 1933, any land belonging to a local authority and not occupied for the purpose for which it was acquired may be appropriated for any other purpose approved by the Minister for which the local authority are authorised to acquire land. Counsel also quoted s. 42, sub-s. 1, of the Town and Country Planning Act, 1947, and argued that as now, under those Acts, with the permission of the Minister, Blake Recreation Ground might, in certain circumstances, be used by the council for some other purpose, which might be a profitable one, the ratio decidendi of *Lambeth Overseers v. London County Council* [[1897] A. C. 625] no longer applies. On that point counsel for the plaintiff also referred to *North Riding County Valuation Committee v. Redcar Corporation* [[1943] K. B. 114] …

If Mr. Hackforth-Jones' contention were right, *Lambeth Overseers v. London County Council* [[1897] A. C. 625] would have to be reconsidered in view of the Acts of 1933 and 1947; but that was not suggested by the Divisional Court which decided the *Redcar* case [[1943] K. B. 114]. Indeed, *Lambeth Overseers v. London County Council* [[1897] A. C. 625] was referred to and the principle there laid down was accepted without question. …

I think that the general conclusion to be drawn is that the Acts of 1933 and 1947 do not alter the position of a local authority with regard to land which it has acquired under s. 164 of the Public Health Act, 1875, for the purpose of public walks or pleasure grounds. It is not for them to decide to turn this land to some other use; that could only be done, as I read the Acts, with the

> consent of the Minister concerned. So far as a local authority are concerned, if land is bought under s.164 of the Act of 1875 for that purpose it is dedicated to the use of the public for the purpose of a park …"

77. In *Blake v Hendon Corporation* [1962] 1 QB 163, the Court of Appeal approved *Hall v Beckenham Corporation* and applied the principles in the Brockwell Park case. Devlin LJ said, at 300:

> "In all the cases in which parks have been considered it has been taken for granted that what the public gets is ….. the beneficial ownership of the land. We can see no reason why the public should be entitled to get anything less under section 164 of 1875 than they got under the special Act in the *Brockwell Park* case."

78. Although the term "trust" is not used in the PHA 1875, unlike the OSA 1906, nonetheless a statutory trust has been held to arise under both Acts. As Hickinbottom LJ observed, in *R (Friends of Finsbury Park) v Haringey London Borough Council* [2018] PTSR 644, at [16]:

> "For the sake of completeness, I should say that, even where a park has been established under statutory provisions that contain no express comparable trust (e.g. section 164 of the Public Health Act 1875 (38 & 39 Vict. C550), these have been construed by the courts as having a similar effect (see e.g. *Attorney-General v Sunderland Corporation* (1876) 2 Ch. D 6334 641, per James LJ …..), i.e. it is held on trust for the purpose of public enjoyment. That construction was recognised by Parliament in section 122 of the [Local Government Act 1972] …. which concerns appropriation of land by local authorities and expressly refers to "land held in trust for enjoyment by the public in accordance with [section 164 of the 1875 Act]"."

79. The existence of a statutory trust, even when not expressed as such in the statute, was also confirmed in *R (Naylor) v Essex County Council* [2014] EWHC 2560 (Admin), by John Howell QC, sitting as a Deputy Judge of the High Court, at [36] – [38], citing *R (Barkas) v North Yorkshire CC* [2014] UKSC 31; [2015] AC 1952 WLR 1360, per Lord Neuberger, at [45], and in the Court of Appeal, per Sullivan LJ at [27] – [34].

80. In the light of these authorities and the relevant statutory provisions, I consider that, if Shropshire Council had addressed its mind to the legal status of the Recreation Ground, it would have been likely to conclude that the Recreation Ground was purchased and established pursuant to powers in the PHA 1875 or the OSA 1906, and it was held by the Borough Council (and then the Town Council) on a statutory trust for the benefit of the residents of the area.

81. The facts of this case were clearly distinguishable from the facts in *Whitstable Society v Canterbury City Council* [2017] EWHC 254 (Admin), in which Dove J. held that, although the disputed site had been purchased with the intention of developing it as an open space, the development never took place, and so it was not at any stage an open

space, as defined in section 336 TCPA 1990. Here, there was compelling evidence that the Site was both purchased and developed as part of the Greenfields Recreation Ground.

