Neutral Citation Number: [2017] EWHC 467 (Admin)

Case No: CO/4110/2016

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/03/2017

Before :

MR JUSTICE DOVE

- -

Between :

Carolyn Brown (an officer of the Hanwell Community Forum)	**Claimant**
- and -	
London Borough of Ealing	**Defendant**
- and -	
Queens Park Rangers Holdings Limited	**Interested Party**

- -
- -

Marc Willers QC & Justine Compton (instructed by **Richard Buxton**) for the **Claimant**
Stephen Whale (instructed by **Solicitor for the London Borough of Ealing**) for the **Defendant**
Reuben Taylor QC (instructed by **Withers LLP**) for the **Interested Party**

Hearing date: 21st February 2017

- -

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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MR JUSTICE DOVE

Mr Justice Dove :

Introduction

1. This is an application for judicial review of a planning permission granted by the defendant to the interested party on 2nd June 2016, following the defendant's planning committee's resolution to grant the application on 16th September 2015. The application and the planning permission granted consent for development described as:

> "Redevelopment of the site, following demolition of the existing buildings, to provide a first team training and academy facility for Queen's Park Rangers Football Club, incorporating a two storey, with basement, training centre building, a three storey multifunctional operations building, to be built in two phases, an indoor hall building, a single storey maintenance building and single story plant building, along with three first team pitches and eight academy/youth pitches, plus the re-provision of community facilities incorporating a single storey community building linked to the indoor hall (shared with QPR), with changing rooms, showers, WCs and social space and up to 11 football pitches, including one artificial pitch and three cricket wickets. In addition, the development proposes associated developments including 263 permanent car parking places (plus overspill parking for a further 292 cars), floodlighting, boundary treatments, an additional vehicle and pedestrian point of access onto Windmill Lane, hard and soft landscaping and engineering works to regrade the site to provide level playing surfaces (with site levels increasing in part by a maximum of five metres)."

2. Permission to apply for judicial review was granted by Ouseley J on 15th November 2016 on one Ground which is set out below. In addition, shortly before the hearing the claimant gave notice of an application to amend to include a second Ground. At the hearing I indicated that I proposed to hear submissions and deal in my judgment with all of the following in relation to that Ground: the application to amend; the application for permission to apply and, if granted, the substantive merits of the point.

The facts

3. The site with which the application for planning permission is concerned is an area of land some 24.8 hectares in extent owned by the defendant, and known as Warren Farm. In 2011 the defendant resolved to invite bids for the redevelopment of Warren Farm, and in due course in May 2012 announced that the interested party was the preferred bidder. On 21st December 2012 the interested party applied for planning permission to redevelop Warren Farm, and on 20th December 2013 permission was granted for a proposal which was in principle similar, but in detail different, from the proposal which is the subject of these proceedings. In due course the claimant, acting on behalf of the Hanwell Community Forum ("the HCF"), applied for permission for judicial review of the grant of that planning permission and the associated legal

arrangements. That application was refused following an oral renewal on 13th May 2014.

4. In or about May 2015 the interested party submitted the planning application which is the subject of these proceedings, which is described within the papers as being a revised application. One of the principle differences between the two applications was that instead of dealing with a difference of levels across the land at Warren Farm by terracing the site, in the present application an engineering operation was proposed whereby infill material was to be imported onto the site and, along with a cut and fill exercise, the entire area of the site was proposed to be levelled. That engineering operation would, it was calculated, require the importation of 180,000 cubic metres in volume of land filling material.

5. It will be clear from the inception of legal proceedings in respect of the first planning permission that the interested party's proposals in relation to the Warren Farm site have attracted a considerable amount of public concern and opposition. That concern has been articulated in the form of a number of areas of objection. It is unnecessary for the purposes of these proceedings to set out the breadth and nature of the objections raised by, in particular, the claimant and the HCF. At the heart of their objections for the purposes of these proceedings is the status of the site as Metropolitan Open Land ("MOL") and the implications of the proposals both in relation to the strictures of that policy, and also the use of the land which it was contended was being made for recreational purposes by the public. These, amongst other concerns, formed part of the representations of objection which were made by the claimant to the planning application for the revised proposal.

6. In order to assist the planning committee to reach a determination on the application the defendant's officers prepared a detailed report which was presented to the members. The report commenced with an executive summary which concluded in the following terms:

> "This report concludes, as with the previous scheme, that 'very special circumstances' in support of the application, including: the compelling need for the development; lack of alternative 'brownfield' sites; benefits to the local community; and the proposed steps to mitigate any harm to the openness of the MOL, are sufficient to outweigh any harm. It is also considered that there are no other areas of demonstrable harm that would be sufficient to warrant refusal of the scheme and that permission should be granted, subject to an appropriate legal agreement, conditions and referral to the Mayor for his final consideration."

