Neutral Citation Number: [2020] EWCA Civ 143

Case No: 2019/0898

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION, PLANNING COURT IN WALES
His Honour Judge Keyser QC
[2019] EWHC 742 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13 February 2020

Before:
LORD JUSTICE DAVID RICHARDS
LORD JUSTICE PHILLIPS
and
SIR STEPHEN RICHARDS

- -

Between:

RENEW LAND DEVELOPMENTS LIMITED	**Respondent**
- and -	
WELSH MINISTERS	**Appellant**
- and –	
(1) CONWY COUNTY BOROUGH COUNCIL	**Interested**
(2) CARTREFI CONWY CYF	**Parties**

- -
- -

Gwion Lewis (instructed by the **Government Legal Department**) for the **Appellant**
Thea Osmund-Smith (instructed by **Aaron & Partners Llp**) for the **Respondent**

Hearing date: 30 January 2020

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Approved Judgment

Sir Stephen Richards:

1. This appeal arises out of an application by Renew Land Developments Limited ("Renew") and Cartrefi Conwy Cyf for outline planning permission for a housing development on land at Plas Gwilym Quarry, Old Colwyn, Conwy. The local planning authority, Conwy County Council ("the Council"), refused the application. The applicants appealed under s.78 of the Town and Country Planning Act 1990 ("the 1990 Act") against that refusal. By a decision dated 28 August 2018 Ms Kay Sheffield, an inspector appointed by the Welsh Ministers, dismissed the appeal. A challenge to the inspector's decision was brought by Renew under s.288 of the 1990 Act and was upheld by His Honour Judge Keyser QC, sitting as a judge of the High Court. The judge quashed the decision and remitted the matter for redetermination by the Welsh Ministers. The Welsh Ministers now appeal to this court against the judge's order. The issues on the appeal are relatively narrow and relate primarily to the inspector's finding that the development would result in an unacceptable loss of open space. There is no dispute about the applicable legal principles.

The background

2. The application site is in a predominantly residential area. It covers an area of approximately 4.41 hectares and comprises a former quarry currently in commercial use, an area of pasture land to the south, and a grassed area of approximately 0.85 hectares to the north-east which is the focus of the case.

3. The application for outline planning permission was considered by the Council on the basis that the precise number of dwellings on the site could not be established until approval of the detailed layout after the grant of outline permission, but the likely number of dwellings was estimated at between 80 and 100.

4. The officers' report to the Council's planning committee concluded that the development would provide benefits in terms of helping to address the shortfall in housing land supply, as well as providing a beneficial use for under-used previously developed land. It also referred to a number of other benefits. As the application stood, however, the report considered there to be a number of critical questions that were unresolved, including the question of adequate provision of open space. The recommendation was that planning permission be refused.

5. The Council's refusal of the application was issued on 18 October 2017. The reason for refusal was:

> "The proposed development would result in the loss of existing open space identified as play space within Conwy County Borough Council's Open Space Assessment, of which there is a shortfall within the settlement of Old Colwyn. The application makes no provision for the replacement of this lost open space nor does it make adequate on-site provision for play space as part of the development. The proposal is therefore contrary to Policy DP/3, CFS/11 and CFS/12 of the adopted Conwy Local Development Plan 2013, Technical Advice Note 16: Sport, Recreation and Open Space and Planning Policy Wales, Edition 9."

6. Policy DP/3 of the Local Development Plan states in general terms that the Council will require development to meet the Council's approved standards of open space provision (paragraph 1(b)).

7. Policy CFS/11 states that new housing development of 30 or more dwellings must make on-site provision for the recreational needs of its residents, in line with the Council's standards for open space.

8. Policy CFS/12, headed "Safeguarding Existing Open Space", is the central policy for the purposes of this case. It reads:

> "Planning Permission will not be granted for development which results in the loss of open space except where there is an over-provision of open space in the particular community, and the proposal demonstrates significant community benefits arising from the development, or where it will be replaced by acceptable alternative provision within the vicinity of the development or within the same community."

The explanatory text states:

> "4.5.10.10 The term 'open space' as referred to in Policy CFS/12 includes the following types as described in TAN 16: public parks and gardens, outdoor sports facilities, amenity green space and provision for children and young people. Such areas are of great significance to the local communities in the Plan Area. This is not only for the sports and recreational opportunities they offer, but the impact open space has on the attractiveness of the built and natural environment. Therefore, existing open space should not be lost unless the open space assessment clearly demonstrates an over-provision of open space necessary for the community's requirements ....
>
> 4.5.10.11 If there is an under provision of open space in the community, the developer will need to provide an acceptable alternative site within the vicinity of the development, or within the same town or community council area. Any alternative site should be equivalent to, or better than, that taken by development and be easily accessible to the local community by sustainable transport modes."

