Neutral Citation Number: [2022] EWHC 1675 (Admin)

Case No: CO/4135/2021

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
(Sitting in Leeds)

Leeds Combined Court Centre
1 Oxford Row
Leeds LS1 3BG

Date: 6th July 2022

Before:

MR JUSTICE EYRE

- -

Between:

TV HARRISON CIC	**Claimant**
- and -	
LEEDS CITY COUNCIL	**Defendant**
-and-	
LEEDS SCHOOLS' SPORTS ASSOCIATION	**Interested Party**

- -
- -

Jenny Wigley QC (instructed by **Leigh Day**) for the **Claimant**
Paul G Tucker QC and Kilian Garvey (instructed by **Leeds City Council Legal Services**) for the **Defendant**
The Interested Party did not attend and was not represented

Hearing dates: 20th June 2022

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE EYRE

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be **10:00am** on **6th July 2022**

Mr Justice Eyre:

Introduction.

1. The Claimant is a community interest company and in these proceedings it challenges the Defendant's decision of 25th October 2021 ("the Decision") whereby the Defendant granted itself outline planning permission in respect the erection of up to 61 affordable dwellings on land at Oldfield lane in Wortley ("the Site").

2. In these proceedings, as in those before Lane J to which I will refer below, the Claimant has described the Site as a longstanding sports field which is valued by the local community. It is used for informal leisure and recreational activities and following restoration work by members of the local community it is being used informally as a sports field.

3. The Interested Party is the freehold proprietor of part of the Site with the Defendant owning the balance. The Interested Party holds a lease from the Defendant in respect of the Defendant's part of the Site but steps are in hand for the Defendant to acquire the entirety of the Site. The Interested Party has taken no part in the proceedings.

4. The Decision followed a meeting of the Defendant's South & West Plans Panel ("the Panel") on 23rd September 2021. The Panel resolved (on the casting vote of the chair) to defer the matter to allow notification to the Secretary of State (because the proposed permission related to the Defendant's own land) but subject to that to delegate the matter to the Chief Planning Officer for approval subject to conditions.

5. The Claimant challenges the Decision on four grounds:

    i) Ground 1 alleged that in failing to take into account policy N6 of the Leeds Unitary Development Plan the Defendant had erred in law in that it had failed to have regard to the policies of the statutory development plan contrary to sections 70(2) of the Town & Country Planning Act 1990 and section 38(6) of the Planning & Compulsory Purchase Act 2004.

    ii) Ground 2 alleged a failure to give adequate reasons for the Decision.

    iii) By Ground 3 the Claimant alleged that the Defendant had failed to have regard to material considerations in respect of paragraph 99(a) of the National Planning Policy Framework and/or had irrationally failed to obtain relevant information in respect of the matters addressed there.

    iv) Finally, by Ground 4 it was said that the report of the Chief Planning Officer to the Panel ("the Officers' Report") had materially misled the Panel in respect of the adequacy of the measures intended to satisfy paragraph 99(b) of the NPPF and that as a consequence the Defendant had failed to have regard to a material consideration.

6. On 3rd February 2022 HH Judge Klein granted permission on Grounds 1 and 3 but refused it on Grounds 2 and 4. The matter came before me for the substantive determination of Grounds 1 and 3 and for consideration of the Claimant's renewed application for permission in respect of Grounds 2 and 4 (to be followed if appropriate by determination of those grounds).

The Factual Background to the Decision.

7. The Site is described in the Officers' Report as an undeveloped greenfield site consisting mainly of grass with some trees along the western and northern boundaries. The Site is surrounded by residential properties interspersed with other local facilities such as shops, schools, public houses and the like. The Claimant sees that as a somewhat minimalist description of the Site which it says is greatly valued for its recreational use and, following the restoration work, as a sports field.

8. The Leeds Unitary Development Plan (Review 2006) ("the LUDP") was adopted by the Defendant in July 2006. That plan included policy N6 which provided that:

> "Development of playing pitches will not be permitted unless:
>
> i. There is a demonstrable net gain to overall pitch quality and provision by part redevelopment of a site or suitable relocation within the same locality of the city, consistent with the site's functions; or
> ii. There is no shortage of pitches in an area in relation to pitch demand locally…"

9. The following parts of the accompanying text are of note:

> "5.2.22 Playing fields, pitches, courts and greens perform a special function for formal outdoor sport and recreation, allied to that of greenspace. Where the public has full access to a playing field (for example within a park), the playing field has been included within the protected greenspace designation (Policy N1) on the Proposals Map. Elsewhere, playing pitches without full public informal access, including private playing fields, have been identified with a separate notation as Protected Playing Fields on the Proposals Map. The discussion in this section covers both categories of playing field…
>
> 5.2.24 In some instances it may be appropriate to secure an overall improvement in pitch quality and provision through more effective layout or enhancement of existing pitches, or the relocation of facilities elsewhere. The relocation of playing fields and facilities from their present location will need to be clearly justified, and demonstrated to be not detrimental to pitch users. As a consequence relocated pitches will need to be accessible and well related to pitch demand. Any relocations will also need to take into account local deficiencies, against the overall aim to rectify any shortfalls in the surrounding areas, and against the background of the city-wide provision…"

10. The Site is marked as a protected playing pitch and part of the Urban Green Corridor on Map 21a which accompanied the LUDP.

11. There was debate before me as to the meaning of policy N6(i). The Claimant said that "quality" and "provision" were to be read together with the consequence that for development of a playing pitch to be permitted there had to be a demonstrable net gain of both quality and provision which could be achieved either by part redevelopment of a site or by suitable relocation. The Defendant said that the word "provision" related to the redevelopment or relocation and indicated the way in which the net gain in quality was to be achieved. The policy could have been more clearly expressed but I am satisfied that the Claimant's interpretation is correct. In favour of the Defendant's interpretation it can be said that it is a possible construction of at least the first part of the policy and that it will not often be the case that part redevelopment of a site could lead to a gain in provision but that it could more readily be seen as leading to a gain in

quality. Nonetheless the Claimant's interpretation is preferable both as a matter of syntactical analysis and by reference to the rationale of the policy. The words "quality" and "provision" are more readily seen as both being matters which are described by "overall pitch" and in respect of which "gain" is required. That analysis is supported by the presence of "and" between them. Moreover, while "provision" could be read as relating to "redevelopment" it is more difficult to read it as relating to "suitable relocation" and in relation to the latter part of policy N6 it is hard to see of what there is to be provision. Not only is the Claimant's reading preferrable as a matter of syntax but one can readily understand why the policy required a gain both in quality and in provision if development of a playing pitch was to be permitted. Finally, although the accompanying text is not to be seen as determining the meaning of the policy it is of note that the reference at 5.2.25 to "an overall improvement in pitch quality and provision" is entirely consistent with the Claimant's reading of the policy but inconsistent with the Defendant's.

