Neutral Citation Number: [2014] EWCA Civ 878

Case No: C1/2014/0147

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT
Mr Justice Hickinbottom
[2013] EWHC 3947 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/07/2014

Before :

THE CHANCELLOR OF THE HIGH COURT
LORD JUSTICE RICHARDS
and
LORD JUSTICE CHRISTOPHER CLARKE

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Between :

The Queen (on the application of Hampton Bishop Parish Council)	**Claimant/ Appellant**
- and -	
Herefordshire Council	**Defendant/ Respondent**
and	
(1) Herefordshire Rugby Football Club **(2) Bloor Homes Limited**	**Interested Parties**

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Sasha White QC and **Andrew Byass** (instructed by **Clyde & Co LLP**) for the **Appellant**
Richard Kimblin and **Nina Pindham** (instructed by **Herefordshire Council Legal Services**) for the **Respondent**
Ian Dove QC and **Jack Smyth** (instructed by **Wragge & Co LLP**) for the **Interested Parties**

Hearing date : 17 June 2014

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Approved Judgment

Lord Justice Richards :

1. The broad context of the present case was described in these terms by Hickinbottom J in the judgment under appeal:

> "2. It concerns Hereford Rugby Club's proposal to relocate from their current modest ground on the banks of the River Wye near Hereford City Centre, to an out-of-city ground with all the facilities required by a regional rugby club. The club is amateur, and has no significant funds; and so the proposed development includes nearly two hundred dwellings which will financially enable the new sports facilities to be built. Over half of the new houses will be open market; but 35% will be affordable, i.e. accommodation for households whose needs are not met by the market. On any view, the proposed development is substantial, occupying over 20 hectares. It is not only outside the development boundary for Hereford and in open countryside, it is in an area of orchards, which provide an important local landscape on a route into the city. Once the club has moved, it is proposed to give the old ground to the Council."

2. On 17 September 2012 Herefordshire Council ("the Council") granted outline planning permission to Hereford Rugby Club ("the Rugby Club") for the proposed development, briefly described as a "development of grass and all weather sports pitches, clubhouse, indoor training building, car parking and landscaping supported by enabling residential development of 190 units". The site is about 3 km from Hereford City Centre, on land to the east of Holywell Gutter Lane, Hampton Bishop, in an area for which Hampton Bishop Parish Council ("the Parish Council") is the parish council.

3. The Parish Council brought judicial review proceedings against the Council to challenge the grant of planning permission. The Rugby Club and Bloor Homes Limited, a construction company with a commercial interest in building the housing which forms part of the proposed development, took part in the proceedings as interested parties. In a judgment handed down following a rolled-up hearing, Hickinbottom J granted permission to apply for judicial review but dismissed the substantive claim.

4. The Parish Council now appeals against the judge's order. Permission to appeal was granted by Beatson LJ on limited grounds. In the result there are two issues before this court: (1) whether the Council failed to comply with the duty under section 38(6) of the Planning and Compulsory Purchase Act 2004 ("the 2004 Act") to determine a planning application in accordance with the development plan unless material considerations indicate otherwise; and (2) whether the Council acted in breach of regulation 122 of the Community Infrastructure Levy Regulations 2010 ("the CIL Regulations") in taking into account as a material consideration a planning obligation entered into pursuant to section 106 of the Town and Country Planning Act 1990 ("the 1990 Act") to transfer the Rugby Club's existing ground to the Council for the nominal sum of £1 on completion of the move to the new site.

The facts

5. I propose to summarise the factual material in some detail because, as will appear in due course, it is central to the resolution of the issues.

6. The Rugby Club lodged its application for planning permission in November 2010. The application was supported by a planning statement and an environmental statement. It was based at that time on 250 enabling residential units. No reference was made to the Rugby Club's existing ground being transferred to the Council once the club had moved to the new site.

7. The application was the subject of major revisions in July 2011, including a reduction in the number of residential units from 250 to 190, 35% of which would be affordable housing. The revised proposal was supported by an addendum planning statement.

8. A lengthy planning officer's report ("the first report") was prepared for the purposes of a meeting of the Council's Planning Committee on 31 August 2011 at which the application was due to be considered.

9. Section 6 of the first report gave the officers' appraisal of the proposal. As part of that, it stated at paragraph 6.10 that the starting point for consideration of the development proposals was the adopted development plan, namely the Herefordshire Unitary Development Plan ("the UDP") and the Regional Spatial Strategy for the West Midlands. I can focus on the UDP since nothing turns on the provisions of the Regional Spatial Strategy.