(iv) Appropriation of the Site

82. The evidence available to Shropshire Council showed that a "small portion of Greenfields Recreation Ground" was appropriated for use as allotments in World War II. The Borough Council only authorised this appropriation of the 'Greenfields Recreation Ground' on a temporary basis, on condition that it would be reinstated within 6 months after the end of the war. However, the land allocated for allotments was not reinstated within that timeframe, and Borough Council minutes, believed to be from 1954 or 1956, stated that "[t]he matter has been referred to the Allotments Committee because there are 13 temporary allotments still being cultivated on the Recreation Land adjoining under powers contained in the Defence Regulations which had expired in October 1953. Alternative accommodation would therefore have to be found for the 13 tenants."

83. The Claimant referred to the 1954 Ordnance Survey Map which identified an area as "Allotment Gardens". This area was located in the same part of the Barker Land, and subsequently the recreation ground, shown on the earlier plans, in which the Site is situated. Therefore, there was strong evidence that the Site was in the portion of the recreation ground which was allocated for allotments in 1942. This was supported by the evidence of Gary Farmer, who previously worked as a gardener for the Borough Council. He said that, in 1978, the area in which the Site is located "showed signs of previously been cultivated during the WW2 dig for victory campaign". Mr Farmer's evidence was that by the time he started in 1978, the allotments had fallen into disuse and the area had become an overgrown wilderness, separated from the Greenfields Recreation Ground by a hedge. It was not part of the recreational facilities by 1978.

84. In the late 1970s the Council established a tree nursery in the area in which the Site is located. Mr Farmer and Mr Banks gave evidence that the tree nursery was fenced to prevent public access. The tree nursery ceased operations at some point in the late 1990s or 2000. In contradiction to the evidence of Mr Farmer and Mr Banks, local residents claimed that they could and did use this area when the tree nursery was in operation, as well as subsequently.

85. The planning officer was in possession of the factual information about the allotments and the tree nursery. She accepted that the Site was in the area previously used for these purposes, and indeed relied upon that past history in support of her conclusion that the Site was not part of the Greenfields Recreation Ground. However, she failed to consider the question of the legal status of the Site on the basis that it was originally part of the Greenfields Recreation Ground, but was later used for allotments and a tree nursery. The question that Shropshire Council ought to have considered was whether the Site had been lawfully appropriated for uses other than public recreation.

86. Section 126 LGA 1972 confers power on parish and community councils (which includes the Borough Council and the Town Council in this case) to appropriate land which they own for a different purpose, subject to various restrictions. Notice must be

given of any proposed appropriation of open space and any objections considered. Section 126 provides (so far as is material):

> "**126. Appropriation of land by parish and community councils and by parish meetings.**
>
> (1) Any land belonging to a parish or community council which is not required for the purposes for which it was acquired or has since been appropriated may, subject to the following provisions of this section, be appropriated by the council for any other purpose for which the council are authorised by this or any other public general Act to acquire land by agreement.
>
> …
>
> (4A) Neither a parish or community council nor a parish meeting may appropriate by virtue of this section any land consisting or forming part of an open space unless before appropriating the land they cause notice of their intention to do so, specifying the land in question, to be advertised in two consecutive weeks in a newspaper circulating in the area in which the land is situated, and consider any objections to the proposed appropriation which may be made to them.
>
> (4B) Where land appropriated by virtue of subsection (4A) above is held—
>
> (a) for the purposes of section 164 of the Public Health Act 1875(pleasure grounds); or
>
> (b) in accordance with section 10 of the Open Spaces Act 1906(duty of local authority to maintain open spaces and burial grounds),
>
> the land shall by virtue of the appropriation be freed from any trust arising solely by virtue of its being land held in trust for enjoyment by the public in accordance with the said section 164 or, as the case may be, the said section 10."

87. Subsections 4A and 4B were inserted by section 118 of, and paragraph 17(2) of schedule 23 to, the Local Government and Planning Act 1980.