12. The LUDP has been replaced as the Defendant's development plan by the Core Strategy and the Site Allocations Plan ("the SAP") both of 2019 together with the Aire Valley Area Action Plan and the Natural Resources & Waste Development Plan Document. However, a number of the policies in the LUDP were retained and remain part of the development plan and these include policy N6.

13. Policy HG2 of the SAP allocated the Site for housing identifying it as having a capacity of 61 units. At 3.11.9 the SAP provided that:

> "The Site Allocations Plan housing allocations mean that should a planning application for housing on an allocated site be submitted to the Council, it is acceptable in principle by virtue of it being allocated for that use in the Local Plan. However, each planning application is judged on its individual merits and where there are specific requirements that will need to be applied, these are listed against each site below…"

14. The site requirements for the Site were:

> "The development should provide new greenspace to extend the existing area of greenspace to the north and to create a green link across the site from this greenspace to Oldfield Lane, in accordance with West Leeds Gateway SPD. The existing sports facilities should be relocated in Leeds and/or local improvements to existing facilities in the locality of the site should be provided."

15. On 28th January 2020 Tom Riordan, the Defendant's Chief Executive, had responded by email to an issue which had been raised as to the correctness of the allocation of the Site in the SAP. The Claimant's predecessor, the T.V. Harrison Community Action Group, had questioned the accuracy of the assessment of outdoor sport green space in the Wortley ward in which the Site is located. Mr Riordan began by saying that the Site had been "assessed on its own merits" and that the allocation for housing had "been found sound through the Site Allocation Process". Mr Riordan said that the total area of green space provided by the Wortley Recreation Ground (which was at a different location from the Site but also in the Wortley ward) had been correct. He noted that the entirety of that site had been classified as outdoor sports green space and agreed that it "could have been split into the two Green Space typologies of `Outdoor Sports' and `Parks and Gardens'". Mr Riordan also agreed that if that exercise had been carried out then there would have been "an overall deficiency of `Outdoor Sport' Green Space in the ward rather than a very small surplus". He went on to say that there was no error in the designation of the whole of the Wortley Recreation Ground as green space and that

"if the typologies were amended, the total amount of Green Space in the ward would remain the same but the amount for that typology (Outdoor Sports) would be less". Mr Riordan concluded by saying that even if a change were to be made to the classification of the green space at the recreation ground that "would not alter or give weight to the change" of the allocation of the Site for housing.

16. The Claimant has placed considerable emphasis on this email and has characterised it as an admission that the SAP process and the allocation of the Site for housing was based on a false premise namely that there was a surplus of outdoor sports green space in the Wortley ward when there was in fact a deficiency. I do not agree with that reading of the email. Mr Riordan did accept that a different classification could have been applied to the recreation ground and that if that had been done there would have been seen to be a deficiency of outdoor sports green space in the ward. Mr Riordan was not necessarily accepting that there was an error in that regard but what is significant is that he was at pains to set out the Defendant's view that any such error did not undermine the allocation which had been made in respect of the Site.

17. There is a substantial history of litigation both leading up to and following the Decision. Planning permission had originally been granted on 16th March 2021. However, the Defendant had consented to the quashing of that permission because it accepted that the relevant Officers' Report had erred in advising that the predecessor of NPPF paragraph 99 was not relevant.

18. The Claimant and its predecessor had applied twice for the Site to be included on the Defendant's list of assets of community value for the purposes of section 87 of the Localism Act 2011. The first such application was refused on 17th June 2020. However, that refusal was quashed by consent on 4th November 2020. The second application was refused on 22nd December 2020 but that refusal was quashed by order of Lane J on 25th January 2022 pursuant to his judgment at [2022] EWHC 130 (Admin) following a contested hearing on 16th December 2021. It follows that at the time of the Decision the second refusal to include the Site as such an asset was under challenge but the challenge had not yet been determined.

19. The Defendant had received 352 representations objecting to the grant of planning permission (and 2 in support of it) together with objections from each of the three local ward councillors. Sport England had been consulted and had objected to the application on the footing that it would lead to the loss of a playing field in circumstances where none of the exceptions in Sport England's own policy nor, in its view, the exceptions in NPPF paragraph 99 applied.

The Legal Framework in Outline.

20. It was common ground that by virtue of section 70 of the Town & Country Planning Act 1990 the Defendant was to have regard in considering the application to the provisions of the development plan so far as they were material to the application.

21. Section 38(5) and (6) of the Planning & Compulsory Purchase Act 2004 provided that:

> "…(5) If to any extent a policy contained in a development plan for an area conflicts with another policy in the development plan the conflict must be resolved in favour of the policy which is contained in the last document [F9to become part of the development plan]

> (6) If regard is to be had to 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…"

22. Regulation 8 of the Town & Country Planning (Local Planning)(England) Regulations 2002 provided that:

> "(3) Any policies contained in a supplementary planning document must not conflict with the adopted development plan.
>
> (4) Subject to paragraph (5), the policies contained in a local plan must be consistent with the adopted development plan.
>
> (5) Where a local plan contains a policy that is intended to supersede another policy in the adopted development plan, it must state that fact and identify the superseded policy"

23. It was accepted that the SAP had not stated that it was intended to supersede retained policy N6 of the LUDP.

24. In the Defendant's Summary and Detailed Grounds of Resistance and in their skeleton argument Messrs Tucker QC and Garvey had invoked section 38(5). They had contended that the Defendant had not needed to address any conflict between the SAP and policy N6 because the tension between the two had already been resolved in favour of the SAP by virtue of that section. However, in his oral submissions Mr Tucker moved away from that position and disavowed reliance on that provision. In my judgement he was right to do so. As is explained in the authorities to which I refer at [44] below the assessment as to whether different policies in the development plan are in conflict is a matter of planning judgement. Section 38(5) makes provision as to the way in which such a conflict is to be resolved but it does not operate without more to effect the supersession of policies in earlier documents nor, more significantly, does it remove the requirement to have regard to the terms of the development plan and to consider whether particular parts of that plan are or are not in conflict.

25. The principles governing the judicial review of planning decisions were largely but not entirely agreed before me. Although there were some differences as to aspects of those principles the real dispute was as to their application in the circumstances of this case. I will address those differences when I consider the grounds in turn.

26. It is accepted that NPPF paragraph 99 was a material consideration for the purposes of determination of the application and that provides as follows:

> "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 benefits of which clearly outweigh the loss of the current or former use".

The Decision and the Material on which it was based.

27. The Officers' Report began by emphasising that the Site had been allocated for housing in the SAP and that was a point on which repeated stress was placed in the report.