10. Consideration was given first to the UDP policies in respect of housing:

> "6.12 The UDP policies in general are aimed at strictly controlling new development outside of the defined settlements, the presumption being that such development should only be permitted in exceptional circumstances where specific criteria are met. In this instance, Policy H1 stipulates that any new housing within Hereford and the market towns should be restricted to within the defined settlement boundary whilst Policy H7 defines the criteria under which new housing can be permitted in open countryside. However, this policy is primarily geared towards smaller scale developments such as new farm workers dwellings or conversion of rural buildings rather than large scale residential developments such as this. The development is therefore contrary to the relevant housing policies within the UDP."

11. The report referred next to the UDP policies concerning sport and recreational facilities. It said that Policies RST1 and RST10, in particular, were relevant. Policy RST1 set criteria against which new sport and recreational development should be assessed, and confirmed that such development could be permitted in the countryside but only where the countryside was the primary resource for the proposal, which was not the case here. Policy RST10, however, allowed for major sports facilities on the edge of Hereford where they were meeting identified regional or sub-regional needs; it required such schemes to be acceptable in terms of their environmental impact and

that they be located in a sustainable and accessible location; and it was also subject to the requirement that it be demonstrated that there were no suitable sites available within the urban area to accommodate development. Having examined the question of suitable alternative sites within and around the city, including the availability and viability of such alternatives, the report stated:

> "6.24 The site lies in open countryside where the adopted UDP policies [seek] to control large scale new residential development and only permit large scale sports developments where a regional or sub-regional need is demonstrated. There are many sequentially preferable sites within and around the city that could accommodate either the development as a whole or the development in its disaggregated form but none of these sites would provide the required opportunity to develop the club's facilities due to their financial circumstances. This consideration should not override longstanding land use considerations. The principle of development is therefore contrary to adopted policy.
>
> …
>
> 6.26 Section 38 of the Planning and Compulsory Purchase Order Act 2004 stipulates that all development should be considered in accordance with adopted policy unless material considerations indicate otherwise. This report will now consider the other planning considerations and whether they are sufficient to outweigh the normal policies which control new development in the open countryside."

12. Traffic, access and accessibility issues were examined and were considered acceptable. Examination of landscape and visual impacts, however, led to the conclusion at paragraph 6.56 that the development would be contrary to the requirements of Policy LA2 of the UDP (which provided that proposals for new development that would adversely affect either the overall character of the landscape or its key attributes or features would not be permitted). It is apparent from a later passage in the report that the development was also considered to be contrary on landscape grounds to Policy LA3 (which provided that development outside built up areas which was acceptable in terms of other UDP policies would only be permitted where it would not have an adverse effect upon the landscape setting of the settlement concerned) and to Policy S7 (which related to natural and historic heritage). Consideration was then given to a range of other matters, none of which was found to give rise to serious concerns, though it was noted that there would be an adverse impact on biodiversity at least in the short term (which, as appeared later, was considered to be contrary to Policy NC6). There was also a discussion of the proposed agreement under section 106 of the 1990 Act, which at that stage included no provision in respect of the Rugby Club's existing ground.

13. In a concluding section (paragraphs 6.150-6.156), the report repeated that the policies within the UDP were the relevant tests against which the development had to be judged; summarised the points already considered in detail; and concluded that although there were a number of positive elements to the development which could be

given significant weight, on balance they were not considered sufficient to outweigh the significant negative landscape and visual impacts and the associated conflict with adopted policy requirements. It was therefore recommended that the application be refused for the reason that, in summary, it was contrary to Policies LA2, LA3, H7 and RST10 (to which list were added Policies S7 and NC6 at the meeting on 31 August 2011).

14. An update prepared after the first report but circulated before the meeting on 31 August recorded that the Rugby Club had offered to transfer the existing ground to the Council for £1.

15. At the meeting of the Planning Committee on 31 August the application was described as being "finely balanced between the requirements of the Unitary Development Plan policies and the housing needs of the County". Members resolved, contrary to the recommendation in the first report, that officers acting under delegated powers be authorised to issue planning permission in respect of the proposed development, subject to conditions considered necessary by officers and subject to (1) there being no further representations or consultations raising new material planning considerations by the end of the amended plan consultation period, (2) the resolution of an outstanding objection from Natural England, (3) the resolution of other issues identified in the officer's appraisal, and (4) the completion of a section 106 planning obligation in accordance with the matters raised in the officer's appraisal and any additional matters considered necessary by officers.

16. In the event, however, planning permission was not granted pursuant to that resolution. On 27 June 2012 the application was brought back before the Planning Committee in order to draw members' attention to various points of updating and in particular to give them an opportunity to consider whether the newly introduced National Planning Policy Framework ("the NPPF") materially changed the planning policy considerations.