88. By section 270 LGA 1972, the term "open space" is defined by section 336(1) TCPA 1990 which provides:

> ""open space" means any land laid out as a public garden, or used for the purposes of public recreation, or land which is a disused burial ground."

89. This definition is less comprehensive than the definition of "open space" in section 20 OSA 1906.

90. The case of *Western Power Distribution Investments Limited v Cardiff County Council* [2011] EWHC 300 (Admin) concerned land held under section 164 PHA 1875 which the Council unlawfully designated as a nature reserve. Ouseley J. considered the effect of the provisions on appropriation of land by principal councils in the LGA 1972, which are not materially different to those which apply to parish and community councils. He said, at [14]:

> "Appropriating land held under s.164 of the 1875 Act frees it from the trust: s.122(2B). However, by s.122(2A) such land can only be appropriated after the Council has published notification of its intention to do so and has considered the ensuing objections…."

91. In *R (Goodman) v Secretary of State for Environment, Food and Rural Affairs* [2015] EWHC 2576 (Admin), which concerned the appropriation of land dedicated to recreational use for development, Dove J. rejected the Inspector's analysis that appropriation could be inferred by the conduct of a local authority in dealing with land as if it had been lawfully appropriated (at [20] – [21]). He went on to say:

> "22. The difficulty with that suggestion is the need for the authority, when exercising the power under Section 122 of the 1972 Act, to be satisfied that the land "is no longer required" for the purpose for which it is held. That requires some conscious deliberative process so as to ensure that the statutory powers under which the land is held is clear and appropriation from one use to another cannot, in my view, be simply inferred from how the council manages or treats the land."

92. The predecessor to section 126 LGA 1972 was section 163 of the Local Government Act 1933 ("LGA 1933"), which required ministerial approval for any appropriation of land. It provided, so far as is material:

> "163 – Power to appropriate land
>
> Any land belonging to a local authority and not required for the purposes for which it was acquired or has since been appropriated may be appropriated for any other purpose approved by the Minister for which the local authority are authorised to acquire land…"

93. Section 42 of the Town and Country Planning Act 1947 also allowed appropriation with the consent of the Minister for any purpose specified in the development plan.

94. The effect of these provisions was considered in *Hall v Beckenham Corporation*, where Finnemore J. held that a local authority could only turn land dedicated to the use of the public to some other use with the consent of the Minister (see the citation at paragraph 76 above).

95. In *R (Malpass) v Durham County Council* [2012] EWHC 1934 (Admin), HH Judge Kaye QC, sitting as a Judge of the High Court, recorded, at [41], that it was common ground between the parties that:

> "…
>
> - In the absence of some formal or lawful appropriation, once acquired for one purpose, the local authority cannot (absent some temporary use or not inconsistent use) use the land for some other purpose.
>
> …"

96. HH Judge Kaye QC went on to accept the submission made by counsel for the Claimant, at [39], that:

> "…
>
> - It was insufficient merely to state that the land was 'in practice' held for a purpose which not inconsistent with the new, informally appropriated, purpose. To be a valid appropriation to the stated use, the local authority must have concluded that the land subject to the appropriation was 'not required' for its existing purposes (see Local Government Act 1933, s.163, 165). No such resolution is recorded … Moreover, to take effect as an appropriation from one use to another the formal statutory mechanisms of the Local Government Act 1933 needed to be complied with and ministerial approval (at that time) was needed. It was apparent that none of the formalities had been observed…."

97. If Shropshire Council had considered the application of these legal principles to the evidence in this case, it would have been very likely to conclude that, aside from the temporary war time allocation allotments, there had been no formal appropriation of any part of the Greenfields Recreation Ground to a purpose other than recreational use. There was no evidence of a resolution by the Borough Council or Town Council that a portion of the Recreation Ground was no longer required for recreational purposes and should be appropriated for another use. Nor was there any evidence that the formal procedures for appropriation had been followed. There was no evidence of ministerial approval for appropriation under the previous legislation, nor formal notices advertising proposed appropriation and consideration of objections under the LGA 1972, as amended.