7. The committee report listed relevant policies in particular from the London Plan including policy 7.17 in relation to MOL, and policy 7.18 in relation to Protecting Open Space and Addressing Deficiency. A section of the report was devoted to summaries of the representations which had been made when the application had been consulted upon. That summary included a response from the Brent River and Canal Society in which they observed that the development would be "inappropriate development for Metropolitan Open Land and Brent River Park". An overall response was provided to all of their objections by the officers in which they observed that all

of the issues raised were material considerations in the determination of the application and were addressed in the relevant detailed sections of the report.

8. After setting out the representations which had been made on the application, the overall structure of the officer's conclusions on the planning merits of the application was as follows. Firstly, the officers examined the principle of development starting with addressing the site's status as MOL. In that context they determined that it was an inappropriate development, examined the harm to openness which would be caused by the proposal, considered the benefits arising from the development and asked whether they could amount to very special circumstances. They concluded that the benefits outweighed the harm and that very special circumstances had been demonstrated. They assessed the development in relation to its designation as Community Open Space. The report then moved on to consider a range of detailed matters such as the design, scale and siting of the development; transport and parking issues; issues pertaining to public access of the site; a suite of issues associated with residential amenity; heritage and nature conservation matters and then the question of public access. Having set out the overall structure of the officer's conclusions it is necessary to examine their detailed conclusions in respect of a number of those matters.

9. Starting with the consideration of MOL issues the report commenced with an examination of whether or not the development proposed was inappropriate and the following observations were given:

> "In determining what constitutes appropriate development, paragraph 7.56 of the London Plan also directs the LPA to the policy guidance in paragraphs 79-92 of the NPPF on Green Belt. Paragraph 89 of the NPPF states that a local planning authority should regard the construction of new buildings as inappropriate in Green Belt (MOL in this instance), but defines some exceptions to this rule. Whilst most of the exceptions are not relevant to this proposal, the policy does permit the provision of appropriate *(built)* facilities for outdoor sport, so long as these preserve the openness of the site and do not conflict with the purposes underpinning its designation. Whilst this guidance refers specifically to buildings, as the use of the land as a sports ground remains unchanged, the use itself is considered to be acceptable/compatible. Regarding the buildings themselves, a good proportion of the built space (the changing areas etc.) are deemed to be directly ancillary to the outdoor recreation activities. Some of the facilities (the Indoor Hall) may not fall within the definition of an appropriate use as defined in paragraph 89 of the NPPF or clause B of the Policy 7.17 as these are viewed as being essentially indoor facilities, although their complementary role and significance in supporting a viable outdoor operation is recognised. For this reason elements of the built form (by nature of their use) for the purpose of the assessment are treated as inappropriate development. In any event, paragraph 7.56 of the London Plan

> is clear that appropriate development should be limited to 'small scale' structures.
>
> When considered collectively the proposed buildings are not considered to be of a 'small scale' and therefore the quantum of the proposed build of 14,465sqm is not considered to represent appropriate development in MOL policy terms.
>
> Having established that the built form is inappropriate by nature of its use (in part) and also by its scale, it is necessary to consider whether very special circumstances exist to support the development.
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> Paragraph 88 of the NPPF states that very special circumstances will not exist unless the potential harm to the Green Belt (MOL in this instance) by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations."

10. The report then went on to consider the nature of the impact of the buildings which were proposed upon the openness of the MOL, and also assessed the effect of the earth works required to level the site. Having identified the various aspects of harm to openness the report then proceeded to consider the benefits of the proposal which were claimed to justify it and amount to very special circumstances. These included the compelling need for the development; the lack of alternative brown field sites; and benefits to the community. At the end of that discussion the following conclusion was reached:

> "On balance, as with the previous scheme which had established the principle of this development, its benefits outweigh the perceived harm to the MOL and the proposal is therefore considered to be appropriate."

11. The report then went on to consider whether or not the development was appropriate bearing in mind the designation of the site as Community Open Space. Having assessed the specific details of the proposals, the officer's conclusion was that the development accorded with the relevant policies of the development plan in this respect.

12. The report described issues in relation to unauthorised access and community access in the following paragraphs. It is pertinent to set out this part of the report because it has a bearing upon subsequent consideration of public access by the report which is controversial in the context of this case. The officers observed:

> "Unauthorised Access across the Site and Right of Way Application
>
> Unofficial access has been created at the north eastern corner of the site, where a hole in the fence was formed, allowing local residents to use the space for unofficial recreation and to access Windmill Lane from Trumpers Way and Hanwell.

Unauthorised access has also been made across the level crossing (and over a locked gate) via Jubilee Meadows and Blackberry Corner, connecting to the canal and further afield.