9. Technical Advice Note 16 (TAN 16) is national guidance for Wales which requires local planning authorities to carry out open space assessments to inform their local development plans. It advises that locally generated standards should be based on robust evidence derived from the open space assessment and should include quantitative elements, a qualitative component and an accessibility component. It refers in Annex B to the definition of "open space" in s.336 of the 1990 Act, which includes "land … used for the purposes of public recreation", and it states that for the purposes of the guidance open space should be regarded as all open space of public value.

10. The Council's Open Space Assessment ("OSA"), to which reference is also made in the reason for refusal, is a document dated August 2012. It was due to be updated in the light of an assessment exercise complying with TAN 16 but no such exercise had been carried out by the time of these proceedings. It is not itself part of the Local Development Plan but is material to the application of policy CFS/12. Paragraph 2.1 sets out the categories of public open space currently recorded: they include playing pitches, outdoor sports facilities and "Children's playing space – equipped play areas, areas for wheeled play and less formal areas". Reference is also made in paragraph 2.3 to major formal amenity areas such as public parks and gardens. Paragraph 3.1 states:

> "Not all the areas of public open space are owned by the Council. If a formal agreement exists to state they are available for public/dual use they are considered as contributing to public open space provision."

Paragraphs 6.1 and 6.2 contain tables relating to amounts of open space by locality and category. There was some doubt before us as to how the tables were to be read. It appears to me, however, that Table 1 sets out the amounts of existing open space and includes 3.43 hectares of existing "play space" in Old Colwyn; whilst Table 2 sets out the deficits of open space against relevant standards and shows a deficit of 2.81 hectares of play space in Old Colwyn. The detail is ultimately unimportant since, as considered below, it was common ground before the inspector that the grassed area of 0.85 hectares on the application site was included in the assessment of play space in Old Colwyn and that there was a substantial deficit of play space in the locality.

The appeal to the inspector

11. The appeal to the inspector was brought by both of the applicants for planning permission (Renew and Cartrefi Conwy Cyf). It proceeded on the basis of written representations by the parties and a site visit by the inspector.

12. The applicants' statement of case for the appeal recorded that, as set out in a statement of common ground, "it is only the matters of Open Space and Play Provision that are in dispute between the parties" (paragraph 3.1). It stated that "[a] portion of the application site, 0.85ha, is identified within the Council's Open Space Assessment as play space" and that the assessment also identified that there was an under-provision of play space in Old Colwyn (paragraph 3.6). It argued that the OSA provided only a quantitative assessment of open space across the borough; that policy CFS/12 did not require a like-for-like replacement of the play space being lost on the application site but required a value judgment, i.e. a qualitative assessment, not simply a quantitative one; and that the Council had failed to make the appropriate assessment (paragraphs 3.8-3.12). It continued (with emphasis in the original):

> "3.13 The land the subject of the allocation has been identified by the Council as ***informal*** play space and could only ever be considered informal because that land is in private ownership. It is within the gift of the landowner to choose to fence off the land at any point in time and restrict access to that space. If the landowner were to do this the land could no longer perform the function of play space; it would remain undeveloped and thus

> only have a visual amenity value as open space, albeit this would be affected by the erection of said fence.
>
> 3.14 This is the fall-back position.
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> …
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> 3.18 The portion of the appeal site in question is not formally allocated and safeguarded specifically within the Local Plan; it is only by way of the landowner leaving it unfenced and in allowing people to use it that it has value as 'play space', albeit informal as no formal play provision is made.
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> 3.19 This being the case, as previously discussed, the use of the land as open space can be lost without the need for any formal planning permission as the land could be fenced under permitted development rights.
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> 3.20 If the land were fenced and public access then prevented the land would no longer fall within the definition in the primary legislation i.e. 'used for the purposes of recreation'.
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> 3.21 As set out above to fence the land is the Appellant's fall-back position and it is necessary to consider the weight this carries and how this affects the value judgment made in respect of CFS/12. For a fall-back position to be a material consideration it needs to be possible, rather than probable. It is entirely possible to fence this land. Indeed it's probable that it will be if it would affect the outcome of a future application for the development of land.
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> …
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> 3.24 It is therefore the Appellant's case that the proposed provision of formal play space is equivalent in value to the community to the informal play space that would be lost as a result of this proposal (and could be lost through being fenced in any case). The Appellant is therefore firmly of the view that the proposal is not contrary to LDP policy CFS/12."

13. So far as concerned the question of on-site provision of formal play space and policy CFS/11, the applicants indicated at paragraphs 3.25-3.26 that the Council's objection could be overcome by provision of an equipped play area on land in their ownership immediately adjacent to the application site, and that a unilateral undertaking under s.106 of the 1990 Act had been submitted to secure this provision.

14. The applicants' statement of case went on to raise a separate point concerning national guidance relating to a 5-year supply of land for housing, concluding at paragraph 3.41 that "the Appellant remains of the view that the lack of housing land supply is sufficient to outweigh the loss of open space in the planning balance".