98. In my view, it is very likely that the Borough Council was authorised to appropriate a portion of the recreation ground for use as temporary allotments during World War II. Mr Goodman's research revealed that the Defence (General) Regulations 1939 conferred on local authorities a temporary power to allocate its land for use as allotments, including land forming part of a park or open space, as part of the "Dig for Victory" project. The temporary power was revoked by section 5(1) of the Emergency Laws (Miscellaneous Provisions) Act 1953. Section 5(1) also made provision for local authorities to let land for the purpose of allotment gardens, "notwithstanding anything in any Act …. or any trust or covenant or restriction affecting the land". However, there was no evidence that the Borough Council ever resolved to exercise its powers under the 1953 Act to continue to let the land as allotments on a more permanent basis.

99. In my view, Shropshire Council should have considered the likelihood that, after 1953, any informal appropriation for use other than recreational use was unauthorised and probably unlawful.

100. Alternatively, Shropshire Council should have considered the Claimant's submission that the post-war use of part of the Recreation Ground as allotments by members of the public was consistent with recreational use, which has been broadly interpreted by the courts (see *Burnell v Downham Market* (paragraph 74 above); *AG v Sunderland Corporation* (paragraph 75 above). Although only a sub-section of the public is able to enjoy the use of an allotment at any one time, restricted access may be consistent with open space status (*R v Council of the City of Plymouth and Cornwall County Council* (1987) 19 HLR 328, 339).

(v) Disposal of the Site

101. The Town Council disposed of the Site to IP2 in 2017, on the basis that it was not part of the Greenfields Recreation Ground. If, as the evidence strongly suggested, the Site was part of Greenfields Recreation Ground, Shropshire Council should have considered the legal implications of the sale.

102. Section 127(1) LGA 1972 enables a parish or community council (which includes the Borough Council and Town Council in this case) to dispose of any of its land in any manner it wishes, subject to certain restrictions. The material restriction is in subsection (3) which provides that the provisions of subsections 123 (2A) and (2B) apply to such a disposal.

103. Subsections (2A) and (2B) of section 123 LGA 1972 provide:

> "(2A) A principal council may not dispose under subsection (1) above of any land consisting of forming part of an open space unless before disposing of the land they cause notice of their intention to do so, specifying the land in question, to be advertised in two consecutive weeks in a newspaper circulating in the area in which the land is situated and consider any objections to the proposed disposal which may be made to them.
>
> (2B) Where by virtue of subsection (2A) above a council dispose of land which is held –
>
> (a) for the purpose of section 164 of the Public Health Act 1875 (pleasure grounds); or
>
> (b) in accordance with section 10 of the Open Spaces Act 1906 (duty of local authority to maintain open spaces and burial grounds),
>
> the land shall by virtue of the disposal be freed from any trust arising solely by virtue of its being land held in trust for enjoyment by the public in accordance with the said section 164 or, as the case may be, the said section 10."

104. Subsection 128(2) LGA 1972 provides:

> "(2) Where under the foregoing provisions of this Part of this Act or under any other enactment, whether passed before, at the same time as, or after, this Act, a local authority purport to acquire, appropriate or dispose of land, then—
>
> (a) in favour of any person claiming under the authority, the acquisition, appropriation or disposal so purporting to be made shall not be invalid by reason that any consent of a Minister which is required thereto has not been given or that any requirement as to advertisement or consideration of objections has not been complied with, and
>
> (b) a person dealing with the authority or a person claiming under the authority shall not be concerned to see or enquire whether any such consent has been given or whether any such requirement has been complied with."

105. Subsection 131(1) of the Local Government Act 1972 provides:

> "(1) Nothing in the foregoing provisions of this Part of this Act or in Part VIII below—
>
> (a) shall authorise the disposal of any land by a local authority in breach of any trust, covenant or agreement which is binding upon them, excluding any trust arising solely by reason of the land being held as public walks or pleasure grounds or in accordance with section 10 of the Open Spaces Act 1906; …"

106. It was not in dispute that the Town Council did not comply with the requirements in subsection 123(2A) LGA 1972 to advertise its intention to dispose of the Site and to consider any objections to the proposed disposal. The Claimant submitted that, in consequence, the Site was not freed from the trust arising under the PHA 1875 or the OSA 1906, pursuant to subsection 123(2B) LGA 1972, when the Site was sold. He submitted that subsection 128(2) LGA 1972 only protected the validity of the sale to IP2. It did not extinguish the public's right to use the Site for recreational purposes, just as village green rights or highway rights could not have been extinguished merely by sale of the land.

