Neutral Citation Number: [2018] EWCA Civ 556

Case No: C1/2017/0718

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
PLANNING COURT
MR JUSTICE DOVE
[2017] EWHC 467 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23 March 2018

Before:

Lady Justice Hallett
Lord Justice Patten
and
Lord Justice Lindblom

- -

Between:

	Carolyn Brown (an officer of the Hanwell Community Forum)	**Appellant**
	- and -	
	London Borough of Ealing Council	**Respondent**
	- and -	
	QPR Holdings Ltd.	**Interested Party**

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- -

Mr Marc Willers Q.C. and Ms Justine Compton (instructed by **Richard Buxton Environmental and Public Law**) for the **Appellant**
Mr Stephen Whale (instructed by **London Borough of Ealing Council**) for the **Respondent**
Mr Reuben Taylor Q.C. (instructed by **Withers LLP**) for the **Interested Party**

Hearing date: 12 December 2017

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Judgment Approved by the court for handing down (subject to editorial corrections)

Lord Justice Lindblom:

Introduction

1. Did a local planning authority err in law in granting planning permission for a development of recreational facilities on Metropolitan Open Land, by misapplying or failing to apply relevant national policy and policies in the development plan? That is the basic question in this appeal. It does not raise any novel issue of law.

2. The appellant, Ms Carolyn Brown, is the Chairperson of the Hanwell Community Forum. By a claim for judicial review she challenged the planning permission granted by the respondent, the London Borough of Ealing Council in June 2016 for development proposed by the interested party, QPR Holdings Ltd. ("QPR"), on a site of some 25 hectares to the north of Windmill Lane in Southall, which is known as Warren Farm. The appeal before us is against the order of Dove J., dated 23 March 2017, dismissing that claim.

3. The site is within a large area of Metropolitan Open Land. It is also designated as Community Open Space under Policy 5.6 of the council's Development (or Core) Strategy 2026 (adopted in April 2012). From the mid-1960's until 2013 it had been used by members of the public for formal sport and recreation – football, cricket, netball, tennis and athletics, and since 2013 for informal recreation – such as walking and jogging. QPR's proposal, as described in the application for planning permission, was this:

> "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 and a three-storey multi-functional operations building, … an indoor hall building, a single storey maintenance building and single storey plant buildings, 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), … and up to eleven football pitches, including one artificial pitch, and three cricket wickets. In addition, … associated developments including 263 permanent car parking spaces …, flood lighting, … and engineering works to re-grade the site to provide level playing surfaces … ."

4. At its meeting on 16 September 2015 the council's Planning Committee, following the recommendation of the Head of Planning Services, resolved that, subject to referral to the Mayor of London and a section 106 obligation being entered into, planning permission was to be granted. Planning permission was eventually granted on 2 June 2016.

5. The claim for judicial review was originally pursued on a single ground, on which Ouseley J. granted permission in November 2016. At the hearing before Dove J. a second ground was added, on which he refused permission. Permission to appeal against

Dove J.'s order was granted by Lewison L.J. on 3 July 2017. Lewison L.J. also granted permission to apply for judicial review on the second ground, and ordered that the claim on that ground be retained in this court to be heard with the appeal on the first.

6. A full account of the relevant facts is provided in Dove J.'s judgment (in paragraphs 3 to 17), which I gratefully adopt.

The issues before us

7. From the two grounds of appeal and the respondent's notice of 31 July 2017 these issues emerge:

    (1) whether the officer's conclusion, accepted by the committee, that "very special circumstances" existed to justify the grant of planning permission for "inappropriate development" on Metropolitan Open Land was bad in law; and

    (2) whether the council failed to take into account the proposal's "conflict" with Policy 7.18 of the London Plan, which requires the "loss of protected open spaces" to be "resisted".

The planning officer's report

8. The officer's report to the Planning Committee for its meeting on 16 September 2015 began with an "Executive Summary", in which she acknowledged the site's designation as Metropolitan Open Land and Community Open Space, and, in the concluding paragraph, said this:

    > "This report concludes, as with the previous scheme [for which the council had granted planning permission on 20 December 2013], 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."

9. In a section of the report where she set out her "Reasoned Justification", under the sub-heading "Principle of Development", the officer acknowledged that the site "constitutes Ealing's largest sports ground, and is considered to be of strategic importance", and "[as] a Council owned site it has until fairly recently operated as a community sports facility, which has been deteriorating over time, and does not meet current sporting facilities standards", and "[therefore], due to lack of finance it no longer fulfils this role".