17. A further officer's report ("the second report") was produced for the purposes of the meeting. The officer's appraisal commenced with the observation that the competing factors to be assessed resulted in "a very finely balanced decision". Among matters noted by way of update were that Natural England had withdrawn their objection and that a section 106 agreement had been agreed by all parties and was awaiting signature. The agreement included provision for "Freehold transfer of Hereford Rugby Club's existing grounds and buildings to the Council at no cost upon completion of their new facilities". It also included a full ecological management plan.

18. The report stated that there had been two other notable changes since previous consideration of the application by the Planning Committee. One was the introduction of the NPPF:

> "7.14 At the heart of the NPPF is a general presumption in favour of sustainable development and applications for housing should be considered in this context. It has previously been accepted that the development can be regarded as sustainable in terms of its location, accessibility, design and construction standards to be achieved. However, this presumption does not

> override normal, site specific planning considerations and the need to comply with the relevant Unitary Development Plan policies where they are consistent with the NPPF. In this regard, the site remains contrary to policy H7 being located in the open countryside.
>
> 7.15 Whilst the additional documents such as the design code and ecological management plan do go some way to mitigating the negative impacts of the development, in your officer's opinion, the loss of orchard and adverse visual and landscape impact of the development cannot be fully mitigated and therefore the development remains in conflict with the UDP policies listed in 7.13 above [i.e. those identified in the first report] …."

19. The other, related change was the publication of the Council's latest Annual Monitoring Report which included an analysis of the current supply of deliverable housing land. The point made in relation to that was that the NPPF required local planning authorities to identify a five year supply of housing, with an additional 5% buffer, to ensure choice and competition in the market for land; the Council currently had a shortfall; and the need for the Council to provide for additional deliverable housing sites was therefore more explicit than was the case previously and had to be considered a material consideration in favour of the development.

20. The report had a concluding section broadly similar to that of the first report but with a number of additional points. It factored in references to the NPPF, noting that the sustainability of the development and the delivery of additional housing should be given particular weight. It also observed that the transfer of the Rugby Club's existing site to the Council would be a significant sport and community asset for the benefit of the city. It ended with a recommendation that planning permission be refused for the following reason:

> "The site is within open countryside outside of the settlement boundary for Hereford as defined by the adopted Herefordshire Unitary Development Plan (UDP). The residential element of the development does not satisfy any of the exception criteria within policy H7 and the presumption against new housing development within the open countryside therefore applies. UDP policy RST10 only permits major sports facilities on the edge of Hereford where they are acceptable in terms of their environmental impact. It is considered the development will be visually intrusive, will result in the permanent loss of a significant area of orchard which is a Biodiversity Action Plan habitat, and will adversely erode the landscape character of the site and setting of the city. As such the development is contrary to policies S7, LA2, LA3, NC6, H7, and RST10 of the UDP. The requirements of the National Planning Policy Framework are not considered sufficient to outweigh the conflict with adopted policies."

21. The minutes of the meeting of the Planning Committee on 27 June 2012 show that there was considerable discussion of the UDP policies referred to in the officer's reports. Members making comments in support of the application considered that there was in fact compliance with various of the policies in question. One of the members then moved that the application be approved contrary to the officer's recommendation, identifying policies that supported the application. The debate continued. Towards the end the member who had moved the motion confirmed the following, which therefore became the basis on which the motion was moved:

> "That he accepted that by approving the application the application would be considered as a departure from Policy H7 of the UDP, but that this was justified through the NPPF, through the provision of affordable housing and the lack of a five year housing land supply.
>
> That the application conformed to the criteria as set out in policies LA2 and LA3 of the UDP as it would not adversely affect the landscape setting and character due to the comprehensive Ecological Management Plan and layout.
>
> That in respect of policy RST10, the environmental impact was deemed as acceptable with any concerns outweighed by the provision of regional sporting facility on a suitable, viable and affordable site. This was reiterated through the withdrawal of an objection by Natural England.
>
> That the proposed Ecological Management Plan and the withdrawal of Natural England's objection addressed Policies S7 and NC6.
>
> That he adopted the reasoning on the other planning issues as set out in the report."

The motion was carried by 14 votes to 4.

22. There followed, on 17 September 2012, the completion of the section 106 agreement and the formal grant of planning permission pursuant to the Planning Committee's resolution.