15. The Council's statement of case maintained the Council's position that the proposed development would result in the loss of open space, in an area where there was a significant shortfall, without any replacement provision that was equivalent either in terms of size or suitability. The Council believed, however, that the second limb of the refusal reason, relating to the lack of play space provision could be overcome, subject to a planning condition and the satisfactory completion of the unilateral undertaking. As to the fall-back position relied on by the applicants, the Council considered that the prospect of the land being fenced off in advance of development was unlikely and that, as such, the weight to be afforded to it as a material consideration was low.

16. The applicants' rebuttal statement added nothing material to the dispute between the parties. It referred repeatedly to the 0.85 grassed area as open space that would be lost as a result of the development and argued that the loss was outweighed by the provision of the equipped play area and by the fall-back position, both of which matters were said to affect the value judgment to be made in respect of policy CFS/12.

The inspector's decision

17. At paragraph 5 of her decision, the inspector identified the main issue as being "whether the development would make satisfactory provision of open space". She noted at [8] that in refusing planning permission the Council had raised concerns in respect of (i) the lack of play space to serve the development and (ii) "the loss of 8.5 ha of designated informal open space". She went on to explain in [9] that the applicants' submission of a unilateral undertaking had overcome the Council's concerns regarding the lack of play space, subject to a condition as to the submission of details. The inspector said that she was similarly satisfied that the development would make adequate provision for the recreational needs of its residents, in accord with Policy CFS/11.

18. At [10] she noted that there was no dispute between the parties that there was an overall deficit of open space provision in Old Colwyn and in the neighbouring community of Llysfaen. Whilst the informal open space of which the appeal site formed part was not formally allocated and protected in the local development plan, it was included as a play area in the Council's OSA. She continued:

> "11. The OSA provides a quantitative assessment of open space. It recognises that not all open space is owned by the Council but if a formal agreement exists to state it is available for public/dual use it is considered as contributing to public open space provision. There is no evidence to suggest that the open space which falls within the appeal site was not based on a formal agreement with the landowner."

19. At [12] she said that she was aware that the OSA was several years old and that the standards on which it was based had been updated in 2017; nor did it take account of the quality or accessibility of areas of open space. She referred to the Council's contention that any update of the OSA would still identify significant shortfalls in the overall provision of open space in Old Colwyn; and she stated that she had no evidence to the contrary.

20. The decision continued:

> "13. It is accepted that the obligation in the [unilateral undertaking] to provide an equipped play area would give the facility formal status. However, the equipped play area would constitute an up-grade of an existing area of informal open space and would not provide additional land for use as open space. It is acknowledged that the equipped play area would provide a facility not currently available in the vicinity of the site, to the benefit of residents of the wider area as well as future occupants of the development. Nevertheless, it would constitute a loss of informal open space additional to that which would be lost within the appeal site itself. I am not persuaded that the provision of an equipped play area would adequately compensate for the loss of a significant area of informal open space in a community where there is an overall deficit in open space provision.
>
> 14. I therefore find the development would result in an unacceptable loss of public open space, contrary to policy CFS/12 of the LDP and the guidance in Planning Policy Wales (PPW9) and Technical Advice Note (TAN) 16: Sport, Recreation and Open Space which seek to protect formal and informal open space from development except where it will be replaced by acceptable alternative provision within the vicinity of the development or within the same community.
>
> 15. I have noted the Appellants' intention to fence off the area of open space which falls within the appeal site thus preventing public access to it. These works would be allowed under permitted development rights. Although the Council is of the view that the prospect of these actions being carried out in advance of the development is unlikely, I am satisfied by the evidence that it is the intention of the Appellants to do so and as a fall-back position it is a material consideration in the determination of the appeal. It is accepted that such actions would prevent public use of the land. Nevertheless the land would be devoid of built development and depending on the type of fence erected it would continue to make a contribution to visual amenity."

21. The inspector then dealt at [16] with the guidance requiring local planning authorities to ensure that sufficient land is available or will be made available to provide a 5 year supply of housing land. She stated that she was aware that the Council was unable to demonstrate a 5 year supply. In these circumstances the need to increase supply had previously carried considerable weight in the determination of applications, provided the development would otherwise comply with development plan and national planning policies. However, following the recent removal of the relevant paragraph in the guidance, the weight to be attributed was now a matter for the decision-maker.

22. Having then considered other issues raised, the inspector concluded:

> "19. The development would result in the loss of informal open space in a community where there is already an overall deficit in open space provision. This carries significant weight against the appeal.
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> 20. It is acknowledged that the land could be fenced off preventing its use as informal open space. In addition the development would contribute to housing land supply including an element of affordable housing. The provision of an equipped play area which would be of benefit to the local community as well as future occupants of the proposed dwellings also adds weight in support of the appeal. However I do not consider these factors to be sufficient to outweigh the loss of open space.
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> 21. For the reasons given above, and having had regard to all other matters raised, the appeal is dismissed."