10. As for the "Appropriateness of Development on Metropolitan Open Land", the officer reminded the committee that "the whole site is designated as MOL and forms part of the wider area of Norwood Green/Osterley Metropolitan Open Land as defined on the Council's Policies Map and in Policy 5.1 of the Council's Development (or Core) Strategy (April 2012)". She drew attention to the "purposes of MOL … defined in clause D of Policy 7.17 of the London Plan …". She said "… the site clearly fulfils its MOL status through: providing a key break in the built form; accommodating open recreation facilities of strategic importance; and forming a link in a wider green network". She referred to Policy 7.17 of the London Plan and government policy on Green Belt in paragraphs 79 to 92 of the National Planning Policy Framework ("the NPPF"). She concluded that "[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". She went on:

> "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. 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.
>
> There is no prescribed list of what might constitute 'Very Special [Circumstances]' (VSC). It may be that a single aspect of the proposal may itself be a VSC sufficient to justify development or it may be that a number of circumstances cumulatively amount to VSC.
>
> The starting point in this assessment is first to establish the nature of the harm caused. This should focus primarily on the fundamental aim of the MOL, namely its contribution to openness. Any harm caused to this fundamental aim by reason of inappropriate development is given substantial weight. … ."

The officer then considered the harm arising from the "Impact of Buildings" and the "Impact of the Earthworks". On the "Impact of Buildings", she said:

> "As proposed the new buildings are focused around the existing built form and hardstanding, necessitating their removal/demolition. The combined footprint of the proposed buildings is 14,465sqm, which is an increase of 12,612sqm over the existing situation, which is 1,853sqm, although a reduction of 1,763sqm from the previously consented scheme of 16,228sqm. As a proportion of the overall site, the built form amounts to a small percentage of [the] overall site.
>
> As well as seeking to minimise impact on openness, the decision to cluster the new built form has also been driven by a number of other factors. …
>
> As well as assessing the extent of the built footprint and its siting it is also

necessary to consider the impact of the height and massing of the proposed buildings on the open character. At present the existing buildings are largely one storey in height (plus flue stacks). As proposed, the buildings range in height from 5.9m to 12.5m or from 1 to 3 storeys. An increase from the present situation on the site, although in the context of these wider open environs, this increase is not deemed to be significantly intrusive to its open character. The proposed height is also considered to achieve an acceptable balance in respect of accommodating essential functional space, and minimising impact on the landscape. … ."

As for the "Impact of the Earthworks", she said:

> "In addition to the built works assessed above the proposal involves extensive earthworks, which seek to raise the existing land, creating a single level plateau. …
>
> Whilst the formation of a plateau will clearly change the landform, its perceived impact on the openness of the site is considered to be minimal. … ."

Under the heading "Very Special Circumstances", she said:

> "Having assessed harm, it is necessary to establish the benefits arising from the development and overriding circumstances justifying the proposal. These 'very special circumstances' can be summarised as follows: i) a compelling need for the development; ii) the lack of any 'brownfield' sites that are suitable, feasible and available; iii) and the overriding benefits for the local community … ."

The officer then set out her conclusions on those three matters: first, the "Compelling Need for the Development"; secondly, "Lack of Alternative 'Brownfield' Sites"; and thirdly, "Benefits to the Local Community". In dealing with the "Compelling Need for the Development" she referred to several things, including this:

> "Existing facilities at Warren Farm have deteriorated due to lack of investment and reduction in public expenditure and therefore the strategic sports function ceased despite the requirement in Policy 5.6 of the Core Strategy 2012, to provide 'improved changing rooms, outdoor sports areas and social facilities'."

As for the "Benefits to the Local Community" she said:

> "The benefits to the local community versus the perceived harm to the Green Belt have previously been assessed and the following was concluded that:
>
> - On balance, the benefits of encouraging [sports] participation for young people and health improvements form the basis of the argument in favour of the redevelopment of the site. The project is supported by the Community Sports Development Plan, which has been produced by the QPR Trust Organisation, and this includes the development of a variety of sporting and community activities (apart from football), which would be developed and

take place at the site;

- The development complies with and is pursuant to policies 3.1, 3.2 and 3.19 of the London Plan;
- QPR's charitable trust aims to enhance life chances by working with partners to offer a range of sports, education, health, training, employment, social inclusion, diversity and community opportunities, which are considered to accord with adopted policy."