23. The grant contained two and a half pages of summary reasons for approval. It said that regard had been had *inter alia* to the NPPF and numerous listed policies of the UDP. It referred to the fact that the site lay in open countryside and the development did not satisfy any of the exceptions listed in Policy H7, so that approval was a departure from the requirements of the policy. It then said that "the following material planning considerations were given weight in departing from Policy H7". The matters that followed included:

    i) Regard had been had to the requirements of section 6 of the NPPF and the need to consider housing applications in the context of a presumption in favour of sustainable development.

ii) The was a need for new sports facilities and there were no suitable sites within the urban area to accommodate the facilities. The environmental impact of the proposed facilities was acceptable, and the site was readily accessible by a choice of means of transport as required by Polices S8 and RST10. The community health and well-being benefits that the facilities would offer would meet the aims of section 8 of the NPPF.

iii) The visual and landscape impact of the development on the site and the setting of the city was acceptable in accordance with Policies S7, LA2 and LA3. The ecological management plan ensured that the development was also compliant with Policy NC6.

iv) The matters secured through the section 106 agreement, including the safeguarding of additional publicly owned sports and recreation facilities, were material considerations in favour of the development.

v) It had been determined that the development would not have any likely significant effect on the Special Area of Conservation, meeting the requirements of Policy S7 and the Habitats Regulations.

vi) In various other respects the proposal was considered to comply with UDP policies and the NPPF. Reference was made in particular to Policies T8, DR4, DR5 and DR7.

24. The summary of reasons concluded, in its last substantive paragraph:

> "In summary, the approval of the development is a departure from Herefordshire Unitary Development Plan Policy H7. However, having regard [to] the requirements of the National Planning Policy Framework and its presumption in favour of sustainable development, compliance with other Herefordshire Unitary Development Plan policies and particularly the creation of new sports facilities meeting an identified need, the delivery of additional housing and affordable housing in the context of current shortfall in the Council's deliverable housing land, the sustainability of the development and the sustainable location of the site, the provisions of the planning obligation and the acceptable environmental, landscape and biodiversity impact of the proposals, the development is considered acceptable."

The first issue: the application of section 38(6) of the 2004 Act

25. By section 70(2) of the 1990 Act, in dealing with an application for planning permission local planning authorities must have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations. Section 38(6) of the 2004 Act provides that if regard is to be had to the development plan for the purpose of any determination, the determination must be made in accordance with it unless material considerations indicate otherwise.

26. The correct general approach to the application of section 38(6) was set out by Lord Clyde in *City of Edinburgh Council v Secretary of State for Scotland* [1997] 1 WLR

1447, by reference to a corresponding section of the Scottish legislation (section 18A of the Town and Country Planning (Scotland) Act 1972). Lord Clyde stated that the section "has introduced a priority to be given to the development plan in the determination of planning matters" (1458B); in a speech agreeing with him, Lord Hope referred to it as introducing a "presumption in favour of the development plan" (1449H). Lord Clyde went on to describe what this meant in practice. The passage (at 1459D-G) has been cited frequently but it bears repetition:

> "In the practical application of section 18A it will obviously be necessary for the decision-maker to consider the development plan, identify any provisions in it which are relevant to the question before him and make a proper interpretation of them. His decision will be open to challenge if he fails to have regard to a policy in the development plan which is relevant to the application or fails properly to interpret it. He will also have to consider whether the development proposed in the application before him does or does not accord with the development plan. There may be some points in the plan which support the proposal but there may be some considerations pointing in the opposite direction. He will require to assess all of these and then decide whether in light of the whole plan the proposal does or does not accord with it. He will also have to identify all the other material considerations which are relevant to the application and to which he should have regard. He will then have to note which of them support the application and which of them do not, and he will have to assess the weight to be given to all of these considerations. He will have to decide whether there are considerations of such weight as to indicate that the development plan should not be accorded the priority which the statute has given to it. And having weighed those considerations and determined these matters he will require to form his opinion on the disposal of the application …."

27. Lord Clyde referred next to a suggestion by counsel for the Secretary of State that in the practical application of the section two distinct stages should be identified, namely (1) the decision-maker should first decide whether the development plan should or should not be accorded its statutory priority; and (2) if he decides that it should not be given that priority, it should be put aside and attention concentrated upon the material factors which remain for consideration. Lord Clyde commented as follows on that suggestion (at 1459H-1460C):

> "But in my view it is undesirable to devise any universal prescription for the method to be adopted by the decision-maker, provided always of course that he does not act outwith his powers. Different cases will invite different methods in the detail of the approach to be taken and it should be left to the good sense of the decision-maker, acting within his powers, to decide how to go about the task before him in the particular circumstances of each case. In the particular circumstances of the present case the ground on which the reporter decided to

> make an exception to the development plan was the existence of more recent policy statements which he considered had overtaken the policy in the plan. In such a case as that it may well be appropriate to adopt the two-stage approach suggested by counsel. But even there that should not be taken to be the only proper course. In many cases it would be perfectly proper for the decision-maker to assemble all the relevant material including the provisions of the development plan and proceed at once to the process of assessment, paying of course all due regard to the priority of the latter, but reaching his decision after a general study of all the material before him. The precise procedure followed by any decision-maker is so much a matter of personal preference or inclination in light of the nature and detail of the particular case that neither universal prescription nor even general guidance are useful or appropriate."