107. The Claimant relied upon the judgment of Lightman J. in *R v Pembrokeshire County Council ex parte Coker* [1999] 4 All ER 1007, when considering a Council's grant of a lease for less than the best consideration without the consent of the minister, contrary to section 123 LGA 1972. He said, at [14]:

> "The language of s.128(2) is perfectly clear and unambiguous: in favour of a person claiming under the council…., the lease is not invalid even if a higher rent or greater consideration could have been obtained and the necessary consent of the minister was not obtained. Mr Giffin for the applicants submitted that a distinction should be drawn between cases where such a lease is

> challenged in judicial review proceedings and where the issue as to its validity arises in some other context or proceedings, and that s.128(2) does not bite when the lease is challenged in judicial review proceedings because the court should not construe s.128(2) as restricting the jurisdiction of the court to examine the legality of conduct or of a transaction in judicial review proceedings. But on no basis does Section 128(2) limit the jurisdiction of the Court to examine the legality of the conduct of the Council in granting the lease or to grant any proper declaratory relief; what it does do is to protect the title of CSSL from exposure to risk of the invalidity of the lease by reason of the failure of the Council to obtain a required consent and precludes the grant of any relief impugning the validity of, or setting aside, the lease on this ground."

108. Lightman J.'s judgment in *ex parte Coker* was applied in *R (Structadene Ltd) v Hackney LBC* (2001) 82 P & CR 25, which also concerned a failure to obtain ministerial consent for a disposal for less than the best consideration under section 123 LGA 1972. Elias J. said, at [28] – [30]:

> "28. Mr Rutledge contends that section 128(2) will apply only where the sole feature of the decision which renders it unlawful is the failure to obtain consent. I have no doubt that that is correct; the provision states in terms that the invalidity is not to arise "by reason that …. Any consent has not been given". It is important to appreciate, however, that this is not the same as saying that the purchaser should be treated as if the consent had been given. That is not what the statute says. In my opinion the purchaser can use the provision as a shield to fend off any challenge that he has failed to obtain consent, but he cannot use is to fashion a sword entitling him to claim that he has consent.
>
> 29. This distinction is important.…if the section were to involve deeming consent to have been given, this would significantly limit the potential grounds of challenge. The consent would render a potentially unlawful disposal at common law lawful.
>
> 30. However, the subsection in my judgment does not go that far. It only relieves the purchaser from the <u>failure to obtain</u> consent. Accordingly, in so far as the applicant is able to identify breaches of the law going beyond operating or independently of that breach, the provision will not give any protection…."

109. It was agreed before me that the principles established in these cases also applied to a failure to comply with the notice requirements under subsection 123(2A) LGA 1972, though obviously the question whether or not a statutory trust under the PHA 1875 or the OSA 1906 subsists over the land, even after a valid conveyance to a third party, did not arise.

110. Mr Wright submitted that a so-called statutory trust arising under the PHA 1875 or the OSA 1906 did not meet the requirements for a valid trust in private law, and he doubted

whether it could properly be characterised as a trust at all. The relevant statutory provisions imposed powers and duties upon local authorities only, not upon other owners of land, and they did not confer property rights on members of the public which could be enforced against private owners.

111. Whilst accepting that a statutory trust under the PHA 1975 and the OSA 1906 is *sui generis* and clearly distinguishable from a private law trust, I consider I am bound to follow the wealth of higher authority which has established the concept of a statutory trust. In my view, the legal effect of any disposal of land is now governed by the LGA 1972, not the private law of trusts.