Under the heading "Conclusions" in this part of her report she said:

> "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 officer then turned to the "Appropriateness of Development on Community Open Space", on which she said this:

> "As noted above, the site is also designated as Community Open Space reflecting its use as a sports ground. This designation was added in April 2012, alongside the adoption of the Development (or Core) Strategy. As defined in the Local Plan Glossary (appendix 4 of the Core Strategy) Community Open Space is defined 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 noted above, DM Policy 2.18 outlines the LPAs approach to managing development on such land, and the assessment of this proposal against this policy in relation to MOL applies equally here, and so is not repeated.
>
> With regards to its use as a sports ground, which is recognised through its COS designation, Policy 5.6 'Outdoor Sports and Active Recreation' of the Development Strategy is also relevant as this sets out the LPAs approach to protecting and promoting the network of sports grounds in the Borough. Underpinned by the Council's Facilities Strategy, which has sought to identify priority sites for investment, the supporting text to this policy specifically identifies Warren Farm as being one of four key sports fields in the Borough where investment should be secured to improve changing rooms, outdoor sports areas and social facilities. The proposal clearly accords with these objectives.
>
> Policy 3.19 'Sports Facilities' of the London Plan is also relevant. This policy states that 'Development proposals that increase or enhance the provision of sports and recreation facilities will be supported'. Whilst the proposal is consistent with this objective, consideration must be given to the level of community access achieved and how this compared with the previous/present use of the site. To this end, the revised scheme offers better compliance with Policy 3.19 in that, as discussed in detail in forthcoming sections, the design and layout of the buildings would be improved and a level playing field formed. These amendments enhance

the development. Furthermore, improved pedestrian and cycle access to the site would be secured under the revised scheme."

12. She also considered "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. Under the heading "Public Access", she said:

> "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 the part of the development site entailed in the application proposal and the development is therefore considered to be acceptable in this respect."

Issue (1) – "very special circumstances"

14. Policy 7.17 of the London Plan (March 2016) concerns "Metropolitan Open Land". It states:

"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.

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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. …

… ."

15. The supporting text in paragraph 7.56 states:

"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."

16. Paragraph 87 of the NPPF says that "inappropriate development is, by definition, harmful to the Green Belt and should not be approved except in very special circumstances". Paragraph 88 states:

> "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 any potential harm to the Green Belt by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations."

Paragraph 89 says that a local planning authority "should regard the construction of new buildings as inappropriate in Green Belt", but among the six identified "[exceptions] to this" is the "provision of appropriate facilities for outdoor sport, outdoor recreation and for cemeteries, as long as it preserves the openness of the Green Belt and does not conflict with the purposes of including land within it".

17. There is plentiful authority on the meaning and application of policy for development in the Green Belt and on Metropolitan Open Land. This court considered the decision-maker's approach to development on Metropolitan Open Land in *R. (on the application of Lensbury Ltd.) v Richmond-upon-Thames London Borough Council* [2016] EWCA Civ 814, [2017] J.P.L. 96, where Sales L.J. noted (in paragraph 31 of his judgment) that, under Policy 7.17 of the London Plan, "the protection to be afforded to the MOL is to be equivalent to, and no less than, the protection afforded to Green Belt in national policy". This is not in dispute here.

18. The contentious issue in this case, which relates to the concept of "any other harm" in paragraph 88 of the NPPF, is also the subject of clear authority. In *Redhill Aerodrome Ltd. v Secretary of State for Communities and Local Government* [2014] EWCA Civ 1386, [2015] P.T.S.R. 274, Sullivan L.J., having referred to his own decisions at first instance in *Doncaster Metropolitan Borough Council v Secretary of State for the Environment, Transport and the Regions* [2002] J.P.L. 1509 and *R. (on the application of Basildon District Council) v First Secretary of State* [2005] J.P.L. 942, said (in paragraphs 18, 20 and 21 of his judgment):

> "18. … Not only are the words "any other harm" in the second sentence of [paragraph 88 of the NPPF] 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.
>
> …
>
> 20. It is common ground that all "other considerations", which will by definition be non-Green Belt factors … must be included in the weighing exercise. … 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.

21. … 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."

19. It is common ground before us that that analysis applies equally to decision-making on proposed development on Metropolitan Open Land.