28. That passage was evidently not intended to qualify Lord Clyde's earlier observations about the general approach required by the section. It is up to the decision-maker how precisely to go about the task, but if he is to act within his powers and in particular to comply with the statutory duty to make the determination in accordance with the development plan unless material considerations indicate otherwise, he must as a general rule decide at some stage in the exercise whether the proposed development does or does not accord with the development plan. I say "as a general rule" because there may be exceptional cases where it is possible to comply with the section without a decision on that point: I have in mind in particular that if the decision-maker concludes that the development plan should carry no weight at all because the policies in it have been overtaken by more recent policy statements, it may be possible to give effect to the section without reaching a specific decision on whether the development is or is not in accordance with the development plan. But the possibility of exceptional cases should not be allowed to detract from the force of the general rule.

29. Our attention was drawn to a number of later authorities which for present purposes do not add materially to the principles set out in the *City of Edinburgh* case. It may be helpful, however, to mention two of them. In *R v Rochdale Metropolitan Borough Council, ex p. Milne* [2001] JPL 470, at paragraph 50, Sullivan J (as he then was) emphasised that it is enough that the proposal accords with the development plan as a whole; it does not have to accord with each and every policy therein. In *Tesco Stores v Dundee City Council* [2012] UKSC 13, [2012] PTSR 983, at paragraph 22, Lord Reed JSC observed that "Where it is concluded that the proposal is not in accordance with the development plan, it is necessary to understand the nature and extent of the departure from the plan which the grant of consent would involve in order to consider on a proper basis whether such a departure is justified by other material considerations".

30. The relevant principles were not affected by the introduction of the NPPF. That document refers in terms, at paragraphs 11-13, to section 38(6) of the 2004 Act and states that the NPPF does not change the statutory status of the development plan as the starting point for decision making: proposed development that accords with an up-to-date local plan should be approved, and proposed development that conflicts should be refused unless other material considerations indicate otherwise. It states

that the NPPF constitutes guidance for local planning authorities and decision-makers both in drawing up plans and as a material consideration in determining applications. Whilst it is clear from other passages that the policies in the NPPF may affect the *weight* to be given to policies in the development plan, the duty to determine applications in accordance with the development plan unless material considerations indicate otherwise remains the same.

31. Consideration of the section 38(6) issue in the court below appears to me to have become over-elaborate. The judge understood Mr White QC, for the Parish Council, to be arguing for a two-stage process of the kind suggested by counsel for the Secretary of State in the *City of Edinburgh* case. I think that that was a misunderstanding on the judge's part. It led to a detailed analysis in the course of which the judge referred to the passages of the NPPF concerning housing provision as an example of "how, in a more complex planning application such as this, it is difficult if not impossible to keep policies and thus material considerations found within the parameters of the development plan separate from material considerations found outside it" (paragraph 127). In my view that observation needs to be viewed with caution: I acknowledge the practical problem but I think that even in a complex case it is necessary, in order to give proper effect to section 38(6), to keep firmly in mind the distinction between development plan policies and other material considerations (including considerations that affect the weight to be given to the development plan policies).

32. The judge went on to cite the passage from Lord Clyde's speech in the *City of Edinburgh* case in which the particular two-stage process suggested by counsel for the Secretary of State was rejected. He said that that passage provided a conclusive answer to Mr White's submission, which of course it would have done if that had been the submission Mr White was making. Then, in further reference to the same passage from Lord Clyde's speech, he said this (at paragraph 129):

> "Whilst of course they must (i) identify and engage with the relevant policies in the development plan, properly understood and considered as a whole and (ii) pay proper regard to the statutory priority given to the development plan, there is no legal or practical requirement for planning decision-makers specifically to determine whether a development proposal is or is not in accordance with the development plan."

33. I respectfully disagree with a proposition formulated in those terms. It will be clear from what I have said above that in my view compliance with the duty under section 38(6) *does* as a general rule require decision-makers to decide whether a proposed development is or is not in accordance with the development plan, since without reaching a decision on that issue they are not in a position to give the development plan what Lord Clyde described as its statutory priority. To use the language of Lord Reed in *Tesco Stores v Dundee City Council* (see paragraph 29 above), they need to understand the nature and extent of any departure from the development plan in order to consider on a proper basis whether such a departure is justified by other material considerations.