For the purposes of addressing some of the objections to the revised scheme, it is noted that two applications to modify the Definitive Map to include Public Rights of Way across the centre of the Warren Farm site have been recently submitted and are yet to be determined. These applications have been made under the Wildlife and Countryside Act 1981 and have been submitted by members of the local community who have made statements detailing how they have accessed the secure site.

Some of the activities mentioned include: dog walking; informal leisure; kite flying and as a short-cut from Hanwell towards Windmill Lane.

Community access to the site and the revised scheme have been cited in many letters of objection as a reason for the refusal of the proposed development. It must be noted at this point that this was, and still is, intended to be a secure site and subject to the outcome of the pending applications, there are no public rights of way currently registered across the site.

The determination of the applications for modification of the Definitive Map are running in parallel with the assessment of this planning application. The two processes, although linked, should not hinder the outcome of either of these applications. Although the pending applications should be noted, less weight can be given to them as material considerations."

13. Later on in the report the officers went on to consider the question of public access on the basis of objections having been raised to the loss of the site as an area of accessible open space. The officer's conclusions were in the following terms:

"Public Access:

A number of local residents have raised concerns on the basis that they consider the proposal will result in a loss of public access to a large proportion of the site and consider that this loss would have a detrimental effect on the area as "open spaces are very limited and this will be another open space lost to the public."

Whilst public access would be restricted to around half of the 25 hectare site as a result of the development the area is not identified as having a deficiency of public open space provision and it is considered that there would remain appropriate open space provision for residents of Hanwell – for example, Long Wood; Brent River Park; Elthorne Park; and the area to the

south of the River Brent/Grand Union Canal – and Southall – for example, Glade Lane Canalside Park; Southall Park; and Osterley Sports Club. In addition further areas, such as Osterley Park; Brent Lodge Park; Norwood Green; Heston Park; London Playing Fields/Boston Manor Playing Fields and Boston Manor Park are relatively close to the development site. It should also be noted that the site is designated as Community Open Space and not Public Open Space.

The improvement to the existing facilities, in conjunction with the availability of other open space areas in the general vicinity of the application site, is considered to outweigh the direct impact of the 'loss' of public access to part of the development site entailed in the application proposal and the development is therefore considered to be acceptable in this respect."

14. Finally, in relation to the issues which are controversial in the present case, the officers addressed the question of the impact of the development upon residential amenity from noise and lighting and flood lighting in the following terms:

"Noise:

The application has been accompanied by a Noise Impact Assessment (NIA) which sets out an agreed approach for noise mitigation and suggests that conditions 16 and 17, applied to the previous application, would not require to be reapplied to the proposed scheme since it has been demonstrated that the proposal meets specified guidance within SPG 10 'Noise and Vibration'.

The properties most affected by the impacts of noise are those on Aviary Estate, 2 and 3 Warren Farm and to a lesser extent Lock Cottages and other residential properties on Windmill Lane. In terms of noise, the main issues of concern are the impact of noise from matches taking place on the outdoor pitches and vehicle movements. Any occasional match or community gala days would also be likely to cause some noise pollution, however, these would be isolated incidents occurring infrequently. In terms of amenity there would be little change to the previous situation at the site, which was a sports club. There is likely to be an intensification of the use, however, in terms of the wider public gain, this would be a positive, as it would indicate that the site is well used and functioning correctly.

The generated vehicle movements, although increased, would not be in the order, or to the detriment of, residential amenity, to such an extent to justify the refusal of the proposed development. However, in order to mitigate any negative impact of the development on noise during construction a Construction Management Plan (CMP) would be required by

condition, which would restrict vehicle movement during noise sensitive times. The additional shared access to the facility at 2 and 3 Warren Farm would be for service and occasional use and would therefore not have an unacceptable impact on residential amenity.

Lighting and Floodlighting:

The proposed scheme has been accompanied by a Lighting Assessment. This assessment acknowledges that although sports pitches are intensely lit, and in close proximity to the boundary, can be illuminated in such a way to comply with the requirements of the Institution of Lighting Professionals *'Guidance Notes for the Reduction of Obtrusive Light, GN01:2011'.*

The proposed floodlighting would have some impact on the surrounding area, especially at night-time. A Lighting Assessment has been submitted to accompany the revised scheme, which reviews the proposed lighting to the external pitches against the current regulations (for the reduction of Obtrusive Light). In short, the analysis in the report demonstrates compliance with the requirements of the Institute of Lighting Professionals' (ILP) Guidance Notes on the Reduction of Obtrusive Light 2011.

Utilising most energy efficient floodlights, minimising light spill and implementing a management strategy to only utilise the pitches when they are in use are cited as some of the mitigatory design measures, which minimise light pollution, especially in areas closest to residential properties.

Floodlighting is not considered to give rise to any detrimental impact on residential amenity. The floodlighting of sports pitches is considered to be appropriate and is a normal feature of sporting facilities and such lighting could reasonably be expected to be installed even if the site remained as a solely community sports venue."