The High Court challenge

23. The challenge under s.288 of the 1990 Act to the inspector's decision was brought by Renew alone. It included materially different arguments from those advanced before the inspector. They were reflected in part in the judge's reasoning, though the judge went further than them in applying his own analysis to the issues.

24. The judge opened his discussion of the issues as follows:

> "34 … However, it seems to me that there is a basic point at the heart of Renew's case which, however it might be analysed forensically, may be stated colloquially as follows: it makes no sense to suppose, and the Inspector did not adequately explain how it could be, that a development that was acceptable in principle under policies in favour of residential development on suitable sites within urban areas could be rendered unacceptable on account of a policy for the preservation of open spaces, in circumstances where the Inspector accepted that the landowner both could and would fence the relevant land, and thereby remove it from the stock of available open space, if the development were not permitted."

25. As appears from the judgment at [35], ground 1 of the challenge was treated as falling into two parts, involving the contentions (a) that the inspector erred in regarding the application site as open space for the purposes of policy CFS/12, and (b) that the inspector failed to deal properly with the fall-back argument. But the judge thought that the two parts "have an underlying coherence that makes it appropriate for them to be considered as aspects of a single ground of challenge".

26. At [36]-[45] the judge summarised the parties' submissions and made various comments on them. He then gave his reasons for finding in Renew's favour on ground 1(a):

"47. The "open space" objection to the proposed development under policy CFS/12 rested on the supposition that the application site included 0.85 hectares of play space within a total of 3.43 hectares of play space in Old Colwyn identified in the OSA. That land could only have been included as being a "less formal area" within the third of the categories identified in paragraph 2.1 of the OSA. As it was land in private ownership, it could only have been considered as "contributing to public open space provision" if it were subject of a "formal agreement" with the landowner: see paragraph 3.1 of the OSA. As has been mentioned, the appellants' case on appeal proceeded on the basis that the figures in the OSA did indeed include the 0.85 hectares. If that were all that was to be said, the Inspector's approach would, in my view, have been unimpeachable: both parties accepted that the land was included in the OSA's figures and that policy CFS/12 was engaged; if there were any mistake of fact, the appellants shared responsibility for it and could not now complain of it. As for the question of a formal agreement, in and of itself this was a side-show, because the actual question, on which there was no ostensible dispute, was whether the policy was engaged. If the policy was engaged, then in the absence of any contrary information the Inspector was entitled to proceed on the basis that any prior conditions for inclusion of the land in the OSA had been satisfied.

48. However, that was not all that was to be said. The plain averments in the appellants' Statement of Case, which were not materially contradicted by the Council, tended strongly to indicate that there was no "formal agreement" of any sort in place in respect of the land. Actually, the formality of any agreement does not seem to me to be the most important question: the OSA was not a lawyers' document and ought not to be construed like one; it would be idle to worry about the precise meaning to be attached to the word "formal" in this context. However, the substance of the matter is important. The object of policy CFS/12 and of the OSA is to preserve the bank of public open space. Most such public open space will of course be in public ownership. Where it is not, the land will be included in the bank of public open space only if the owner has made an agreement for its use as public open space. The Inspector accepted the premise of the appellants' fall-back case as set out in paragraph 3.13 of their Statement of Case. This necessarily meant that, if there were any agreement at all on the part of the landowner, it could have amounted to no more than an agreement that people could play on the land until the landowner decided to stop them by enclosing the land. It is not strictly impossible that there was such an agreement. However, it is highly implausible; to see this, one has only to try to imagine someone actually making such an agreement with a

> public body. The implausibility is heightened by the repeated reference to the land in question as "informal" play space and by the absence of any actual reference to an agreement. Furthermore, an agreement of that nature, amounting to no more than a permissive licence terminable at will, is plainly not a proper basis for the application of a policy protecting public open space (as though a policy against development would apply if the landowner had "agreed" that it would not stop people playing on the land until it decided to do so, but would not apply if a landowner with a right to fence simply took no action until it decided to fence).
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> 49. It has not been suggested that the Inspector was wrong to accept the fall-back. However, acceptance of the fall-back shows that, whether or not the 0.85 hectares was included in the OSA's figure of 3.43 hectares for Old Colwyn, it was not a public open space because the landowner could exclude the public from it at will. That being so, it was in my judgment an error of law and also irrational to accept that policy CFS/12 was truly engaged, notwithstanding that the parties appeared to have supposed that it was.
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> 50. I should make it clear that this is not to say that, because there would be no conflict with policy CFS/12 if the fall-back materialised, the proposed development did not give rise to a policy conflict at the time of the decision. Mr Lewis rightly criticises such an argument in paragraph 44 of his skeleton argument. The point is rather that the very fact that the fall-back was capable of materialising showed that the supposed policy conflict was illusory.
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> 51. Further, at the very least, the incoherence of the Inspector's conclusion regarding the fall-back and any proposed reliance on policy CFS/12, especially when taken with the comments in the appellants' Statement of Case regarding the informal and precarious nature of any public user of the 0.85 hectares, ought to have led her to make further enquiry of the parties as to the status of the land, and her reliance on policy CFS/12 in the absence of such enquiry was in my judgment irrational."