34. Whilst I have indicated my concerns about those aspects of the judgment below, I do not think that the appeal on the section 38(6) issue turns on them. Mr White's

essential submission to this court is that because of a failure in the officer's reports to set the issues clearly within the framework of section 38(6), the members of the Planning Committee did not have in mind the importance of the development plan and the priority to be given to it; they did not distinguish between the development plan and material considerations; they were utterly confused. Whether that submission is correct can be determined by reference to the factual material in the case (the officer's reports, the minutes of meetings and the summary reasons for granting planning permission) without the need for more refined analysis. I have summarised the relevant material at some length earlier in this judgment. In my judgment it shows Mr White's submission to be unfounded.

35. The officer's first report (see paragraphs 8-13 above) spelled out in paragraph 6.10 that the development plan was the starting point for consideration of the proposal and identified the UDP as a key part of the development plan. It then considered the application of the UDP policies concerning housing and sport and recreation, concluding at the end of paragraph 6.24 that the principle of development "is therefore contrary to adopted policy". This was followed by the statement at paragraph 6.26 that section 38 of the 2004 Act "stipulates that all development should be considered in accordance with adopted policy unless material considerations indicate otherwise" and that the report would go on to consider whether other planning considerations were sufficient to outweigh the normal policies controlling new development in the countryside. To my mind, that was more than enough to make clear to members the importance of the development plan and the statutory priority to be accorded to it by section 38(6) – matters with which all or most of them can be expected to have been familiar already. The remainder of that section of the report did nothing to undermine that basic message. It examined a number of other relevant UDP policies, finding an additional conflict with the landscape policies in particular, and a variety of other material considerations. The concluding section repeated that the UDP policies were the relevant tests against which the development had to be judged, that the development was contrary to a number of those policies, and that other elements were not considered sufficient to outweigh the negative landscape and visual impacts and the associated conflict with policy requirements. The whole exercise involved a proper application of section 38(6).

36. The second report (see paragraphs 17-20 above) built on the first report, drawing attention to updates and new points. Again it put the development plan at the forefront of the exercise, whilst recognising that the NPPF and the shortfall from a five year supply of housing provided material considerations in favour of the development. This appears very clearly from the reason why it was recommended that planning permission be refused. The stated reason identified various conflicts with the UDP policies and concluded: "As such the development is contrary to policies S7, LA2, LA3, NC6, H7 and RST10 of the UDP. The requirements of the National Planning Policy Framework are not considered sufficient to outweigh the conflict with adopted policies". That was a straightforward application of section 38(6) and cannot have left members in any doubt about the approach they were required to follow.

37. The minutes of the Planning Committee on 27 June 2012 (see paragraph 21 above) show that members understood perfectly well the importance of the UDP policies. In the case of several of those policies, however, the majority disagreed with the

officer's assessment that the development would not be in compliance with them. That was a planning judgment properly open to them, as Mr White had to accept in this court. Members did agree with the officer's assessment that the development would be contrary to Policy H7, the key policy in respect of new housing in the countryside, and that the development would in that respect be a departure from the development plan. The departure was considered to be outweighed by the NPPF and other considerations. In all of this one sees the general approach of the officer's reports carried through into the decision-making process, albeit with a difference of planning judgment on the question of compliance with certain of the policies.

38. The views of the majority at the meeting were then reflected in the summary reasons given in the grant of planning permission itself (see paragraphs 22-23 above). The summary acknowledged the departure from Policy H7 but identified "material planning considerations" to which weight was given and in the light of which the development was considered acceptable.

39. The one respect in which the summary may be open to criticism is in referring to instances of compliance with other UDP policies as "material planning considerations" to be given weight in departing from Policy H7. Mr White relied in that respect on a passage in the judgment of Kenneth Parker J in *Colman v Secretary of State for Communities and Local Government* [2013] EWHC 1138 (Admin), at paragraph 23. In rejecting an argument that certain benefits would always constitute a material consideration relevant to the grant of permission and should therefore be "read into" the relevant policies of the development plan, Kenneth Parker J said this:

> "… it is a fundamental and long established principle of planning law that something identified as a 'material consideration' (such as the putative economic and environmental benefit in the present context) is conceptually distinct from considerations identified in the development plan and does not *ceteris paribus* carry the same weight as an aim or consideration identified in the development plan itself. It is, therefore, essential, both analytically and in policy terms, to separate objectives or considerations specifically set out in the development plan from something else than can count only as another 'material consideration'."