15. Save for issues relating to open space, lighting and flood lighting, it is uncontroversial for the purposes of this claim that having analysed and assessed all of the other matters set out in the report, and alluded to in the description of the structure of the report set out above, no element of planning harm was identified.

16. The officer's report was not able to capture all of the representations made in respect of the proposals since some were made after the report had been drafted. Additionally, it appears that following the committee's site visit on 12th September 2015 they expressly requested further advice in relation to a particular issue not relevant to these proceedings. The officers prepared "Briefing Notes" in order to update the planning committee. Within this additional documentation the officers address issues raised by further written representations from the HCF. The officers noted an objection on the

basis that the consent would be unlawful if the public footpath applications which were under active consideration were approved. The officers observed that the existence of the footpath applications did not affect the processing of the planning application, and further that if the footpath applications were approved it would be possible to consider diverting them if consent were granted for the interested party's development proposals.

17. The minutes of the planning committee record the objections raised by the claimant on behalf of the HCF. The members accepted the officer's recommendation and resolved to grant planning permission at their meeting on 16th September 2015. Following this on 8th October 2015 the Greater London Authority concluded that the Mayor of London was content for the defendant to determine the application itself. Following this conditional planning permission was granted on 2nd June 2016 accompanied by a planning obligation of the same date.

The Law

18. The first area of law which arises in relation to the claimant's challenge is the correct approach to be taken by the court to a committee report, when the legality of a planning permission is under challenge which has followed from the acceptance by the members of a recommendation by officers that permission should be granted. This is well trodden ground and nothing in the present case raises any novel proposition of law contentious between the parties.

19. Firstly, in order for a claimant to succeed in demonstrating that there has been an error of law in circumstances such as the present it is necessary for the claimant to demonstrate that the members have been significantly misled by the advice given in the report (see the observations of Judge LJ (as he then was) in Oxton Farms v Selby District Council [1997] EWCA Civ 4004). In considering this issue a committee report is to be read in context and for the purpose for which it is produced. It has to be read as a whole and fairly. It is a document produced to advise lay members in the task of practical decision-taking in respect of a planning application. It should not therefore be examined or scrutinised as some kind of legal instrument or technical treatise. Furthermore, it should be borne in mind when considering the report that it is addressed to members with a substantial local knowledge and who in many cases, such as the present, will have participated in a site visit for the purpose of briefing themselves for reaching their decision. Further, it is a sensible and reasonable inference that where members have followed an officer's recommendation to grant planning permission they have (unless the minutes convincingly indicate otherwise) adopted the officer's reasoning and findings in reaching their conclusion.

20. As will be apparent from the extracts from the committee report set out above the application in this case required consideration of policy related to MOL. This designation is directly addressed by policy 7.17 of the London Plan and thus this policy of the Development Plan was engaged in making the decision. Section 38(6) of the Planning and Compulsory Purchase Act 2004 provides as follows:

> "38(6) If regard is to be had to the development plan for the purpose of any determination to be made under the Planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise."

21. The detail of the policy is set out below. For present purposes it suffices to note, as was observed in the recent decision of the Court of Appeal in R (on the application of Lensbury Limited) v Richmond Upon Thames LBC [2016] EWCA Civ 814, [2017] JPL 96 the policy, and indeed the supporting text, equates MOL in policy terms with the Green Belt and requires application of Green Belt policy from paragraphs 79-92 of the National Planning Policy Framework ("the Framework") when considering planning applications within MOL areas. In particular for present purposes, paragraph 88 of the Framework provides as follows:

> "88. When considering any planning application, local planning authorities should ensure that substantial weight is given to any harm to the Green Belt. 'Very special circumstances' will not exist unless the potential harm to the Green Belt by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations."

22. In Redhill Aerodrome Limited v Secretary of State for Communities and Local Government & others [2014] EWHC 2476, Patterson J had to consider the correct interpretation of paragraph 88 and in particular the phrase "any other harm". The submission which she accepted on behalf of the claimant was expressed in paragraphs 54-56 of her judgment in the following terms:

> "54. Now, as Mr Katkowski QC submits, the policy matrix is different in that all of planning policy is contained within the NPPF which is to be read and interpreted as a whole. That includes when, for individual considerations in a planning application, it is appropriate to refuse planning permission. For each of the individual considerations a threshold is set which, when it is reached or exceeded, warrants refusal. It is for the decision maker to determine whether the individual impact attains the threshold that warrants refusal as set out in the NPPF. That is a matter of planning judgement and will clearly vary on a case by case basis.
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> 55. Here, the individual non Green Belt harms did not reach the individual threshold for refusal as defined by the NPPF. Was it right then to take them into account either individually or as part of the cumulative Green Belt harm assessments?
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> 56. On an individual basis given the clear guidance given in the NPPF I have no difficulty in concluding that, in this case, it was not right to take the identified non Green Belt harms into account. The revised policy framework is considerably more directive to decision makers than the previous advice in the PPGs and PPSs. There has, in that regard, been a considerable policy shift. Where an individual material consideration is harmful but the degree of harm has not reached the level prescribed in the NPPF as to warrant refusal, in my judgment, it would be wrong to include that consideration as "any other harm"."