28. The report then summarised the various objections noting in particular the objections to the loss of a sports field. The response of Sport England was summarised at length and in detail. It was noted that Sport England took the view that the Site was to be regarded as a playing field. The report recorded the view of Sport England that it had been "unable to find any reference to a robust and up to date assessment that provides clear evidence that the site is surplus to current and future sporting demand". The summary culminated with the explanation that Sport England was objecting because the loss of the sports field was not, in that body's view, justifiable either by reference to Sport England's own policy or by reference to paragraph 99 of the NPPF.

29. At [18] – [22] the Officers' Report listed the elements of the development plan and listed the policies which were said to be relevant. The list included a number of retained policies from the LUDP and described them as relevant. Fourteen such policies were listed but the list did not include policy N6.

30. At [23] and [24] the report made reference to the SAP. At [23] it was said the allocation in respect of the Site was not affected by the challenge which had been made to the allocation of sites which had been in the green belt. That had the consequence that the SAP was to be "afforded full weight in consideration of any decision making on this application".

31. At [24] this was said:

> "The site is allocated for housing in the SAP under reference number HG2-84 and thus the principle of the site's use for housing has been considered through the examination of the SAP. The allocation is subject to specific site requirements relating to:
>
> - the provision of on-site greenspace,
> - a "green link" connecting Oldfield Lane to the on-site greenspace,
> - Existing sports facilities should be relocated in Leeds and/or local improvements to existing facilities in the locality of the site should be provided;
>
> as well as
>
> - a gas pipeline affecting the site"

32. The appraisal began at [29] with consideration of the "Principle of Development". Reference was again made to the allocation of the Site for housing in the SAP and it was said that the proposal was "considered to be wholly in accordance" with the allocation in the SAP.

33. At [35] the report again emphasised the importance of the SAP allocation in these terms:

> "Refusals based on principle of development, on allocated sites in an adopted plan could undermine the Plan-led system and may negatively impact on the Council's ability to demonstrate a five year housing land supply, in the long-term. The SAP has provided evidence that the application site is more sustainable than other discounted sites within the Outer South West HMCA. Development such as this is the mechanism for delivery to provide the required infrastructure that would improve the sustainability and accessibility in the locality. The SAP allocations and identified sites have been cumulatively assessed to ensure that appropriate infrastructure can be provided where this is within the power of

the Council. It also provides clarity on how much growth is planned to occur in different areas so that infrastructure providers, for their own investment plans working closely with the Council, may provide for the housing pipeline."

34. Then at [36] it said:

> "A number of the objections raised questions regarding the SAP process of allocating this site for housing (from its previous allocation of Greenspace). However, the SAP Inspector considered this to be sound stating:
>
> *"The overall process represents a sound approach to identifying those sites considered to represent the best and most sustainable choice for development in each HMCA to contribute to the target requirement"*
>
> Thus, through the examination into the SAP the site was identified as being an appropriate location for development".

35. At [37] reference was made to the applications to list the Site as an asset of community value. The view was expressed that even if the Site were to be seen as such an asset with the consequence that such status was to be regarded as a material consideration it would not carry weight such as "to impact on the suitability of the land for housing". The treatment of this aspect of the matter concluded with the words:

> "Moreover and more fundamentally, the benefits of the proposal would outweigh the loss of an asset of community value such that permission is justified even if the site were to be treated as an ACV."

36. The report then turned to address green space considerations. In that context the objection of Sport England was again noted and the report said that the Defendant attached "great and considerable weight to this objection".

37. The terms of NPPF paragraph 99 were recited and the application of that provision was noted. The report concluded that while sub-paragraph (c) had not relevance the exceptions at (a) and (b) were both satisfied such that notwithstanding the objection from Sport England "paragraph 99 does not act as a bar to development of the Site".

38. The analysis in respect of paragraph 99(a) was expressed thus:

> An assessment, by way of the Open Space, Sport and Recreation Assessment (July 2011) carried out extensive assessment work regarding all public and private green space to underpin the green space designation policy within the SAP and that is the most up to date position. The assessment scored all open spaces out of 10 with Oldfield Lane scoring 0.66 out of 10. This was also echoed within the West Leeds Gateway SPD (adopted 2010, superseded in 2019 upon the adoption of the SAP) where it was stated that
>
> *"Just to the east of the existing supermarket and to the north of Oldfield Lane is a disused playing field which is partly owned by Leeds Schools Sports Association (LSSA) and partly by the City Council. This site has been disused for several years as it was no longer 'fit for purpose' for the LSSA to use for exhibition matches and as the home of Leeds City Boys. The pitch has never been in general community use and retaining this single pitch is not consistent with the Council's strategy for playing*

> *pitches. The site is now being made available for housing development"*

> It was therefore considered that the quality of this open space was so poor that it did not provide a meaningful function as Green Space dating back to 2010. As such, officers consider that at the time of the assessment, this site was considered to be surplus to requirements by reason of its overall quality though still recognising that as a ward overall there would be a deficit. It is the view of Officers that this first paragraph 99 exception against development on open space has been met on the basis that the Site is surplus to requirements (owing to the deficient quality of the open space). Further, officers are of the view today, having regard to the quality of Site and the provision of available open space that the Site is surplus to requirements. Indeed, the Site's allocation for housing provides some evidence that it is surplus to requirements"

39. The analysis in relation to paragraph 99(b) was expressed more shortly as:

> "The site requirements set out within the SAP require that as part of any development existing sports facilities need to either (i) relocate within Leeds or (ii) provide local improvements to existing facilities in the locality of the site as well as providing policy compliant Green Space on site. These requirements will be secured through condition to be dealt with through any Reserved Matters application. It is the view of Officers that this second paragraph 99 exception against development on open space has also been met"

40. Having said that the officers did not regard paragraph 99 as posing a bar to development the following alternative analysis was set out:

> "In the alternative, even if none of the exceptions within paragraph 99 were satisfied, the Council would still take the view that the development should be granted. Indeed, taking the benefits of the proposal as a whole and having regard to the development plan allocation, it is considered that these issues should be afforded weight such that they would convincingly overcome the guidance contained within paragraph 99 of the NPPF and any harm associated with the development proposal. Indeed, it must be acknowledged that the NPPF does not displace the primacy of the development plan. In this instance, the development plan has allocated the Site for development. This allocation would overcome any countervailing conflict with the policies in the NPPF in the planning judgement of officers."