20. Dove J. was not persuaded that the officer's assessment revealed an unlawful approach, inconsistent with the Court of Appeal's decision in *Redhill Aerodrome Ltd.*. The concept of "any other harm" in paragraph 88 of the NPPF was, as he put it, "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" (paragraph 33 of the judgment). He acknowledged that the officer's conclusion on "the MOL issues" appeared "towards the start of [her] conclusions", and that the relevant conclusion "follows on from a section which (having concluded the development was inappropriate) analysed the harm to MOL and then … set out the benefits relied upon …" (paragraph 34). The "real concern" expressed on behalf of Ms Brown had been that the "only harm" featuring in the officer's conclusion was "harm to MOL". The question here, therefore, was "whether or not there was "any other harm" which was left out of account and should have been included in the balance struck within [the officer's] conclusion". If there was, the policy in paragraph 88 of the NPPF "would have been misinterpreted and misapplied in the light of the Court of Appeal's interpretation in [*Redhill Aerodrome Ltd.*] which would amount to an error of law in the decision" (paragraph 35).

21. The judge went on to say (in paragraph 36):

"36. Having considered the committee report I am satisfied that [the council] and [QPR] 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 … 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."

22. On a "proper reading" of the officer's report, the judge was not satisfied that there was any "other non-MOL harm to be taken into account on the basis of [her] planning evaluation of the other material considerations relevant to the decision". The officer's assessment could be challenged only on rationality grounds, and no such argument was advanced. Nor could it be suggested that the members had taken a different view from hers. The relevant conclusion in the report had been reached "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 NPPF] was the harm to MOL". Ground 1 of the claim therefore failed (paragraph 39).

23. For Ms Brown, Mr Marc Willers Q.C. submitted that the judge's analysis cannot be reconciled with the approach described by Sullivan L.J. in *Redhill Aerodrome Ltd.*. The concluding paragraph of the "Executive Summary" of the officer's report implied a two-stage approach, despite the reference to "any harm" at the end of the first sentence. The reference to there being "no other areas of demonstrable harm … sufficient to warrant refusal …" suggested that, in considering whether "very special circumstances" had been shown to exist, the officer had disregarded "other areas of demonstrable harm". In the body of the report, she had separated her consideration of various kinds of planning harm, including the "loss" of "public access" from her consideration of "very special circumstances". Before Dove J. Mr Willers had also raised concerns about the officer's treatment of two other forms of harm, namely "Noise" and "Lighting and Floodlighting", both of which were also considered separately from the "very special circumstances" balance, but those concerns were not rehearsed before us.

24. Mr Willers submitted that in advising the committee on the acceptability of the proposed development on Metropolitan Open Land, the officer had to strike the relevant balance properly. She had to avoid "double-counting". Otherwise, she would not be exercising her planning judgment lawfully, and the committee, if it followed her advice, would not be doing so either. Here, Mr Willers submitted, the officer did not strike the balance properly. She did make the mistake of "double-counting". She weighed the benefit to the local community of improvements to the existing facilities against the "loss" of public access, and concluded that, on balance, there would be no harm in this respect, having already deployed the same planning benefit, with the same force, in the "very special circumstances" balance against the harm to Metropolitan Open Land "by reason of inappropriateness" and the other harm she had identified – the harm attributable to the impact of the buildings and the impact of the earthworks. Logically,

the "mini-balancing exercise" undertaken in the part of her report where she considered "Public Access" ought to have come before her consideration of the acceptability of the development on Metropolitan Open Land. By structuring her report in the way that she did, she excluded the harm attributable to the "loss" of public access from the "very special circumstances" balancing exercise. Had she constructed her assessment correctly, she would have had to give the benefit of the improvements to the existing facilities less weight than she did in the "very special circumstances" balance because the "loss" of public access had to be set against it. Her failure to do that, and in turn the committee's, was enough, Mr Willers submitted, to vitiate the council's grant of planning permission.

25. I cannot accept that argument.

26. This court has consistently emphasized the need for planning officer's reports to committee to be read with reasonable benevolence and realism, and not in an overly legalistic way (see my judgment in *Mansell v Tonbridge and Malling Borough Council* [2017] EWCA Civ 1314, [2018] J.P.L. 176, at paragraphs 41 and 42). We must keep that in mind here.