23. Her decision was the subject of an appeal reported at [2014] EWCA Civ 1386, [2015] PTSR 274. Giving the leading judgment in the Court of Appeal Sullivan LJ concluded, in allowing the appeal, as follows:

> "The Framework
>
> 15. It is common ground that excluding non – Green Belt harm from "any other harm" in the second sentence of paragraph 88 of the Framework would make it less difficult for applicants and appellants to obtain planning permission for inappropriate development in the Green Belt because the task of establishing "very special circumstances", while never easy, would be made less difficult. All of the considerations in favour of granting permission would now be weighed against only some, rather than all of the planning harm that would be caused by an inappropriate development…
>
> Paragraph 88
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> 18. There is no dispute that the words in paragraph 88 should not be construed in isolation, and must be construed in the context of the Framework as a whole, but Mr. Maurici QC and Mr. Whale for the Appellants rightly submit that the starting point must be the words of the policy in paragraph 88. Not only are the words "any other harm" in the second sentence of that paragraph unqualified, they are contained within a paragraph that expressly refers, twice, to "harm to the Green Belt." When the policy wishes to restrict the type of harm to harm to the Green Belt it is careful to say so in terms.
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> 19. The Appellants also submit that the Judge's approach to "any other harm" would lead to an imbalance in the weighing exercise that is at the heart of paragraph 88. In paragraph 51 of her Judgment, having rejected the Second and Third Appellants' submission that the effect upon landscape character and the visual impact of the proposed development were harms to the Green Belt, Patterson J continued:
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> "51. …The effect upon the landscape character and the visual impact of a development proposal are clearly material considerations but are different from a consideration of harm to a Green Belt. If a development proposal contributed to the enhancement of the landscape, visual amenity and biodiversity within the Green Belt those could well be factors in its favour as part of a very special circumstances balancing exercise…."
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> 20. It is common ground that all "other considerations", which will by definition be non-Green Belt factors, such as the employment and economic advantages referred to by the Inspector in her decision in this case, must be included in the weighing exercise. On the Judge's approach, if an inappropriate

> development in the Green Belt is beneficial in terms of the appearance of the landscape, visual amenity, biodiversity or, presumably any other matter relevant for planning purposes such as the setting of a listed building, or transportation arrangements, it must be weighed in the balance when deciding whether "very special circumstances" exist; but if the inappropriate development is harmful to any of those non-Green Belt considerations, that harm must not be weighed in the balance when deciding whether "very special circumstances" exist. I accept the Appellants' submission that this imbalance is illogical. If all of the "other considerations" in favour of granting permission, which will, by definition, be non-Green Belt factors, must go into the weighing exercise, there is no sensible reason why "any other harm", whether it is Green Belt or non-Green Belt harm, should not also go into the weighing exercise.
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> 21. Mr. Katkowski submitted that it was not illogical to exclude non-Green Belt harm from the weighing exercise because the underlying purpose of the policy was to protect the openness of the Green Belt so that it could continue to serve one or more of the five purposes identified in paragraph 80 of the Framework. Since there is no suggestion that the underlying policy purpose has changed as between PPG2 and the Framework – the essential characteristics and the five purposes of the Green Belt all remain the same – this argument is, in reality, a return to the submission that *River Club* was wrongly decided. There is no dispute that the underlying purpose of the policy was, and still is, to protect the essential characteristic of the Green Belt – its openness – but there is nothing illogical in requiring all non-Green Belt factors, and not simply those non-Green Belt factors in favour of granting permission, to be taken into account when deciding whether planning permission should be granted on what will be non-Green Belt grounds ("very special circumstances") for development that is, by definition, harmful to the Green Belt."

Policy

24. I have set out above the central policy of the Framework which is involved in this case in paragraph 21 above. In addition it is necessary to set out two policies from the London Plan which are relevant to the claimant's arguments, namely policy 7.17 in respect of MOL (which has also been alluded to above) and policy 7.18 in relation to Protecting Open Space and Addressing Deficiency. Those policies, so far as relevant, provide as follows:

> "Policy 7.17 Metropolitan open land
>
> Strategic

A The Mayor strongly supports the current extent of Metropolitan Open Land (MOL), its extension in appropriate circumstances and its protection from development having an adverse impact on the openness of MOL.