27. The judge then gave his reasons for also agreeing with ground 1(b):

> "53. … If the appellants were able to fence the land and were intent on doing so, it makes no practical sense to say that the development would involve the loss of a public open space. I agree with Miss Osmund-Smith's submission that it was irrational for the Inspector to conclude on the one hand that the fall-back was made out but to conclude on the other hand that the development would result in a loss of open space in conflict with policy CFS/12. I also agree that it was irrational to conclude that the development would result in an unacceptable

> loss of public open space, in circumstances where the proposed development included formal designation of some play space and where the fall-back, which was found to represent the actual intentions of the landowner, would involve the entire loss of the existing informal provision and of the potential formal designation."

28. He said at [54] that all of those reasons in relation to ground 1 "are ways of saying that the point put colloquially in paragraph 34 above is in my judgment unanswerable".

29. He went on to express agreement with a further argument raised by counsel for Renew under ground 1(b) but which in the circumstances the judge considered to be of secondary importance. It concerned the inspector's assessment, in relation to the fall-back position, that if the existing area of open space were to be fenced off, nevertheless "depending on the type of fence erected it would continue to make a contribution to visual amenity". The judge's criticisms of that approach were threefold:

> "55. … (1) … It is unclear whether she considered the loss of visual amenity a sufficient reason for refusing permission or merely a disadvantage of development as compared to non-development; she did not say.
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> (2) … If the land were fenced, it would cease to be public open space within the OSA. Therefore, residual visual amenity would be relevant only as a substantive matter in its own right, not as an aspect of the benefit of preserving public open space in accordance with a policy in the local development plan. It was not disputed that the refusal of permission for development would preserve the visual amenity of undeveloped land. The question was what, if anything, was the relevance of that fact. No objection to the development on the ground of visual amenity had been advanced by the Council. Mr Lewis submitted that the Inspector was not required to and did not make any determination on that point: she was entitled simply to consider that, having regard to the residual visual amenity that would be preserved, the fall-back was not a sufficiently weighty consideration to outweigh the policy contravention involved in the proposed development. However, once it is acknowledged that the open space will be lost both under the development and under the fall-back, the preservation of the visual amenity of undeveloped land can only militate against the grant of permission on the appeal if it is considered to be a sufficient free-standing objection to development.
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> (3) The root of the problem, as before, is the illogicality of combining acceptance of the fall-back and the conclusion that the development would result in the loss of a public open space. However, in the circumstances, if the Inspector was going to rely on a visual amenity argument as a reason for refusing

> permission, she ought, for the reasons mentioned in this paragraph, to have raised this with the appellants and given them an opportunity to address it, and her failure to do so constitutes material unfairness."

30. The judge turned briefly to consider ground 2 which, as set out at [57] of the Judgment, had two limbs. The first was that, if there was a conflict with policy CFS/12, the inspector failed to undertake the analysis required by the authorities, in that she did not determine whether the development would conflict with the local development plan as a whole and failed in the circumstances to accord priority to the development plan. The second limb was that, in performing the balance of competing considerations, she failed to identify all of the benefits of the proposed development, which had been acknowledged in the officers' report to the Council's planning committee.

31. The judge repeated his rejection of the inspector's finding of a conflict with the open space policy of the development plan, but continued:

> "58. … However, if it be supposed that the Inspector was technically correct and that there was a policy conflict, the conclusion in paragraph 20 of the Decision was not in my judgment unlawful either as failing to accord priority to the development plan or as failing to have regard to material considerations ….
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> …
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> 60. As for the first limb of Ground 2, I agree with Mr Lewis that the Inspector's reasoning sufficiently showed the "building blocks" of her decision and that it is implicit in her reasoning that she regarded the conflict with policy CFS/12 as putting the proposal in conflict with the development plan as a whole.
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> 61. As for the second limb of Ground 2, the Inspector was not required to refer to every single point that had been raised in the papers. She referred to the main points in the dispute and made clear both what she considered to be the most important factors and why she was deciding the appeal as she was. She also made clear that she had taken account of all the other matters that had been raised but not specifically referred to in the Decision. The weight to be given to the various matters was a matter for her judgement alone. I do not consider that it is at all plausible to suggest that the Inspector failed to have regard to relevant matters or that the reasons for her decision are unclear. Moreover, even if it were thought that the reasoning was in any relevant respect unclear, it has not been shown that Renew has been substantially prejudiced by any lack of clarity."