27. In my view this is not a case in which it can properly be submitted in the light of a planning officer's report to committee that a local planning authority, with the benefit of the officer's advice, has neglected any relevant planning issue or failed to have regard to any material consideration for the purposes of section 70(2) of the Town and Country Planning Act 1990 and section 38(6) of the Planning and Compulsory Purchase Act 2004, or that, on any relevant issue, its exercise of planning judgment was unreasonable in the *Wednesbury* sense. The officer's report was comprehensive and thorough, the conclusions it contains clearly reasoned and, on their face, well within the ambit of lawful planning judgment.

28. The essence of the exercise involved in a "very special circumstances" balance is that no planning harm should be left out of account, nor should any planning benefit. The error to be avoided is to take into account only the harm to Metropolitan Open Land (or Green Belt) and to set this less than complete evaluation of harm against the whole range of planning benefits promised by the scheme. It follows that if the officer, in conducting the "very special circumstances" balance, neither failed to take into account anything that could realistically have made a difference to that exercise nor brought into account something that ought to have been omitted, the ultimate result will have been consistent with the approach indicated by Sullivan L.J. in *Redhill Aerodrome Ltd*.. The crucial question, therefore, is whether, on a fair reading of the officer's report as a whole, that error was avoided. In my view, in agreement with the judge, it was.

29. I do not think that the sequence of issues tackled in the officer's planning assessment can be said to have prevented her from reaching a lawful conclusion on the question of whether there were "very special circumstances" to justify the approval of development on Metropolitan Open Land. She did not, it is true, compose her report as she might have done to reflect the approach in *Redhill Aerodrome Ltd.*. It would probably have been better to have considered the question of whether "very special circumstances" had been

demonstrated, not where she did, but at the end of the report once her conclusions had emerged on all the other matters she had to deal with. Had she done that, her approach might have been easier to follow. This is not to say, however, that by constructing her report as she did, she made an error of law. If, on a fair reading of the report as a whole, as Mr Stephen Whale for the council and Mr Reuben Taylor Q.C. for QPR submitted, she took into account the entirety of the planning harm the development would cause – including the harm to the Metropolitan Open Land and "any other harm" – and weighed against that harm all the benefits of the proposal, without omission or double-counting, then, in substance, her assessment would comply with the approach indicated in *Redhill Aerodrome Ltd.*.

30. In my view the substance of the officer's assessment here is legally sound. She did not fall into the error of "double-counting". That suggestion is mistaken.

31. In principle, it is possible for a particular factor to be relevant, and to carry appropriate weight, in the consideration of more than one planning issue. It may serve to avoid or overcome or, at least, outweigh some real or potential planning harm, and it may also satisfy some planning need that would otherwise go unmet. Mr Willers did not submit otherwise.

32. In this case I see no logical reason why the officer could not properly conclude, when considering the issue of "Public Access", that the "improvement to the existing facilities, in conjunction with the availability of other open space areas in the general vicinity of the application site" would "outweigh the direct impact of the 'loss' of public access to part of the development site …", while also taking into account, under the heading "Compelling Need for the Development" in her "very special circumstances" balance, the deterioration of the existing facilities at Warren Farm through lack of investment, and the requirement in Policy 5.6 of the core strategy to provide improved facilities generally, and specifically at Warren Farm.

33. This was not, in any sense, "double-counting". Rather, the officer's conclusions point up the two-fold relevance of the improvement to recreational facilities at Warren Farm as a material consideration – to which appropriate weight had to be given in two respects, not merely in one. The officer was entitled to conclude, as a matter of planning judgment, that in the context of "Public Access", given the availability of other publicly accessible open space nearby, the balance of relevant benefit – improved sports facilities for the local community – against disadvantage – the "loss" of public access for recreation – fell in favour of the development. I do not accept that this benefit was immaterial in that particular context; it was, I think, plainly a relevant consideration there. The officer was also entitled to conclude, again as a matter of planning judgment, that in the "very special circumstances" balance itself, the ability of the development to meet a need identified in development plan policy – the general need for investment in improved sports facilities, and specifically the need for such investment at Warren Farm – was a consideration to which weight should be given on the positive side of that balance. These conclusions were not in tension or conflict with each other. They were distinct from each other, but mutually consistent. They do not show a material

consideration being given double weight, only a single factor being given due weight in two different respects: first, outweighing a "loss" that would be caused by the development itself; second, meeting an existing need that would not be satisfied without the development.