41. The report concluded with a recommendation for approval preceded by this summary:

> "58. As discussed above, the principle of the development for housing on this site is supported by the up to date Local Plan, specifically Policy HG2 – 84 of the SAP which should be afforded full weight in consideration and determination of the application.
>
> 59. The development will provide 100% affordable housing which far exceeds policy at an acceptable quantum of housing in line with the SAP allocation, with a safe and adequate means of access. It is considered that the principle of developing the site for residential purposes is acceptable in terms of all local and national planning policies subject to the imposition of the conditions set out at the top of this report. This specifically includes the provision of on-site greenspace as well as the requirement that the existing sports facilities should be relocated in Leeds and/or local improvements to existing facilities in the locality of the site being provided. As stated within the report, it is the view of officers that the requirements of paragraph 99 of the NPPF have been satisfied but, in the alternative, even if that was not the case, the benefits of the proposal are such that they still justify the grant of planning permission"

42. The report made no reference to Mr Riordan's email of January 2020 nor to the matters considered therein. However, reference was made to it at the meeting of the Panel by Claire O'Keefe speaking on behalf of the objectors. At the meeting Nicole Walker, a legal officer of the Defendant, explained that the Defendant's refusal to list the Site as an asset of community value was being challenged by way of judicial review but reiterated the view that even if the Site were to be regarded as such an asset that would not affect its suitability for housing. It is of note that in the course of the exchanges Cllr Wray asked whether the SAP process was to be regarded as having been "strong enough" to justify the allocation of the Site for housing. Miss Walker responded by explaining the process which had led up to the adoption of the SAP and the fact that the challenge to the SAP had not affected the Site. In that context she said that the allocation of the Site for housing was to be seen as making it "a sound adopted site within the SAP" and that as such the allocation was part of the development plan which was to be the Panel's "starting point" and to which "great weight" was to be attached.

43. As I have already noted the Panel delegated the matter to the Chief Planning Officer for approval with the Decision being made pursuant to that delegation. The permission granted was subject to a number of conditions of which condition 9 is relevant for current purposes and that provided that:

> "Development on the superstructure of the dwellings shall not commence until details of the relocation of the existing sports facilities in Leeds and/or local improvements to existing facilities in the locality of the site have been submitted to and approved in writing by the Local Planning Authority. These details shall include a timetable for their delivery but shall be provided prior to the completion of the 31st dwelling pursuant to this permission.
>
> To provide suitable Greenspace improvements to the area in accordance with the Site Requirements for this SAP allocation. (HG2-84)"

Ground 1: The Contention that the Defendant erred in Law by a Failure to have Regard to LUDP Policy N6.

44. The effect of section 70 of the 1990 Act and section 38 of the 2004 Act is that the local planning authority is to have regard to the development plan and the determination is to be made in accordance with that plan unless material considerations indicate otherwise and that where there is a conflict between policies deriving from documents in the plan of different dates such a conflict is to be resolved in favour of those deriving from the later document in time. A failure to have regard to the development plan will mean that a local planning authority erred in law but where account has been taken of the relevant provisions of the plan the authority's assessment of those provisions will only be challengeable if it is irrational. That is, however, subject to the caveat that the proper meaning of a policy is a matter of law for the courts and that where a policy has been misconstrued caution is required before concluding that such misconstruction did not affect the conclusion reached. Those propositions were not contentious before me and are derived from *City of Edinburgh Council v Secretary of State for Scotland* 1990 SC (HL) 33 per Lord Clyde at 44G – 45B and *Tesco Stores Ltd v Dundee City Council*, [2012] UKSC 13, [2012] 2 P & C R 9 at [17] – [22] per Lord Reed. The assessment as to whether policies in the development plan are in conflict is similarly a matter for the planning judgement of local planning authority and only susceptible to challenge on the ground of irrationality: see the summary of the effect of the relevant authorities made

by John Howell QC sitting as a deputy judge in *R (RWE Npower Renewables Ltd) v Milton Keynes BC* [2013] EWHC 751 (Admin) at [99] – [105]. The question of whether a proposed development accords with the development plan is a matter of planning judgement which is again only subject to a challenge on the ground of irrationality. Moreover, the approach taken to determining that question can be a broad one and does not have to be mechanistic and nor does it require the listing of every policy nor even of every potentially relevant policy in the development plan and the assessment of the proposal against those policies in turn: see per Sir Duncan Ouseley at [102] – [104] in *Safe Rottingdean Ltd v Brighton & Hove CC* [2019] EWHC 2632 (Admin). Nonetheless there does have to be a decision as to whether or not there is compliance with the development plan (see at [109] in the *Safe Rottingdean* case) and "such a step is not just form. Rather, it is an essential part of the decision making process …" (per Patterson J in *Tivot Way Investments Ltd v SSCLG* [2015] EWHC 2489 (Admin) at [27]).

45. The Claimant's contention can be summarised very shortly. It was said that policy N6 was part of the development plan which was relevant to the proposed development and that, therefore, the Defendant was required to have regard to it. The Defendant had not had regard to the policy and had thereby erred in law.

46. As I have already noted Mr Tucker accepted that section 38(5) of the 2004 Act did not provide the answer to this challenge (though it may be relevant to the extent that I have in due course to consider the effect of section 31(2A) of the Senior Courts Act 1981). Mr Tucker accepted that policy N6 was relevant and that as a "counsel of perfection" it should have been mentioned in the Officers' Report. Nonetheless the failure to do so did not, in Mr Tucker's submission, make the Decision unlawful. This was because of the overlap between policy N6, paragraph 99 of the NPPF, and the site requirement in the SAP. The effect of that overlap was that by addressing the site requirement and, more particularly, paragraph 99 the Defendant had addressed the purpose and objectives of policy N6. Mr Tucker said that the differences between paragraph 99 and policy N6 were differences of wording and not of substance such the consideration of paragraph 99 and of the site requirement amounted to consideration of policy N6.

47. In my judgement and for the reasons I will now rehearse the Claimant is correct and by failing to address policy N6 the Defendant failed to have regard to the provisions of the development plan and erred in law.

48. The Officers' Report clearly had no regard to policy N6. Not only was no express mention made of that policy but, significantly, it is absent from the list of retained LUDP policies which are said to be relevant to the proposed development.

49. There is no dispute that policy N6 was part of the development plan. Further than that it was clearly of relevance to the proposed development. Policy N6 related to the development of playing fields and the proposal was for development of a playing field. It was, moreover, for development of a playing field which had been identified as a "protected playing pitch" on the map which accompanied the LUDP. The policy was directly relevant to the proposed development in a way which other policies which were listed were not. The Officers' Report listed a number of retained policies from the LUDP which were said to be relevant to the proposal but the relevance of which was markedly less direct than that of policy N6. Thus policies in respect of landscape design, incidental open space, site boundaries, and others were listed. Those were doubtless

relevant to the proposal in general terms but unlike policy N6 they were not directly relevant to the core debate about the proposal which was whether the playing field should be developed for housing.