40. In my view that passage does not give Mr White much help. It would obviously have been better for the summary reasons in this case to draw a clearer separation between the UDP policies and other material considerations. I do not accept, however, that the way in which the UDP policies were dealt with evidences any real confusion on the part of the Planning Committee as to the approach required under section 38(6). What was being said in substance (reflecting what had been said at the meeting on 27 June 2012) was that the proposed development complied with all the relevant UDP policies except Policy H7 and that the departure from Policy H7 was justified by material considerations.

41. Surprisingly, neither Mr Kimblin nor Mr Dove QC, appearing respectively for the Council and for the interested parties, was willing to be pinned down on whether the members of the Planning Committee decided that the proposed development was in accordance with the development plan or whether they decided that it was not in

accordance with the development plan. I do not know why they were so cautious on that point. The court can operate only on the basis of the material before it, and on that basis it seems to me that the members decided that the proposed development was *not* in accordance with the development plan. There was no suggestion that this was a case where development plan policies pulling in different directions required a potentially difficult overall judgment to be made as to whether the development accorded or did not accord with the development plan as a whole (cf. *R v Rochdale Metropolitan Borough Council, ex p. Milne*, cited above). Policy H7 stood out as a key policy. It meant that the building of 190 residential units in open countryside was a major departure from the development plan. The members put this at the forefront of their reasons. I have no difficulty in concluding that they decided on account of it that the development was not in accordance with the development plan but they considered that the departure from the development plan was justified by other material considerations.

42. Even if I were wrong about that, it would make no practical difference to the outcome. On any view, the members found that the only departure from the development plan was in relation to Policy H7, which they took fully into account. That was the sole (but obvious) basis on which the proposed development could be found not to be in accordance with the development plan. The only alternative logically open to them was that the proposed development was in accordance with the development plan taken as a whole, i.e. setting the fact of compliance with various UDP policies against the fact of non-compliance with Policy H7. As I have said, there is nothing to suggest that members followed that approach. Had they done so, however, it would necessarily have led them in the circumstances to the same ultimate decision, that planning permission should be granted.

43. In conclusion on this issue, I am satisfied that the members of the Planning Committee approached their decision in the way required by section 38(6) and were not in a state of confusion as submitted by Mr White. If there was an error in the formulation of their summary reasons for the grant of planning permission, it was not material.

The second issue: the transfer of the Rugby Club's existing ground to the Council

44. In my account of the facts I have explained that one of the planning obligations entered into under section 106 of the 1990 Act was for the transfer of the Rugby Club's existing ground to the Council for £1 on completion of the move to the new site. That proposed obligation was taken into account by the Council as a material consideration weighing in favour of the grant of planning permission. The issue here is whether the Council thereby acted in breach of regulation 122 of the CIL Regulations.

45. Regulation 122 provides:

> "122(1) This regulation applies where a relevant determination is made which results in planning permission being granted for development.

> (2) A planning obligation may only constitute a reason for granting planning permission for the development if the obligation is –
>
> (a) necessary to make the development acceptable in planning terms;
>
> (b) directly related to the development; and
>
> (c) fairly and reasonably related in scale and kind to the development.
>
> (3) In this regulation –
>
> 'planning obligation' means a planning obligation under section 106 of TCPA 1990 and includes a proposed planning obligation …."

I have omitted the elaborate definition of "relevant determination". It is common ground that the decision to grant planning permission in this case was a relevant determination.

46. Regulation 122 can be seen in part as a codification of principles developed in the case law. For example, in *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, 770A-B, Lord Keith of Kinkel stated the position as follows:

> "An offered planning obligation which has nothing to do with the proposed development, apart from the fact that it is offered by the developer, will plainly not be a material consideration and could be regarded only as an attempt to buy planning permission. If it has some connection with the proposed development, which is not de minimis, then regard must be had to it."

A classic example of an offer that cannot properly be taken into account as a material consideration was given by Staughton LJ in *R v Westminster Council, ex p. Monahan* [1990] 1 QB 87, 122C, namely that of a developer who wishes to erect an office building at one end of the town and offers to build a swimming-pool at the other end, which Staughton LJ described as being little different from offering the planning authority a cheque so that it can build the swimming-pool for itself provided the developer has permission for his office development. In such a case, as Lord Collins of Mapesbury JSC indicated in *R (Sainsbury's Supermarkets Ltd) v Wolverhampton City Council* [2010] UKSC 20, [2011] 1 AC 437, paragraph 70, there is no real connection between the benefits and the development. In the same passage, however, Lord Collins made clear that off-site benefits which are related to or are connected with the development will be material.