Planning decisions

B The strongest protection should be given to London's Metropolitan Open Land and inappropriate development refused, except in very special circumstances, giving the same level of protection as in the Green Belt. Essential ancillary facilities for appropriate uses will only be acceptable where they maintain the openness of MOL…

7.56 The policy guidance of paragraphs 79-92 of the NPPF on Green Belts applies equally to Metropolitan Open Land (MOL). MOL has an important role to play as part of London's multifunctional green infrastructure and the Mayor is keen to see improvements in its overall quality and accessibility. Such improvements are likely to help human health, biodiversity and quality of life. Development that involves the loss of MOL in return for the creation of new open space elsewhere will not be considered appropriate. Appropriate development should be limited to small scale structures to support outdoor open space uses and minimise any adverse impact on the openness of MOL. Green chains are important to London's open space network, recreation and biodiversity. They consist of footpaths and the open spaces that they link, which are accessible to the public. The open spaces and links within a Green Chain should be designated as MOL due to their Londonwide importance.

Policy 7.18 Protecting open space and addressing deficiency

Strategic

A The Mayor supports the creation of new open space in London to ensure satisfactory levels of local provision to address areas of deficiency.

Planning decisions

B The loss of protected open spaces must be resisted unless equivalent or better quality provision is made within the local catchment area. Replacement of one type of open space with another is unacceptable unless an up to date needs assessment shows that this would be appropriate."

25. In relation to protected open space the London Plan contains a glossary which provides a taxonomy of types of defined protected open spaces and includes two definitions, which were relied upon by the claimant, in the following terms:

> "District Parks
>
> Large areas of open space that provide a landscape setting with a variety of natural features providing a wide range of activities, including outdoor sports facilities and playing fields, children's play for different age groups and informal recreation pursuits.
>
> 20hectares/1.2 kilometres
>
> Linear Open Spaces
>
> Open spaces and towpaths alongside the Thames, canals and other waterways; paths, disused railways; nature conservation areas; and other routes that provide opportunities for informal recreation. Often characterised by features or attractive areas which are not fully accessible to the public but contribute to the enjoyment of the space.
>
> Variable / Wherever feasible"

26. The London Plan also provides a definition in its Glossary of Protected Open Space in the following terms:

> "Protected open space
>
> Metropolitan open land and land that is subject to local designation under Policy 7.18 (which would include essential linear components of Green Infrastructure as referred to in Policy 2.18). This land is predominantly undeveloped other than by buildings or structures that are ancillary to the open space. The definition covers the broad range of types of open space within London, whether in public or private ownership and whether public access is unrestricted, limited or restricted. The value of open space not designated is considered as a material consideration that needs to be taken into account when development control decisions are made."

The Grounds

27. On behalf of the claimant Mr Marc Willers QC advances two Grounds in support of the claim. The second Ground, as set out above, arises by way of a recent amendment to the case.

28. So far as Ground 1 is concerned, Mr Willers submits that the officers in their report significantly misled the members by failing to properly advise them in relation to the correct approach to assessment of the MOL issues. He submits that, firstly, it is clear from the Redhill Aerodrome case that in order to interpret the policy of the Framework at paragraph 88 correctly and therefore apply it accurately, it is necessary for the decision-maker to weigh all harm, both MOL harm and non-MOL harm against the benefits of the proposal before a decision as to whether or not very special

circumstances exist can be reached. He submits that in the present case, in particular because of the way in which the officers' conclusions were structured, there were elements of non-MOL harm which were not taken into account and weighed against the benefits when the conclusion as to the existence of very special circumstances was reached. He contends that when the committee report is examined the conclusions as to very special circumstances were reached prior to consideration of other matters such as public access, noise and lighting and flood lighting which he submits can be seen from the officer's report gave rise to harm, which should have been taken into account in the earlier exercise of deciding whether or not there were very special circumstances in the case.

29. In respect of public access, he submits that the officers accepted that there would be a restriction of public access to around half of the site and that therefore this assessment gave rise to non-MOL harm which was left out of account. Similarly, he submitted it was plain from the officer's report that there would be harmful noise impacts which again, in particular because they were left towards the end of the report, were not taken into account when weighing up all of the other non-MOL harm that needed to be considered in assessing whether or not there were very special circumstances. The same could be said, he submitted, in relation to flood lighting: there was harm which could be identified in the officer's assessment which had been left out of account as non-MOL harm when the balance was struck in relation to very special circumstances.