34. Once that is accepted, Mr Willers' argument on this issue must fail. Because, in the exercise of their planning judgment, the officer – and so too the members – concluded that the improvement of the existing facilities at Warren Farm would serve, at least, to cancel out the weight that could be given to the "loss" of public access, there was nothing here that could have caused the "very special circumstances" balance to tip against the proposal. The harm to public access, such as it was, did not escape the officer's planning assessment. It was included in that assessment, but was found to be outbalanced by relevant benefit, so that the proposal was "considered to be acceptable in this respect". The result of that particular balancing exercise, relating to "Public Access", could not, therefore, have told against the proposal had it been explicitly added into the "very special circumstances" balance itself. At worst, the net effect on the "very special circumstances" balance would have been neutral, at best more positive than the balance explicitly carried out. The harm inherent in the "loss" of public access would certainly have made no difference to the outcome of that exercise.

35. The officer's approach was, in my view, entirely unsurprising. Indeed, had she not taken the approach she did, she would have been open to the criticism that she had failed to have regard to a material consideration. In the event, however, her advice to the committee on "very special circumstances" justifying "inappropriate" development on Metropolitan Open Land and on the issue of "Public Access" cannot possibly be regarded as "significantly or seriously misleading – misleading in a material way …" (see paragraph 42(3) of my judgment in *Mansell*).

36. I should add, finally here, that the officer's conclusion on the "Public Access" issue was, as Mr Whale and Mr Taylor submitted, a contingent conclusion, in which some lawful public access to the site was assumed, and that this assumption was somewhat weakened by the subsequent decision of an inspector, in a decision letter dated 19 September 2017, dismissing appeals against the council's refusal of applications to add the two footpaths running across the site to the definitive map.

37. The question before the inspector was whether use of these footpaths was "as of right". He noted that on the access road to the site from Windmill Lane there were "signs … stating for example that dogs are not allowed and that CCTV cameras are in operation" (paragraph 13 of his decision letter). He said that in his view "allowing public access to a sports centre for people to participate in sports, to spectate or indeed for more general recreational use does not necessarily imply an intention to dedicate specific routes across the site as public rights of way" (paragraph 14). He found that "the presence of the pitches would have brought public use of the paths into question whenever they were marked out and indicated a lack of intention on the part of the landowner to dedicate public rights of way" (paragraph 44), and that "by fencing the site and attempting to restrict access and by using land for formal sports, [the] landowners

indicated that they did not intend to dedicate rights of way …" (paragraph 47). Mr Whale submitted to us, in the light of the inspector's decision, that there was no "right" of public access across Warren Farm, and that "[access] by trespassers, whether to fly kites or otherwise, is not access by "right"".

38. Those are not matters for us to grapple with in this appeal. It is enough to say that the inspector's decision does nothing to undermine the officer's observations in the section of her report headed "Unauthorised Access across the Site and Right of Way Application" or her conclusions on "Public Access". If anything, it reinforces those observations and conclusions. But in any event it does not upset the analysis I consider to be right on this issue in the appeal.

Issue (2) – Policy 7.18 of the London Plan

39. Policy 7.18 of the London Plan is concerned with "Protecting open space and addressing deficiency". It states:

> "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.
>
> LDF preparation
> C When assessing local open space needs LDFs should:
> a include appropriate designations and policies for the protection [of] open space to address deficiencies[.]
> … ."

The supporting text for this policy, in paragraph 7.57, says that "[the] categorisation of open space in Table 7.2 provides a benchmark for boroughs to assess their own provision for the different categories of open space found throughout London". Table 7.2 sets out seven categories of open space: "Regional Parks", "Metropolitan Parks", "District Parks", "Local Parks and Open Spaces", "Small Open Spaces", "Pocket Parks" and "Linear Open Spaces". The Glossary in the London Plan defines "Protected open space" in this way:

> "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."

40. Policy 2.18 of the London Plan, which concerns "Green Infrastructure: the Multi-Functional Network of Green and Open Spaces", says that "[the] Mayor will work with all relevant strategic partners to protect, promote, expand and manage the extent and quality of, and access to, London's network of green infrastructure". The predecessor to this policy – Policy 2.18 of the London Plan (2011) – was incorporated into, and added to in, Policy 2.18, "Ealing Local Variation – Green Infrastructure: the Network of Open and Green Spaces" of the London Borough of Ealing Development Management Development Plan Document (adopted in December 2013), under the heading "Planning Decisions". Part G of that policy says that "[the] above Strategic principles will apply to the management of Ealing's defined network of Green Infrastructure …". Part H states:

> "H … Only development ancillary to the open space will be permitted. The size of development within green and open spaces and its impact upon visual openness must be kept at a minimum."