112. The Claimant submitted that there was nothing inherently inconsistent with a statutory trust of a public nature pertaining over land in private ownership. Section 9(b) OSA 1906 empowers the local authority to undertake the management of open space whether any legal interest in the land is transferred to the local authority or not. Accordingly, its powers and duties to maintain open space are not coterminous with it maintaining a legal interest. In *Naylor*, John Howell QC, sitting as a Deputy Judge of the High Court, considered that section 164 PHA 1875 properly construed conferred a similar power on a local authority to manage land for the public by agreement with its owner. Where a local authority maintained land for public recreational use, it could not lawfully object to the public so using it while the public's rights subsisted (per John Howell QC, at [36]).

113. I accept that it is both lawful and feasible for a local authority to control and manage land for public recreational use under the OSA 1906 or the PHA 1875 which is owned or leased by a private owner. However, such an arrangement would typically be pursuant to an express agreement with the private owner. In contrast, in this case, such an arrangement would be imposed on IP2 against its wishes, and it would prevent IP2 from pursuing the purpose for which it purchased the Site, namely, to develop it for housing. IP2 was not put on notice by the Town Council that there was, or even might be, any public right of access to the Site for recreational purposes. Although the Claimant concedes that the conveyance of the freehold to IP2 is valid, by virtue of section 128(2) LGA 1972, the freehold is of no benefit to IP2 if the Site cannot be developed, and presumably IP2 will seek to set aside the sale and/or seek compensation from the Town Council for its financial loss if this claim succeeds. Alternatively, Mr Wright suggested the Town Council could buy back the Site, comply with the notice and consideration of objections requirements in subsection 123(2A) LGA 1972, and then transfer the Site back to IP2, thereby extinguishing the statutory trust under subsection 123(2B) LGA 1972.

114. The Claimant's submission that the trust was not extinguished by the disposal was consistent with the approach taken in *Laverstock Property Co. Ltd v Peterborough Corporation* (1972) 24 P & CR 181, which concerned a conveyancing dispute in which the local authority had contracted to sell land which was subject to a statutory trust under section 10 OSA 1906, but failed to obtain the required ministerial consent. Goff J. held that the statutory trust under section 10 OSA 1906 had not been overridden by the power of disposal under section 165 of the Local Government Act 1933, as it did not authorise the disposal of land in breach of trust, which was expressly prohibited by section 171(d) of the Local Government Act 1933.

115. However, the statutory scheme was significantly altered by the LGA 1972. Perhaps in order to overcome the decision in *Laverstock*, the prohibition on the disposal of land in breach of trust was re-enacted in section 131(1) LGA 1972, but "any trust arising solely by reason of the land being held as public walks or pleasure grounds or in accordance with section 10 of the Open Spaces Act 1906" was expressly excluded from the scope of the prohibition.

116. Furthermore, subsection 128(2)(a) LGA 1972 upholds in clear terms the validity of any disposal, despite a local authority's failure to comply with the prior notice and consideration of objections requirements in 123(2A) LGA 1972. Subsection 128(2)(b), which provides that a person dealing with the authority or a person claiming under the authority shall not be concerned to see or enquire whether the notice and consideration of objections requirements have been complied with, relieves the buyer of any responsibility or legal liability for checking that the statutory requirements have been complied with. As I understand it, in these circumstances the Land Registry will not call for evidence that the statutory requirements have been complied with before registering the transfer of title. In my view, subsection 128(2)(b) LGA 1972 is inconsistent with the Claimant's interpretation that the statutory trust is enforceable against the buyer unless or until the notice and consideration of objections requirements have been complied with. If that were the case, plainly a buyer would be concerned to see and enquire whether those requirements had been met, and paragraph (b) would be misleading. Subsection 128(2) contains two separate protections for the buyer: paragraph (a) protects the validity of the transaction and paragraph (b) protects the buyer from the need to inquire into the local authority's compliance with subsection 123(2A) LGA 1972, and thus whether the statutory trust has been extinguished under subsection 123(2B) LGA 1972. Reading these paragraphs together with subsection 131(1) LGA 1972, which excludes statutory trusts from the protection afforded to other trusts, I consider that their purpose and effect is that the public rights under the statutory trust, insofar as they subsist, cannot be enforced against the buyer.