30. In response to these submissions, Mr Stephen Whale on behalf of the defendant and Mr Reuben Taylor QC on behalf of the interested party submitted that the claimant's approach was not tenable. They submitted that it was clear from the officer's report that there was no additional residual planning harm to be taken into account as non-MOL harm when undertaking the assessment of very special circumstances. Thus, as the officers had formed the view that there was no harm arising in respect of the considerations associated with public access, noise and lighting and flood lighting, there was no other non-MOL harm to be taken into account in assessing whether or not very special circumstances existed. There was in their submission a logic to the way in which officers had structured the committee report, in that by the time they reached their conclusion in respect of very special circumstances all relevant harm had already been identified and there was (as the balance of the committee report demonstrated) no other non-MOL harm to be taken into account. In support of these submissions Mr Whale in particular placed reliance on a witness statement from Mr Weake, a Principle Planning Officer with the defendant who had had involvement throughout the consideration of the planning application, and who confirmed that the approach taken by officers in preparing their report reflected the submissions which they made in respect of it.

31. The claimant's Ground 2 is the contention that the defendant failed to take into account the fact that the Warren Farm site formed part of the Brent River Park and that the proposed development conflicted with policy 7.18 of the London Plan. Mr Willers submitted on behalf of the claimant that within an email on 1st May 2013 the claimant had been advised by an officer in the defendant's Parks Service that the Warren Farm site was within the Brent River Park on the basis that she had provided to the claimant a map which listed Warren Farm amongst the 34 areas of park in the River Brent corridor. The map was described by the officer as being a map of the

Brent River Park. Furthermore, reference was made by Mr Willers to the "Brent River Park countryside management plan" of March 1990 published by the defendant which addressed issues of landscape and wildlife management and noted that large areas of the Brent River Park was open to free public access.

32. In response to these submissions Mr Whale and Mr Taylor submitted, firstly, that the application to amend to include this ground should be refused on the basis that there was no sensible explanation offered for the delay in bringing it. Furthermore, and in any event, they submitted that the Ground was unarguable. Policy 7.18, albeit listed in the committee report, simply did not apply to the Warren Farm site on the basis that it did not accord with the definition in the glossary of the London Plan which required that it was "subject to local designation under policy 7.18". Indeed Mr Whale relied upon correspondence from his instructing solicitor which explained that representations had been made in 2013 to the defendant's Local Plan process which had sought to introduce a planning designation for the Brent River Park but the defendant had successfully resisted such designation on the basis that it was neither appropriate nor necessary.

Conclusions

33. In relation to Ground 1, Mr Willers is correct in his formulation of the relevant approach to Green Belt policy following the interpretation given to paragraph 88 in the Redhill Aerodrome case. It is clear from the Court of Appeal's interpretation that when paragraph 88 refers to "any other harm" it is referencing non-Green Belt harm (or in the present case non-MOL harm). Thus it is incumbent upon the decision-maker, having concluded that development is inappropriate development in the Green Belt or MOL, to identify the harm caused to the Green Belt or MOL (including harm by virtue of inappropriateness in and of itself) and then weigh that harm together with any non-Green Belt or non-MOL planning harm against the benefits relied upon to see whether or not very special circumstances justifying the development have been made out. In my view the "any other harm" to which reference is being made is residual harm in respect of the various material considerations which may be relevant to the decision, after the benefits and dis-benefits relevant to a material consideration have been weighed and balanced and mitigation taken into account.

34. It is right to observe that the conclusion in relation to the MOL issues appears towards the start of the officer's conclusions, and follows on from a section which (having concluded the development was inappropriate) analysed the harm to MOL and then having set out the benefits relied upon reached a conclusion in the following terms (as set out in paragraph 10 above):

> "On balance, as with the previous scheme which had established the principle of this development, its benefits outweigh the perceived harm to the MOL and the proposal is therefore considered to be appropriate."

35. Whilst Mr Willers cavilled at the use of the word "appropriate" he accepted that it is not being used in a technical Green Belt/MOL way at this point in the report and this conclusion is simply expressing compliance with MOL policy. His real concern with this conclusion was that the only harm which featured in it was harm to MOL. The question which arises therefore is as to whether or not there was "any other harm"

which was left out of account and should have been included in the balance struck within this conclusion. If there was any such residual harm to be taken into account, then the test from paragraph 88 (which the officers had set out faithfully in the report as part of their report as set out above in paragraph 9) would have been misinterpreted and misapplied in the light of the Court of Appeal's interpretation in Redhill Aerodrome which would amount to an error of law in the decision.

36. Having considered the committee report I am satisfied that the defendant and interested party are correct when they observe that there was no other residual harm which was identified by the officers in that report. Dealing first with the question of public access, it is clear to me that the conclusion which was reached as set out above was a balanced conclusion, but one which clearly identified that having balanced the relevant factors, there was no residual harm in this respect and that the development was acceptable in relation to public access. I recognise that the issue of public access to the site is one which was controversial and the subject of objection to the proposals. The officers acknowledged that whilst there were objections raised on the basis of public access and putative rights of way, they set out that they were bound to acknowledge that the site was "intended to be a secure site" over which, subject to the pending applications for footpath orders, there were no public rights of way. Thus the conclusion which the officers reached, which balanced the improvement to the existing facilities and the availability of other open space in the area against the restriction of access to around half of the site, weighed up the harm and benefits in respect of this topic and reached the conclusion that the development was acceptable. This conclusion clearly recognises that there was no residual harm in respect of this issue.