50. It is correct that the site requirement and more directly NPPF paragraph 99 covered the same topic as policy N6 and did so in similar terms. However, the differences between them were not just semantic but were instead matters of substance. Properly interpreted policy N6 required a demonstrable net gain in overall pitch quality and provision. That went beyond paragraph 99(b) which would be satisfied by equivalent provision. Moreover, although paragraph 99(b) made reference to replacement provision in a "suitable location" policy N6 in considering the possibility of relocation placed the emphasis on this being "within the same locality of the city". Those were differences of substance. There is also force in the contrast which the Claimant draws between a policy which is part of the development plan and NPPF paragraph 99. As a policy forming part of the development plan N6 had a particular status. The Defendant was required by law not only to have regard to it but also to determine the matter in accordance with it unless it was in conflict with another policy in whose favour the conflict was to be resolved or unless material considerations indicated otherwise. NPPF paragraph 99 was a material consideration to which the Defendant had to have regard but it did not have the same status as a policy which formed part of the development plan.

51. In order to determine the application lawfully the Defendant had to have regard to policy N6. It had to consider that policy and make a judgement as to its interrelation with the SAP and the allocation there of the Site for housing subject to the site requirements. As Miss Wigley QC put it the Defendant had to grapple with the consequences of the policy N6. That was not done and as a consequence the Decision was flawed as a matter of law.

52. Ground 1, accordingly, succeeds. I will consider the other grounds before turning to the question of relief and the effect of section 31(2A) of the 1981 Act.

Ground 3: The Contention that the Defendant failed to have Regard to Material Considerations in respect of NPPF paragraph 99(a) and/or that there was an Irrational Failure to obtain Further Information.

53. As I have explained above the Officers' Report noted the assessment which had led to the SAP and that this was "the most up to date position" and explained why, in the light of the poor quality of the open space at the Site, the officers regarded the provision of open space at the Site as surplus to requirements.

54. The Claimant says that it was not open to the Defendant rationally to conclude that a recognised playing field was surplus to requirements such that the exception in NPPF paragraph 99(a) applied in the circumstances of this matter where there was a deficiency of outdoor sports green space in the Wortley ward and in the absence of a more recent assessment than that of 2011 on which the SAP had been based. It is contended that the error which is said to have been admitted by Mr Riordan in his January 2020 email and the consequence as to the deficiency of outdoor sports green space were material considerations to which the Panel's attention should have been drawn. The Claimant says that by failing to do so the Officers' Report materially misled the Panel.

55. It was accepted that the determination as to whether the paragraph 99(a) exception applied was a matter of planning judgement. Accordingly, it was not susceptible to challenge unless the conclusion reached either was not open to the Defendant acting rationally or had been reached in circumstances where the members of the Panel had been materially misled by the Officers' Report though the Claimant says both that the members had been so misled and that the conclusion was not open to them acting rationally. Similarly it was common ground that in considering whether the report had materially misled the Panel I am to apply the principles summarised by Lindblom LJ in *R (Mansell) v Tonbridge & Malling BC* [2017] EWCA Civ 1314, [2019] PTSR 1452 at [42].

56. The argument which the Claimant advanced founded on Mr Riordan's January 2020 email was misconceived. In that email Mr Riordan firmly expressed the view that the allocation of the Site as housing was unaffected by the question of how the green space at the Wortley Recreation Ground should be characterised. Although there was a deficiency in outdoor sports open space the total amount of green space in the ward was unaltered. The Council was entitled to take the view that the rationale for the allocation of the Site as housing had been unaltered. It was accepted by the Claimant that it is now too late to challenge the allocation made in the SAP. However, the argument as advanced by Miss Wigley was in reality a challenge to that allocation. It was contended that the error and the deficiency of outdoor sports open space were material considerations because they operated to reduce the weight to be given to the allocation in the SAP and/or to increase the value of the Site as outdoor sports open space. I do not accept that they had that effect in circumstances where the allocation formed part of the development plan and where the Panel was in any event considering whether the Site was surplus to requirements for the purposes of paragraph 99(a). In the former respect it is to be remembered that the courts have repeatedly emphasised the public nature of development plans and the need for them to be taken as they stand without attempts to gloss them by means of "forensic archaeology" or investigation of their "provenance and evolution": see *Phides Estates (Overseas) Ltd v SSCLG & others* [2015] EWHC 827 (Admin) at [56] and in particular Lindblom J's reference to the effect of the approach in *Tesco Stores Ltd v Dundee City Council* and *R (TW Logistics Ltd) v Tendring DC* [2013] EWCA Civ 9. It is of note that the error and the deficiency were referred to in the submissions made by Claire O'Keefe at the meeting of the Panel. Even without that these matters were very far from being considerations of such a level of materiality that a failure to refer to them meant that the members of the Panel were being materially misled by the Officers' Report.

57. That leaves the issue of whether it was open to the Defendant rationally to conclude that the Site was surplus to requirements and to do so in the absence of a further assessment.

58. Initially I had reservations as to whether the poor quality of the Site as a playing field could mean that it was surplus to requirements. It might be said that it was necessary to look to the requirements and consider whether they would or would not be adequately met in the absence of the Site. However, on reflection I have concluded that is not the only approach which was open to the Defendant acting rationally. It was open to the Defendant to conclude that a particular playing field was of such poor quality that it added nothing to meeting local need and so was surplus to requirements. Whether in given circumstances that was the conclusion to be drawn and in particular whether it

was the conclusion to be drawn in respect of the Site and without any further assessment were matters of planning judgement.

59. The question then becomes one of whether as a matter of planning judgement the Defendant was rationally able to conclude that the 2011 assessment was sufficient and that the Site could be seen as surplus to requirements. It is to be remembered that the Panel had conducted a site visit and had received representations as to the use of the Site. The conclusions that there was no need for a further assessment and that the Site was surplus to requirements were clearly not the only ones open to the Panel and it may well be that others might have reached different conclusions. Nonetheless the conclusions which were reached were not irrational and were not outside the proper scope of the Defendant's planning judgement.

60. Even if a different view were to be taken such that it was not open to the Defendant in the circumstances to conclude that the paragraph 99(a) exception applied that would not be a basis for the quashing of the Decision. As I will explain below it was appropriate for the Officers' Report to set out a series of alternative or different reasons leading to the same conclusion. The Panel are to be taken to have adopted that reasoning as a whole. In those circumstances the Decision would not fall to be quashed if one of the reasons was flawed provided that one or more of the alternative reasons provided a sound basis for the Decision and provided, as I will explain below, they are truly different such that the flaw in one does not taint the reasoning in the others. As I will explain I am satisfied that it was open to the Defendant to conclude that the paragraph 99(b) exception applied. Indeed the Defendant's reasoning went further than that. The view was taken that even if none of the paragraph 99 exceptions applied the benefits of the proposal were such as to warrant the grant of planning permission. That was a matter of planning judgement and in circumstances where the Defendant had taken account of paragraph 99 and of Sport England's objection it was a conclusion which was open to the Defendant. In those circumstances even if, contrary to my primary conclusion on it, Ground 3 were to be made out it would not form a basis for the quashing of the Decision. That follows not from an application of section 31(2A) of the Senior Courts Act 1981 but from the fact that even if the Defendant's approach in respect of paragraph 99(a) was flawed that did not affect the Decision which was made.