The appeal to this court

32. For the Welsh Ministers, Mr Gwion Lewis advances three grounds of appeal against the judge's order: (1) that it was not irrational for the inspector to conclude that the proposal breached policy CFS/12, not least because the parties agreed before her that the proposal would lead to a loss of open space; (2) that the judge adopted an erroneous approach to the fall-back position; and (3) that there was no procedural unfairness in relation to the issue of visual amenity as it related to the fall-back position. The grounds of appeal are said to be facets of the same essential complaint, that the judge over-complicated what should have been a straightforward case and, as a result, wrongly upheld the claim.

33. For Renew, Ms Thea Osmund-Smith resists the appeal and by way of respondent's notice submits that the judge's decision should be upheld for additional reasons which are in substance those of Renew's unsuccessful ground 2 in the court below.

First ground of appeal

34. At [47] of his judgment the judge took what in my view is the correct starting-point for consideration of the lawfulness of the inspector's decision, namely the common ground between the parties in their written representations to the inspector. As is clear from the passages to which I have referred (see [12]-[16] above), the applicants accepted before the inspector that the 0.85 hectare grassed area on the application site was open space for the purposes of policy CFS/12 and that the development would result in the loss of that open space. On that central point they were at one with the Council. Subject to the judge's view that "that was not all that was to be said", the inspector was plainly entitled in the circumstances to find that the development would result in an unacceptable loss of open space contrary to policy CFS/12.

35. The judge went on, however, to hold at [48]-[51] that more was to be said and that it was "an error of law and irrational for the inspector to accept that policy CFS/12 was engaged, notwithstanding that the parties appeared to have supposed that it was"; or that, at the very least, the inspector ought to have been led to "make further enquiry of the parties as to the status of the land, and her reliance on policy CFS/12 in the absence of such enquiry was … irrational". He did so on the basis of reasoning that I do not find altogether clear but that I am satisfied was mistaken. I can see no justification for holding that the inspector ought to have departed from or made further enquiry about the parties' agreed position before her.

36. An area of open space for the purposes of policy CFS/12 can be in public or private ownership. Areas in private ownership will count, according to paragraph 3.1 of the OSA, "[i]f a formal agreement exists to state they are available for public/dual use". The judge doubted the existence of a formal agreement in respect of the 0.85 hectares, but there was in my view nothing in the material before the inspector to make it irrational for her to proceed on the basis of the common ground that the land was open space for the purposes of the policy. I disagree with the judge's view that "[t]he plain averments in the appellants' Statement of Case … tended strongly to indicate that there was no 'formal agreement' of any sort in place in respect of the land", and with the significance he attached to the references to the land as "informal" play space and to the absence of any actual reference to an agreement. The description of the land as "informal" play space related to the way the land was used (e.g. by a child kicking a

ball around a field, in contrast to a formal play space such as an equipped play area) and told one nothing about the existence or otherwise of a formal agreement in respect of the land. The absence of reference to an agreement in the written representations was of no significance in circumstances where the point was simply not in issue and there was, as the inspector noted, "no evidence to suggest that the open space which falls within the appeal site was not based on a formal agreement with the landowner". There was no inconsistency between the existence of a formal agreement and the applicants' stated fall-back position that the land could or would be fenced under permitted development rights. There is nothing in the OSA about the form an agreement must take or the degree of formality required, and there is no reason in principle why a formal agreement stating that an area of land is available for public use should not be entered into on the basis that it is terminable at will so as to exclude the public thereafter.

37. The judge said that the inspector's acceptance of the fall-back position meant that any agreement, if it existed at all, could have amounted to no more than an agreement that people could play on the land until the landowner decided to stop them by enclosing the land, and that an agreement of that nature was "plainly not a proper basis for the application of a policy protecting public open space", leading to his conclusion that the 0.85 hectares "was not a public open space because the landowner could exclude the public from it at will". I can see no basis, however, for the judge's view that land cannot be open space to which the policy applies if the landowner has the power to exclude the public from it at will. The policy protects against the loss of open space as a result of development. When planning permission is sought for a development, the policy must be applied to the open space existing at the time of the decision whether to grant permission. The effect of the OSA is that if at that time there exists a formal agreement stating that an area of land in private ownership is available for public/dual use, that area counts as open space and the policy applies to it. The fact that the agreement can be terminated at will so as to exclude the public in the future does not take the land outside the scope of the policy. It is true that if the agreement is subsequently terminated and the public are then excluded from the land, it will cease at that point to be open space to which the policy applies. But that is for the future. It does not affect the existing status of the land as open space or the present application of the policy to it. The fact that the landowner not only has the power to exclude the public in the future but actually *intends* to do so by fencing off the land is relevant to the fall-back position, considered below, but again it does not affect the application of the policy to the circumstances as they exist at the time of the decision whether to grant permission for a development.