37. Turning to the question of noise, again I am not satisfied that proper reading of the committee report leads to the conclusion that the officers were identifying residual harm to residential amenity caused by noise. They obviously identified that there would be noise from the use of the facility, but they noted that there would be little change as a consequence of the development from the site's existing use, and other larger events would be infrequent. In relation to vehicle movements the officers recognised that whilst there would be some harm to residential amenity from generated vehicle movements, the requirement for a Construction Management Plan would "mitigate any negative impact of the development on noise during construction". Thus, again, I accept the submissions of the defendant and interested party that the officers' analysis did not show any residual planning harm in respect of noise to be put into the MOL analysis.

38. Turning to lighting and flood lighting the officers recognised that there would be some impact but noted the detailed assessment which had been provided in accordance with recognised guidance from the Institute of Lighting Professionals. That enabled them to reach the conclusion in detailed design terms that "flood lighting is not considered to give rise to any detrimental impact on residential amenity". Thus again I am unable to accept the claimant's contention that there was an element of residual harm in relation to lighting and flood lighting which was left out of account when the officers struck the balance in relation to MOL issues and concluded that the necessary very special circumstances had been demonstrated.

39. These were the three areas in which it was contended that there was other non-MOL harm which should have been taken into account. I am not satisfied that on a proper

reading of the committee report there was any such other non-MOL harm to be taken into account on the basis of the officers' planning evaluation of the other material considerations relevant to the decision. Those evaluations could only be challenged on rationality grounds and, rightly in my view, Mr Willers did not advance any such arguments. Whilst he mooted that members might not have shared these conclusions there is no evidence to support such a contention and the sensible approach, as set out above, is to presume that the members accepted and adopted the officer's views set out in the report. It is clear from the committee report that the officers reached the conclusion as a matter of planning judgment that the only harm to be weighed against the benefits of the proposal in applying paragraph 88 of the Framework was the harm to MOL. For all these reasons Ground 1 must be dismissed.

40. Turning to Ground 2, I see no reason to stand in the way of the claimant amending her claim to allow this Ground to be considered. Obviously it is unsatisfactory for pleadings to be revised in judicial review claims at the last moment. The procedures provided for in CPR54 enable the orderly consideration of issues raised in respect of the legality of decisions, and provide proper procedural safeguards for the submission of evidence that is necessary for consideration to be given to the arguability of those allegations. Exceptionally in the present case there is in my view no prejudice to the defendant and the interested party, on the basis that this is a single narrow Ground which the defendant and interested party have been able to respond to. Having reached the conclusion that I have that the amendment should in this case be permitted I would not wish that to give any encouragement to the adoption of late amendments in other cases. My decision to permit the amendment in this case is based exclusively upon the particular circumstances of the case. I turn then to consider the merits of the Ground.

41. It is clear that the officers had policy 7.18 of the London Plan in mind since, as pointed out above, it was listed amongst the long list of policies from the development plan that were relevant to the case. However, I am not satisfied that there is any substance in the claimant's complaint that the officers erred in failing to provide a detailed appraisal against policy 7.18 in their report.

42. The starting point for considering this argument must be the question of whether or not the Warren Farm site was protected open space for the purposes of the London Plan. In that connection the glossary of the London Plan is, in my view, important. It specifies that to be protected open space the land must be "subject to local designation under policy 7.18". The Warren Farm site was not subject to local designation as protected open space whether as part of the Brent River Park or otherwise. It was designated as Community Open Space which is defined in the defendant's Local Plan Glossary as "land that is protected from development so that it is available as open space for the community but not with full public access". As set out above the officers undertook an assessment of the merits of the proposal against the relevant policy which the officers' report notes is equivalent to the policy in relation to MOL, and thus their assessment of the MOL issues was said to be of equal application. No criticism is or could be made of the legality of that approach. Whilst therefore the land at the Warren Farm site might have some characteristics of protected open space, the key point is that it was not designated as such. In the absence of designation there was no warrant to apply policy 7.18 as suggested. The claimant also pointed out that the Glossary includes MOL within the definition but that does not, in my judgment,

require any different approach from the one which was taken by the officers in this case. Clearly, MOL has its own specific and bespoke policy under policy 7.17 which, as set out above, was accurately applied in this case.

43. Having examined the claimant's submissions in relation to Ground 2 I am unconvinced they are arguable and refuse permission to apply for judicial review in relation to them. I am not satisfied that in this respect there was any arguable misinterpretation or misapplication of policy 7.18 to the particular circumstances of the land under consideration.

44. It follows that I have reached the conclusion that both of the claimant's Grounds for bringing her application for judicial review must be dismissed.