117. I recognise that this interpretation will have the unfortunate effect of depriving local residents of the enjoyment of part of the Recreation Ground which was very probably held in trust for their use. In principle, local residents can challenge a local authority's unlawful disposal of land held under a statutory trust by way of judicial review, but if the proposed disposal is not advertised, they may well not learn of it in time. By the time this claim for judicial review was issued on 19 December 2018, the Claimant was hopelessly out of time to challenge the lawfulness of the Town Council's disposal of the Site to IP2 on 4 October 2017.

118. Returning to the position of Shropshire Council, I consider that, if it had properly considered the legal status of the Site following disposal to IP2, it would have concluded that the rights under the statutory trust, insofar as they subsisted, could not be enforced against the current owner, IP2, by virtue of subsections 128(2) and 131(1) LGA 1972.

(vi) The portion of the Site owned by the Town Council

119. As I explained at paragraphs 2 and 29 above, the Town Council has retained ownership of a small portion of land in the south east corner of the Site. It is part of the carpark for Greenfields Recreation Ground. There is no proposal to develop it, but it includes a

right of access for IP2, from Falstaff Street to the development on the Site. Although Shropshire Council did not consider whether it was subject to a statutory trust, I consider it unlikely that it would have made any difference if it had done so, as the interference with the use of the Recreation Ground by the grant of a right of way across the car park is *de minimis*.

(vii) Conclusion

120. For the reasons set out above, I conclude that Grounds 1 and 2 succeed as Shropshire Council failed to take reasonable steps to acquaint itself with the Site's history and legal status and failed to take into account material considerations. However, applying section 31(2A) Senior Courts Act 1981, I consider it to be highly likely that the outcome for the Claimant would not have been substantially different if the conduct complained of had not occurred, because Shropshire Council would ultimately have concluded that the rights under the statutory trust, insofar as they subsisted, could not be enforced against the owner of the Site and applicant for planning permission, after the disposal of the Site to him by the Town Council in 2017, by virtue of subsections 128(2) and 131(1) LGA 1972. Therefore relief is refused.

Ground 3: Reasons

121. A local planning authority's statutory duty to give reasons for its decisions on applications for planning permission is set out in article 35 of the Town and Country Planning (Development Management Procedure) (England) Order 2015 (SI 2015/595) ("the 2015 Order"), which provides, so far as is material:

> "35. Written notice of decision or determination relating to a planning application
>
> (1) When the local planning authority give notice of a decision or determination on an application for planning permission or for approval of reserved matters—
>
> (a) where planning permission is granted subject to conditions, the notice must state clearly and precisely their full reasons—
>
> (i) for each condition imposed; and
>
> (ii) in the case of each pre-commencement condition, for the condition being a pre-commencement condition;
>
> (b) where planning permission is refused, the notice must state clearly and precisely their full reasons for the refusal, specifying all policies and proposals in the development plan which are relevant to the decision;
>
> ……"

122. In 2013, the Secretary of State, pursuant to his duties under the TCPA 1990, removed the duty on local planning authorities to give "summary reasons" for the grant of

planning permission (Town and Country Planning (Development Management and Procedure) (England) (Amendment) Order 2013 (SI 2013/1238)).

123. However, even in cases where there is no statutory duty to give reasons, and a public body has not volunteered reasons, at common law a duty to give reasons may be implied in order to meet the requirements of fairness.

124. The Supreme Court, in *R (CPRE Kent) v Dover District Council* [2017] UKSC 79, [2018] 1 WLR 108, described the common law duty in the following terms, per Lord Carnwath at [59] – [60]:

> "59 … However it should not be difficult for councils and their officers to identify cases which call for a formulated statement of reasons, beyond the statutory requirements. Typically they will be cases where, as in *Oakley* and the present case, permission has been granted in the face of substantial public opposition and against the advice of officers, for projects which involve major departures from the development plan, or from other policies of recognised importance (such as the "specific policies" identified in the NPPF - para 22 above). Such decisions call for public explanation, not just because of their immediate impact; but also because, as Lord Bridge pointed out (para 45 above), they are likely to have lasting relevance for the application of policy in future cases.
>
> 60 Finally, with regard to Sales LJ's concerns about the burden on members, it is important to recognise that the debate is not about the necessity for a planning authority to make its decision on rational grounds, but about when it is required to disclose the reasons for those decisions, going beyond the documentation that already exists as part of the decision-making process. Members are of course entitled to depart from their officers' recommendation for good reasons, but their reasons for doing so need to be capable of articulation, and open to public scrutiny. There is nothing novel or unduly burdensome about this. The Lawyers in Local Government Model Council Planning Code and Protocol (2013 update) gives the following useful advice, under the heading "Decision-making":
>
> > "Do make sure that if you are proposing, seconding or supporting a decision contrary to officer recommendations or the development plan that you clearly identify and understand the planning reasons leading to this conclusion / decision. These reasons must be given prior to the vote and be recorded. Be aware that you may have to justify the resulting decision by giving evidence in the event of any challenge." (their emphasis)"