61. The challenge on Ground 3 accordingly fails.

Ground 2: The Contention that the Defendant failed to give adequate Reasons for the Decision.

62. In considering Ground 2 it is necessary to address the questions of whether the Defendant had a duty to give reasons in the circumstances here; whether those reasons could be contained in the Officers' Report; whether the reasons given there were adequately explained; and whether it was permissible for the Defendant to provide alternative reasons for the Decision.

63. The Claimant says that fairness required the Defendant to give reasons in circumstances where there was substantial opposition to the proposal; where there was arguably a failure to comply with the development plan by reason of the failure to comply with policy N6; where the Decision was made despite the objection of Sport England and in circumstances where there was disagreement with Sport England as to whether the

paragraph 99 exceptions applied; where a previous permission had been quashed as unlawful; and where the permission was being granted by the Defendant to itself.

64. The reasons contained in the Officers' Report are said to have been inadequate because a series of alternatives were listed. Miss Wigley contended that this was inadequate because it was not possible to know whether all the members of the Panel who approved the Decision had been doing so for the same reason or reasons or whether the adoption of flawed reasons had tainted the conclusions on other potentially valid reasons. Miss Wigley accepted that she was not able to support her contention that the giving of alternative reasons was necessarily inadequate by reference to authority. However, she said that it flowed as a matter of principle from the nature of the duty to give reasons and that to the extent to which the decision in *R (Fraser) v Shropshire Council* [2021] EWHC 31 (Admin) was authority to the contrary it should be distinguished or not followed.

65. Mr Tucker contended that there was no duty to give reasons in the circumstances of this case but that even if there was such a duty then the Officers' Report provided adequate reasons. The Decision was, he said, to be assumed to have been made for the reasons given in the report in their entirety. Mr Tucker said that the giving of reasons in the alternative was a proper approach and relied in that regard on the approach taken in *Fraser*.

66. HH Judge Klein refused permission on the basis that there was no duty to give reasons in circumstances where the Decision accorded with the officers' recommendation and reflected a major departure from neither the development plan nor from policies of recognised importance.

67. There is no statutory obligation on a local planning authority to give reasons for the grant of planning permission in circumstances such as those here. However, there can be circumstances where in order to act with appropriate openness and fairness toward objectors an authority has to provide reasons. The paradigm example of such a circumstances is where the authority's decision is different from that which was recommended by its officers but that is not the only circumstance in which the duty will arise. In *R (CPRE Kent) v Dover DC* [2017] UKSC 79, [2018] 2 All ER 121 Lord Carnwath (with whom the other members of the Supreme Court agreed) approved the approach which the Court of Appeal had taken in *Oakley v South Cambridgeshire DC* [2017] EWCA Civ 71, [2017] 2 P & C R 4 and said, at [57] – [59]:

> "[57] Thus in *Oakley* the Court of Appeal were entitled in my view to hold that, in the special circumstances of that case, openness and fairness to objectors required the members' reasons to be stated. Such circumstances were found in the widespread public controversy surrounding the proposal, and the departure from development plan and Green Belt policies; combined with the members' disagreement with the officers' recommendation, which made it impossible to infer the reasons from their report or other material available to the public. The same combination is found in the present case, and, in my view, would if necessary have justified the imposition of a common law duty to provide reasons for the decision.
>
> [58] This endorsement of the Court of Appeal's approach may be open to the criticism that it leaves some uncertainty about what particular factors are sufficient to trigger the common law duty, and indeed as to the justification for limiting the duty at all (see the

> perception analysis by Dr Joanna Bell: *Kent and Oakley: A Re-examination of the Common Law Duty to Give Reasons for Grants of Planning Permission and Beyond* (2017) 22 Judicial Review 105-113). The answer to the latter must lie in the relationship of the common law and the statutory framework. The court should respect the exercise of Ministerial discretion, in designating certain categories of decision for a formal statement of reasons. But it may also take account of the fact that the present system of rules has developed piecemeal and without any apparent pretence of overall coherence. It is appropriate for the common law to fill the gaps, but to limit that intervention to circumstances where the legal policy reasons are particularly strong.
>
> [59] As to the change of uncertainty, it would be wrong to be over-prescriptive, in a judgment on a single case and a single set of policies. 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."

68. Lord Carnwath was not setting out an exhaustive list of the circumstances in which the obligations of fairness and openness impose a duty to give reasons. Thus, as explained by Lang J in *R (East Meon Forge & Cricket Ground Protection Association) v East Hampshire DC & others* [2014] EWHC 3543 (Admin) at [108], reasons will normally be required when a planning authority has rejected the views of a statutory consultee. The question of whether reasons need to be given will depend on what is required to ensure openness and fairness in the particular circumstances. The instances identified by Lord Carnwath and Lang J do, however, indicate the type of cases in which the duty can arise. For the duty to arise circumstances akin to those identified are likely to be present.

69. In *South Bucks DC & another v Porter (No2)* [2004] UKHL 33, [2004] 1 WLR 1953 Lord Brown summarised the approach to be taken when considering the adequacy of reasons given in discharge of the duty where such a duty has arisen as follows:

> "35 It may perhaps to help at this point to attempt some broad summary of the authorities governing the proper approach to a reasons challenge in the planning context. Clearly what follows cannot be regarded as definitive or exhaustive nor, I fear, will it avoid all need for future citation of authority. It should, however, serve to focus the reader's attention on the main considerations to have in mind when contemplating a reasons challenge and if generally its tendency is to discourage such challenges I for one would count that a benefit.
>
> 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 "principle 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."

70. In that case the House of Lords was considering the adequacy of the reasons contained in an inspector's decision but it was common ground that the same approach is to be taken to the adequacy or otherwise of the reasons for a decision by a local planning authority: see also per Lord Carnwath in the *CPRE (Kent)* case at [37] – [41].

71. Where the grant of planning permission is by a local planning authority whose members do not follow the recommendations of the officers then a formulated statement of reasons will be needed. Where, however, the grant of permission accords with the officers' recommendations a separate formulated statement of reasons will not normally be necessary. In those circumstances the members are taken to have made their decision for the reasons set out in the relevant officers' report and that report can suffice to satisfy the duty to give reasons. It is, however, important to note that when an officers' report is being relied on as providing the reasons for the relevant decision the approach to be taken in considering the adequacy of the report for that purpose is different from that taken when considering whether the report materially misled the members. That is because in the former instance the report is being considered for a different purpose and in relation to a different audience. Attention then turns to the report's adequacy in explaining the reasons for the decision to those affected by it rather than to the report's adequacy as guidance given to the members of the authority in respect of material considerations and related matters. As Lang J explained in *R (Rogers) v Wycombe DC* [2017] EWHC 3317 (Admin) at [56]:

> "On the authorities, there is a distinction between the latitude which the courts accord to the officers when giving advice to the decision-maker, and the more exacting standards required of decision-makers who are under a statutory duty to give reasons to the public for their decisions. Although paragraph 5.26 met the required standard for advice in an officer report, it did not meet the more exacting standard required for the provision of "proper, adequate and intelligible reasons" on the substantial points raised, as it did not explain why permission had been granted pursuant to Policy C10(e), despite the restriction on development in the Agreement..."