38. If the judge is to be understood as going so far as to hold that, as a matter of *law*, land cannot be treated as open space for planning purposes if the landowner has the power to exclude the public from it at will, such a proposition cannot in my view be correct. No authority has been advanced in support of it and it would introduce an unwarranted rigidity into the area of planning policy.

39. In the discussion above I have referred generally to "open space" rather than to "public open space" although the judge uses the latter expression. I do not think that "public" adds anything material for present purposes. The OSA refers to public open space but policy CFS/12 itself and its explanatory text refer simply to open space. What the policy is aimed at is of course the protection of various types of open space

available for public use and amenity or, to use the language of TAN 16 (see [9] above), open space of public value, but whether or not one adds "public" before "open space" makes no difference to the analysis set out above.

40. Even if, contrary to my view, there had been substance to the judge's reasons for concluding that the 0.85 hectares was not open space for the purposes of policy CFS/12, it is very far from being an obvious point that the inspector ought to have taken of her own motion so as to depart from the common ground before her. To borrow from the judgment of Hickinbottom LJ in *Waterstone Estates Limited v Welsh Ministers* [2018] EWCA Civ 1571 at [53], "to impose on the Inspector the legal obligation of taking this point herself would quite unreasonably expect too much of her"; and see generally the reasoning at [49]-[53] of that judgment.

41. In conclusion on this ground of appeal, the inspector was entitled in my view to deal with the matter in the way she did, proceeding on the basis of the parties' common ground that the 0.85 hectares was open space for the purposes of policy CFS/12. It was neither an error of law nor irrational for her to proceed in that way without further enquiry of the parties or for her to find that policy CFS/12 was engaged.

Second ground of appeal

42. Planning applications are to be determined in accordance with the development plan unless material considerations indicate otherwise: s.38(6) of the Planning and Compulsory Purchase Act 2004. Within that framework, policy CFS/12 fell to be considered as part of the development plan, whereas the fall-back position relied on by the applicants fell to be considered as a material consideration. The inspector therefore had to decide first whether there would be a loss of open space in breach of policy CFS/12 and, if so, whether the fall-back position was to be given such weight as to justify the grant of planning permission notwithstanding the conflict with the development plan (subject to a further question, considered below in relation to the respondent's notice, as to whether there was conflict with the development plan taken as a whole). The inspector had the correct approach clearly in mind. The case for the Welsh Ministers on the second ground of appeal is that the judge did not do so and that he conflated the assessment of the proposal against the development plan with the separate question of the weight to be given to the fall-back as a material consideration. The paragraphs of his judgment to which criticism is particularly directed are [50], [53] and [55].

43. I think that the judge clearly understood in general terms the distinction between conflict with the development plan on the one hand and the fall-back position on the other hand. He set out the relevant law in uncontentious terms, in particular at [32] and [42] of his judgment. I am satisfied, however, that he fell into error in his detailed reasoning on the fall-back position.

44. The judge's central reasons for holding that the inspector had failed to deal properly with the fall-back position are at [53] of his judgment. He said first that "it was irrational for the Inspector to conclude on the one hand that the fall-back was made out but to conclude on the other hand that the development would result in a loss of open space in conflict with policy CFS/12". I read that as a restatement of reasoning considered under the first ground of appeal, i.e. that acceptance of the fall-back meant that the land was not open space within the policy because the landowner could

exclude the public from it at will. I have already explained why I regard that reasoning as erroneous but I do not think that the restatement of it involved the further error of conflating the fall-back with the question of compliance with the development plan.

45. The judge went on in the same paragraph to make a further finding of irrationality in the inspector's conclusion that the development would result in an unacceptable loss of open space "in circumstances where the proposed development included formal designation of some play space and where the fall-back … would involve the entire loss of the existing informal provision and of the potential formal designation". There is force in the argument that that passage does not draw a sufficiently clear distinction between breach of policy CFS/12 and the question whether non-compliance with the development plan was outweighed by the fall-back as a material consideration. More importantly, however, the weight to be given to the fall-back was a matter of planning judgment for the inspector. In making that assessment in this case the inspector took into account that, although fencing the land would prevent public use of it, the land would still be devoid of built development and depending on the type of fence erected it would continue to make a contribution to visual amenity. As to the "formal designation of some play space" under the proposed development (i.e. the equipped play area to be provided on adjoining land to satisfy the separate policy CFS/11) and the absence of that facility under the fall-back, the inspector evaluated the pros and cons of the facility at [13] of her decision. In the circumstances it cannot be said, in my judgment, that the inspector failed to have regard to relevant considerations or that it was irrational for her to conclude that the fall-back did not outweigh the breach of the development plan.