125. Lord Carnwath set out the legal principles to be applied in respect of the standard of reasons at [35] to [37] and [42]:

"35. A "broad summary" of the relevant authorities governing reasons challenges was given by Lord Brown in *South Buckinghamshire District Council v Porter (No 2)* [2004] 1 WLR 1953, para 36:

> "The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

36. In the course of his review of the authorities he had referred with approval to the "felicitous" observation of Sir Thomas Bingham MR in *Clarke Homes Ltd v Secretary of State for the Environment* (1993) 66 P & CR 263, 271-272, identifying the central issue in the case as:

> "… whether the decision of the Secretary of State leaves room for genuine as opposed to forensic doubt as to what he has decided and why. This is an issue to be resolved as the parties agree on a straightforward down-to-earth reading of his decision letter without excessive legalism or exegetical sophistication."

37. There has been some debate about whether Lord Brown's words are applicable to a decision by a local planning authority, rather than the Secretary of State or an inspector. It is true that

> the case concerned a statutory challenge to the decision of the Secretary of State on a planning appeal. However, the authorities reviewed by Lord Brown were not confined to such cases. They included, for example, the decision of the House of Lords upholding the short reasons given by Westminster City Council explaining the office policies in its development plan (*Westminster City Council v Great Portland Estates plc* [1985] AC 661, 671-673). Lord Scarman adopted the guidance of earlier cases at first instance, not limited to planning cases (eg *In re Poyser and Mills' Arbitration* [1964] 2 QB 467, 478), that the reasons must be "proper, adequate and intelligible" and can be "briefly stated" (p 673E-G). Similarly local planning authorities are able to give relatively short reasons for refusals of planning permission without any suggestion that they are inadequate."
>
> …..
>
> "42. There is of course the important difference that, as Sullivan J pointed out in *Siraj*, the decision-letter of the Secretary of State or a planning inspector is designed as a stand-alone document setting out all the relevant background material and policies, before reaching a reasoned conclusion. In the case of a decision of the local planning authority that function will normally be performed by the planning officers' report. If their recommendation is accepted by the members, no further reasons may be needed. Even if it is not accepted, it may normally be enough for the committee's statement of reasons to be limited to the points of difference. However the essence of the duty remains the same, as does the issue for the court: that is, in the words of Sir Thomas Bingham MR, whether the information so provided by the authority leaves room for "genuine doubt … as to what (it) has decided and why."

126. In my judgment, this application for planning permission did not fall within the class identified in the *CPRE Kent* case in which the committee was required, at common law, to give specific reasons for its decision. Here, although there was public disquiet at the application, the Committee acted in accordance with the recommendations in the OR. Therefore, unlike the position in *CPRE Kent*, it was sufficient for the Committee to rely upon the reasoning in the OR and it was not necessary to give its own reasons.

127. I have found that the OR did not adequately investigate and address some key issues, and therefore gave flawed advice to the Committee, but I do not consider that this legal error ought also to be characterised as a procedural failure by the Committee to give adequate and intelligible reasons. The reasons in the OR would have met the required standard, as set out by Lord Brown in *South Buckinghamshire District Council v Porter*, if they had not been based upon an erroneous approach to the determination of the application.

128. Therefore Ground 3 does not succeed.

Conclusion

129. For the reasons set out above, Grounds 1 and 2 succeed but Ground 3 does not succeed. Relief is refused under section 31(2A) Senior Courts Act 1981.