47. Mr White's primary submission is that the obligation to transfer the existing ground to the Council was not "directly related to the development" within the meaning of paragraph (2)(b) of the regulation. The development would be several kilometres away from the existing ground. The users of the development would have no

continuing connection with the ground. The obligation related simply to the transfer of the freehold interest in the ground to the Council, with no restriction on use. There were representations in support of the continued use of the existing ground for sports but it was not said that the Council needed to take on ownership of the ground for that purpose or that the mere transfer of ownership to the Council would achieve that result. The Rugby Club itself did not argue that the transfer was necessary in order to secure the future of the ground. The transfer proposal had formed no part of the Rugby Club's original application for planning permission but emerged, in a way that has never been explained, between the date of the planning officer's first report (with its strong recommendation against the grant of planning permission) and the first meeting of the Planning Committee.

48. In holding that the obligation in the present case was directly related to the development, the judge said this:

> "30. … In this case, the existing ground was of course some distance away from the Site, and the development of the existing ground formed no part of the planning application. However, the future use of that ground was nevertheless in play. Sport England had stressed the importance of the existing ground not being lost as a public amenity …, as had the Council's own Parks & Countryside Manager …. The whole purpose of the proposed development is to enable the Rugby Club to relocate to the new development, once complete. It will then have no need for its existing ground at all, and will vacate it. In those circumstances, it was perfectly proper for the Planning Committee to consider the future use of that land, as a material consideration for the proposed development. Placing the existing ground into the responsible ownership of a body which would be able to secure the continued use and operation of the ground as a public amenity, namely the Council, was in the public interest; and, on the unusual facts of this case, was clearly 'directly related' to the development."

49. At paragraph 31 the judge rejected Mr White's criticisms of the circumstances in which the offer to transfer the existing ground arose. He said that there was no evidence or basis for any suggestion of anything sinister or unlawful; only a local authority doing its duty and looking after the public interest; and a rugby club, having no use for its existing ground once its new facilities were available to it, being willing to gift that ground to the Council for continued public benefit. At paragraph 32 the judge gave reasons for rejecting Mr White's reliance on the absence of a restriction on the use of the ground following transfer as indicative that the transfer was a gift of potentially valuable land near the city centre with a view to "buying" planning permission. The judge did not consider such a restriction on use to be necessary or appropriate, pointing *inter alia* to the fact that the use of the existing ground as playing fields was protected by the UDP and that the location of the ground within a functional floodplain meant that it could not be used for higher value development in any event.

50. In my view the judge was right, for the reasons he gave, to reject Mr White's various submissions and to find that the transfer obligation was directly related to the

development. The heart of the matter, as it seems to me, is that the existing ground was going to be released as a direct result of the development for which planning permission was being sought. The future use of the ground was therefore one of the land use consequences of the very decision that the Council was taking. The continuation of the ground's existing use for sport and recreation might have been a practical likelihood in any event but the transfer to the Council, even without restriction, would help in practice to safeguard that outcome. All this is far removed from "buying" planning permission. It fits comfortably within the requirement that the planning obligation be directly related to the development.

51. Mr White had a secondary argument, though not developed in his oral submissions, that the obligation to transfer the existing ground to the Council was not "necessary to make the development acceptable in planning terms", within paragraph (2)(a) of regulation 122. He says that officers did not advise members about the terms of the regulation or advise them that the obligation as to transfer of the existing ground was necessary, nor is there evidence that members concluded that it was necessary.

52. The judge accepted (in paragraph 37 of his judgment) that it would have been helpful if the officer's reports and the members' summary reasons had been explicit about the requirements of regulation 122, but he said that there was no evidence that the Planning Committee failed to approach their decision on a proper basis. The judge drew particular attention to the fact that the decision whether to grant planning permission was finely balanced, observing that "It can be said that, in this finely balanced matter, with the Section 106 obligations as agreed, the proposal was acceptable in planning terms; and, without them, as it stood it would not have been". It is of course impossible to isolate the weight actually placed by the Planning Committee on the obligation to transfer the existing ground to the Council: Mr White's skeleton argument described it as playing "a major part" in the members' decision, which does not sit happily with his argument that the obligation was not necessary to make the development acceptable. But it plainly did weigh in the balance as one of the material considerations justifying a departure from Policy H7. In my judgment, again in agreement with the judge, the conclusion can and should be drawn that the obligation was necessary to make the development acceptable.

53. If and in so far as Mr White intended to maintain other points that were referred to in his written material but were not developed orally (I have in mind, in particular, an argument that the obligation to transfer the existing ground to the Council did not comply with paragraph (2)(c) of regulation 122, and an argument that it was perverse of the Council to require the obligation), in my view they were not covered by the grounds of appeal for which permission was granted and were not points of any substance in any event.

Conclusion

54. For the reasons given I would dismiss the appeal.

Lord Justice Christopher Clarke :

55. I agree.

The Chancellor of the High Court :

56. I also agree.