46. At [55] the judge accepted the submission for Renew that the inspector had erred in relation to the issue of visual amenity. In my view the judge was wrong to find such an error. As to [55(1)], I think it clear that the inspector took into account the preservation of visual amenity if the fall-back materialised simply as a factor affecting the weight to be given to the fall-back. She was not treating any loss of visual amenity resulting from the proposed development as a substantive reason for refusing permission. As to [55(2)], I do not really understand the judge's reasoning, but I disagree in any event with his concluding statement that "once it is acknowledged that the open space will be lost both under the development and under the fall-back, the preservation of the visual amenity of undeveloped land can only militate against the grant of permission on the appeal if it is considered to be a free-standing objection to development". It seems to me that residual visual amenity could lawfully be taken into account in assessing the weight to be given to the fall-back (including the loss of open space to which the fall-back would give rise) even though the objection to the development itself was not put on the basis of loss of visual amenity as a free-standing ground. Ms Osmund-Smith reluctantly but in my view rightly accepted that visual amenity was a legally relevant consideration. As to the point made by the judge in [55(3)], that falls for separate consideration under the third ground of appeal.

<u>The third ground of appeal</u>

47. The judge held at [55(3)] that "if the Inspector was going to rely on a visual amenity argument as a reason for refusing permission, she ought … to have raised this with the parties and given them an opportunity to address it, and her failure to do so constitutes unfairness". The criticism of that reasoning is that the visual amenity argument arose

solely in the context of the fall-back and reflected the applicants' own acceptance, in paragraph 3.13 of their written representations to the inspector, that if the fall-back were implemented the land would remain undeveloped "and thus only have a visual amenity value as open space, albeit this would be affected by the erection of said fence" (see [12] above). It is submitted that since the applicants had already made the point about visual amenity themselves, procedural fairness did not require the inspector to raise it with them before she could rely on it in the decision. I agree with that submission.

The respondent's notice

48. The correct approach to determining whether a proposed development is in accordance with the development plan was explained by Lord Clyde in *City of Edinburgh Council v Secretary of State for Scotland* [1997] 1 WLR 1447, in particular at 1459D-G, and by Sullivan J in *R v Rochdale MBC, ex parte Milne* (2001) 81 P&CR 27 at [46]-[49]. In summary, the decision-maker should have regard to all of the provisions of the development plan that are relevant to the application under consideration; and where policies pull in different directions, in determining whether a proposal is in accordance with the plan the decision-maker has to make a judgment bearing in mind such factors as the importance of the policies which are complied with or infringed and the extent of such compliance or breach.

49. The essence of the case for Renew on the respondent's notice is that the inspector failed to adopt the correct approach: she failed to have regard to material considerations and failed to consider whether the development would be in accordance with the development plan taken as a whole. Attention is drawn to passages in the officer's report to the Council's planning committee which, it is submitted, showed that most of the relevant policies in the development plan were complied with and that many of them told in favour of the proposed development. The policies themselves were listed in paragraph 59 of the report. Paragraph 60 referred to various policies on housing and sustainable development and stated that the development was considered to be "acceptable in principle subject to the following considerations". Those considerations, including the issues of open space, were set out in the following paragraphs. The conclusions in paragraphs 92-94 were (as summarised at [4] above) to the effect that the development would provide a number of benefits, including benefits in terms of helping to address the shortfall in land supply and providing a beneficial use for under-used previously developed land, but there were a number of critical questions (including the question of adequate provision of open space) that were unresolved, which led to the recommendation that planning permission be refused. It is submitted that the inspector, by contrast, failed to acknowledge that some policies favoured the proposed development and that she treated the identified conflict with policy CFS/12 as amounting in itself to a conflict with the development plan as a whole.

50. As already noted, this is in substance the same argument as was rejected by the judge at [57]-[61] of his judgment (see the summary and passages quoted at [30]-[31] above). In my view the judge was right to reject it. The argument ignores the way the applicants' case was put to the inspector and the limited issues that were raised before her. The Council's reason for refusal had been based on open space and play space issues which were plainly considered to give rise to a conflict with the development plan taken as a whole – an unsurprising outcome, given the evident importance of

policy CFS/12 and its statement that "Planning permission will not be granted …" if the open space requirements are not met. There was no suggestion in the applicants' written representations that because other policies favoured the proposed development it should be found to be in accordance with the development plan taken as a whole even if there was a breach of policy CFS/12. The arguments were all about the open space and play space policies themselves, the fall-back position and national guidance relating to a 5-year supply of housing land. The inspector dealt expressly with all those arguments and stated in terms that she had had regard to all other matters raised. It was implicit in her conclusions that she regarded the conflict with policy CFS/12 as sufficient to constitute a failure to accord with the development plan as a whole. It was not necessary for her to spell this out or elaborate it so as to address an issue that had not been raised.

Conclusion

51. For the reasons given above, I would allow the appeal and reinstate the inspector's decision.

Lord Justice Phillips:

52. I agree.

Lord Justice David Richards:

53. I also agree.