72. The same point was made by Martin Rodger QC sitting as a deputy judge in *R (Gare) v Babergh DC* [2019] EWHC 2041 (Admin) at [41]. In the circumstances of *Rogers* the report met the standard for advice in an officers' report applying the approach derived from *R (Mansell) v Tonbridge & Malling BC* but it did not meet the standard summarised in the *South Bucks* case which was required for it to be an adequate statement of the reasons for the authority's decision. However, even when an officers' report is being considered for the purpose of determining whether it discharges the duty of giving reasons for an authority's decision it is important to guard against "excessive legalism or exegetical sophistication": see per Sir Thomas Bingham MR at 271 in *Clarke Homes Ltd v Secretary of State for the Environment* (1993) 66 P & C R 263. What is required in accordance with the *South Bucks* summary is an explanation of why

the decision was made and of the conclusions reached on the principal contentious issues taking account of the fact that those looking to the report to see the reasons for the decision will be aware of the background circumstances.

73. I am satisfied that the Defendant was obliged to give reasons for the Decision but that duty arose only in one regard and was capable of being discharged by the Officers' Report subject to the adequacy of the reasons given in that report. The Defendant was not departing from the recommendation contained in the Officers' Report and was proceeding on the footing that it was acting in accord with the development plan. I do not underestimate the strength of feeling amongst those in the local community concerned about the future of the Site but the proposal was not a matter of public concern of the kind which would of itself require the giving of reasons. It is apparent that in *R (Cross) v Cornwall Council* [2021] EWHC 1323 (Admin) the extent of public opposition to the proposal was one of the matters causing Tipples J to conclude that a formulated statement of reasons was needed (see at [74]). It was not, however, the only such factor and it is significant that there the decision which was made was contrary to the recommendation of the council's officers. The fact that here the Decision involved the Defendant granting planning permission to itself meant that the matter had to be approached with proper care and appropriate procedural rigour. However, that did not, without more, give rise to a duty to provide reasons for the Decision. The Decision was, moreover, specific to the Site and this is not the type of case where the giving of reasons was required by reason of the need to give an indication of the Defendant's likely future approach to other sites. In this case the significant factor is that in giving permission the Defendant was differing from the firmly expressed and fully reasoned objection of Sport England, a statutory consultee. It was that factor which meant that reasons had to be given for the Decision but those reasons could be contained in the Officers' Report provided that the report satisfied the requirements identified by Lord Brown in the *South Bucks* case.

74. Subject to Miss Wigley's argument as to the impermissibility of alternative reasons I am entirely satisfied that the Officers' Report operated as an adequate statement of the reasons for the Decision. The report made clear the basis on which the Decision had been reached. It was readily apparent which policies had been taken into account and which had not (hence the ability for the Claimant to contend that there had been error in failing to have regard to policy N6). The approach which was being taken to NPPF paragraph 99 and to the objection from Sport England was entirely clear and there would be no scope for the Claimant contending that it had been substantially prejudiced by any inadequacy in the reasons provided.

75. Accordingly, I turn to the argument that it was not permissible for the Defendant to proceed on the footing of giving alternative or different reasons for the conclusion that permission was to be granted.

76. In *Fraser* there was an issue as to whether the proposed development had been in accord with policy MD2 of the applicable development plan. The local planning authority had concluded that it was in accord with that policy but having reached that conclusion it had also considered whether planning permission should be granted even if the contrary interpretation was correct and the development was in breach of policy MD2. Sitting as a deputy judge James Strachan QC found that the approach which had been taken by the planning authority meant that the debate as to the meaning of policy MD2 was academic. He found that the council's interpretation of the policy had been correct but

also found that the council had been entitled to conclude that even if that interpretation was wrong and the proposed development was contrary to the policy it was still appropriate to grant permission. It is apparent that the deputy judge regarded it as legitimate for the planning authority to set out alternative reasons for its conclusion. However, it is to be noted that in that case there does not appear to have been a reasons challenge of the kind made in Ground 2 here let alone a challenge to the propriety of setting out alternative reasons for the final decision. In that case the argument had been that the council's interpretation of the policy was wrong and that the alternative reasons showed that the council had not applied its mind properly to the issues but was instead determined to approve the proposal come what may. It follows that Mr Strachan did not have to address the argument advanced before me by Miss Wigley.

77. I have concluded that the Claimant's argument is misconceived. It was entirely legitimate for the Defendant to adopt a process of alternative reasoning and to set out alternative or different reasons for a single conclusion. It cannot tenably be contended that in doing so there was any failure to discharge the duty to give reasons for the Decision. My reasons for that conclusion can be stated shortly.

78. Coming to a conclusion that a particular decision or course of action is justified on a number of different bases is a commonplace approach whether in legal judgments or in decisions resulting from an exercise of planning judgement or in other decisions of public bodies or, indeed, in many circumstances of private or commercial life. It is a normal and legitimate approach for a decision maker to say that a particular course of action is to be approved or rejected because of conclusion A but that if for some reason conclusion A is erroneous then the same course of action is nonetheless to be approved or rejected as the case may be because of conclusion B or conclusion C. There is no reason why such an approach should not be adopted by a local planning authority nor any basis for saying that the reasons for a decision by such an authority cannot be expressed in that way. There may be cases where the supposedly different routes to a decision are not truly different or not different in a material respect and where an error in one conclusion will taint the other conclusions. However, such a case would not be one of alternative reasoning in the material respects but one where a particular premise formed the basis for all the purportedly different routes and clearly if that premise was invalid then all the conclusions based on it would be tainted by that invalidity. Such reasons would not be alternatives for material purposes. If, however, the purportedly different routes are genuinely different routes to the same conclusion then the approach is a legitimate one. That was the position here with the different reasons for coming to a conclusion contrary to the views of Sport England being clearly expressed.

79. The normal approach where a decision is made in accordance with the recommendation in a report from the planning authority's officers is to proceed on the assumption that the decision was made for the reasons set out in the report with those reasons treated as having been adopted by the members unless there was an indication to the contrary: see the summary of that approach by Lord Carnwath at [48] in the *CPRE (Kent)* case. Here there is no indication to the contrary and so the Panel are to be assumed to have adopted the reasoning set out in the Officers' Report and to have adopted that reasoning in its entirety with all the stages of the alternative reasoning adopted. Miss Wigley contended that this approach was not permissible where some of the different routes to the Decision were, on the Claimant's case, illegitimate. This was because it was not possible to know whether all the members who approved the Decision (which as I have

noted was approved on the chair's casting vote) had based that approval on the same reason nor whether the approval had been based on an illegitimate rather than a legitimate reason with members not in fact adopting all the reasons or proceeding through all the chain of reasoning. I reject that contention. The Panel is to be taken to have adopted the reasoning of the Officers' Report and that adoption must be of the reasoning as a whole. It would be artificial and unnecessary in the absence of a particular indication to that effect to assume that the adoption of the reasoning in the report was anything less than total.

80. In those circumstances although the Defendant had a duty to give reasons for differing from the views of Sport England it is not properly arguable with a real prospect of success that any statement of reasons in addition to that in the Officers' Report was required nor that the reasons contained in that report were not adequate. Accordingly, although for slightly different reasons than he articulated, I am satisfied that Judge Klein was correct to refuse permission and the renewed application for permission is refused.

Ground 4: The Contention that the Officers' Report was materially misleading as to the Satisfaction of the Requirements of NPPF paragraph 99(b) by way of a Condition.

81. In the Officers' Report the members of the Panel were advised that a condition securing the requirements of the SAP would meet the requirements of NPPF paragraph 99(b) so that the exception that paragraph provided to the policy against the development of a playing field was satisfied.

82. The Claimant says that the Officers' Report was materially misleading in this respect and that this had the consequence that the Panel did not have regard to a material consideration. This is because it is said that condition 9 was not effective to secure equivalent or better provision in a suitable location and this is what was necessary for satisfaction of the requirements of paragraph 99(b). The contention was that condition 9 could be satisfied by a token improvement to a nearby sports facility. Moreover, condition 9 did not operate as a *Grampian* pre-commencement condition instead it only came into play on commencement of the superstructure works. That could have the consequence that the playing field could be irredeemably lost before the time came for compliance with the condition. Moreover, there would be no realistic prospect of effective redress let alone reinstatement of the playing field if no adequate reprovision or replacement could be found.

83. Judge Klein refused permission saying that condition 9 would enable the Defendant to exercise significant control of the development of the Site and that thereby it would secure equivalent alternative provision. I agree that this ground is not arguable with any realistic prospect of success though I would place the emphasis a little differently. The Claimant did not suggest that the requirements of paragraph 99(b) or of the SAP could not be met by a suitably worded condition but instead contended that the inadequacy of condition 9 was such that it was materially misleading to suggest that it was sufficient. The adequacy of a condition is very much a matter of planning judgement having regard to the particular circumstances. There is scope for differing views as to the type and rigour of condition required and it has to be remembered that the permission would accrue for the benefit of a subsequent owner so that it could not be assumed that the party needing to comply would be the Defendant. The condition does nonetheless operate to impose significant restrictions on the development of the Site in the absence

of alternative provision. It cannot be said that it was not open to the Defendant to conclude as a matter of its planning judgement that the condition would be adequate nor can it be said that the report was materially misleading in saying that it would have this effect. This ground is not arguable with sufficient prospect of success and I refuse permission. I do so without reference to the Defendant's argument that the point is academic because the Defendant took the view that planning permission was merited even if none of the exceptions contained paragraph 99(b) were satisfied though that is an argument which has considerable force.

Relief.

84. It follows that the Claimant has succeeded in establishing that the Decision was based on an approach which was wrong in law but has not established the other grounds advanced. I turn to the question of the appropriate relief.

85. Section 31(2A) of the Senior Courts Act 1981 provides that:

> "(2A) The High Court—
>
> (a) must refuse to grant relief on an application for judicial review, …
>
> if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred."

86. It is not suggested that the qualification provided for in section 31(2B) where there are reasons of exceptional public interest making it appropriate to disregard the provisions of section 31(2A) applies here.

87. The following arguments operate in favour of the Defendant's contention that section 31(2A) comes into operation to preclude the grant of relief notwithstanding my conclusion in relation to Ground 1:

i) The requirement to refuse relief is mandatory and if it is highly likely that the outcome for the applicant would not have been substantially different then relief must be refused.

ii) Although not in identical terms to policy N6 NPPF paragraph 99(b) covered very similar matters. That was considered by the Defendant and did not lead to a refusal of permission.

iii) The SAP was later in time than N6 and so in the event of conflict is to prevail. In addition the Defendant was bound to give considerable weight to the allocation of the Site for housing in the SAP such that it is not likely that express consideration of policy N6 would have altered the outcome.

iv) Condition 9 operated to ensure that there was provision of replacement facilities and even if policy N6 had been considered the Defendant's approach would have been likely to be one of giving permission with the difference at most being one as to the terms of the condition with scope for question as to whether that would be a difference of substance in the outcome.

v) The rejection of Grounds 2 – 4 means that the scope for criticism of the Decision is limited and the basis for overturning the Decision similarly limited.

88. The following factors operate against the application of section 31(2A):

i) Although the challenge has been upheld on a single and narrow ground it is an important one going to the approach taken as a matter of law.

ii) Condition 9 does not replicate the provisions of policy N6 and can be said to be markedly less demanding than would follow from an application of that policy.

iii) There is a difference, as already noted, between the terms of NPPF paragraph 99(b) and policy N6 and between the weight to be given to them. In those circumstances the court cannot, it is said, be satisfied that the outcome would have been the same if the Panel had been addressing N6 as well as NPPF paragraph 99.

iv) The matter was finely balanced as is demonstrated by the fact that approval came through the chair's casting vote.

v) As Holgate J explained in *Pearce v Secretary of State for BEIS* [2021] EWHC 326 (Admin), [2022] Env L R 4 at [152] – [153] where matters of planning judgement are involved the court has to be conscious of the local planning authority's role as the decision maker and a high threshold has to be surmounted before the court can conclude that it is highly likely that the outcome would not have been substantially different if a lawful approach had been adopted.

89. I have concluded that I cannot be satisfied that it is highly likely that the outcome would not have been substantially different if the Defendant had, as it should have done, had regard to policy N6. Putting matters at the lowest it is at least possible that even if consideration of N6 did not lead to a refusal of permission it could have led to a different approach being taken to the condition or conditions imposed to ensure the provision of replacement playing pitches. It is possible that there would have been a different approach either in respect of the nature of the condition or in respect of the replacement provision which was required to satisfy any such condition. In the circumstances here that would have been a difference of substance in the outcome.

90. It follows that section 31(2A) does not operate to constrain the grant of relief. In the absence of such constraint the position is that the Decision was based on an approach which was wrong in law and it is to be quashed.