Paragraph E2.18.1 says that "Green Infrastructure within Ealing includes … Metropolitan Open Land, … Community Open Space …".

41. Policy 5.6 of the core strategy, "Outdoor Sports and Active Recreation", states:

> "The council will:
>
> (a) Protect and promote a network of sports grounds and other active recreation areas in the borough. Sites identified as being of strategic and local importance for outdoor sports will be protected and promoted primarily for this function.
>
> …".

The supporting text includes this:

> "… The following proposals have also been identified for key sports fields in the borough:
>
> …
>
> - Warren Farm – improved changing rooms, outdoor sports areas and social facilities.
>
> All sports grounds in the borough are currently designated and safeguarded as Community Open Space."

The core strategy's Appendix Four: Local Plan Glossary of Terms says that "Community Open Space is protected from development so that it is available as open space for the community, but not with full public access".

42. Policy 3.19 of the London Plan (2011), "Sports Facilities", and its successor in the London Plan (2016) states:

> "…
>
> Planning decisions
>
> B Development proposals that increase or enhance the provision of sports and recreation facilities will be supported. Proposals that result in a net loss of sports and recreation facilities, including playing fields should be resisted. …
>
> C Where sports facility developments are proposed on existing open space, they will need to be considered carefully in light of policies on Green Belt and protecting open space (Chapter 7) as well as the borough's own assessment of needs and opportunities for both sports facilities and for green multifunctional open space."

43. The original contention here was that the council had failed to take into account the fact that Warren Farm was part of the Brent River Park and the proposal's alleged conflict with Policy 7.18 of the London Plan. The response from the council and QPR was that the site was not, in fact, subject to any formal planning designation as part of the Brent River Park. Policy 7.18 was one of the policies listed in the "Informatives" put forward by the officer for inclusion in the decision notice as those to which the council had had regard in deciding to grant planning permission. But it was, in fact, irrelevant. The site did not fall within the definition in the Glossary in the London Plan as being "subject to local designation under Policy 7.18".

44. In argument before us, as in the court below, Mr Willers concentrated on the assertion that Policy 7.18 was misinterpreted and misapplied. He argued that the officer had failed to address the requirement in Part B of the policy – to resist the loss of "protected open spaces … unless equivalent or better quality provision is made within the local catchment area".

45. Dove J. was unimpressed by that argument. In his view it was clear that the officer had had Policy 7.18 of the London Plan in mind, because she had included it in the list of development plan policies said to be relevant to the proposal. But he saw no substance in the complaint that the officer had erred "in failing to provide a detailed appraisal against [Policy] 7.18 in [her] report" (paragraph 41 of the judgment). He went on to say that the site "was not subject to local designation" under Policy 7.18, either as part of the Brent River Park or otherwise. It was "designated as Community Open Space which is defined in [the council'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"". The officer had assessed "the merits of the proposal against the relevant policy". She had noted that the policy was, as the judge put it, "equivalent to the policy in relation to MOL", and "thus [her] assessment of the MOL issues was said to be of equal application". No criticism could be made of this approach. The "key point" here was that the site was not designated as "protected open space". In the absence of such

designation there was no warrant for applying Policy 7.18 as Mr Willers had suggested (paragraph 42). The judge was "not satisfied that … there was any arguable misinterpretation or misapplication of policy 7.18 …" (paragraph 43).

46. My analysis is somewhat different, but it leads to the same final conclusion.

47. One must start with the strategic policy, Policy 7.18, which, in part C, looks to local development frameworks to "include appropriate designations and policies for the protection [of] open space to address deficiencies" – as the definition of "Protected Open Space" in the Glossary confirms. As Mr Whale put it, the policy "devolves" to local planning authorities the task of creating their own regime of policy for achieving such protection of open space, at the local level. Where a local development framework has done this, the making of planning development control decisions must be guided by the relevant local policy. The broad strategic policy for "Planning decisions", in part B of Policy 7.18 – that "[the] loss of protected open spaces must be resisted unless equivalent or better quality provision is made within the local catchment area" – must be read and applied in the light of the specific terms in which protection is given to a particular area of open space at the local level in the relevant local development framework. Where the strategic objective under Policy 7.18 has been given effect in statutorily adopted policies at the local level, one must look to see whether those policies have been correctly interpreted and applied in the decision on a particular proposal. If they have, and unless there is some unusual feature in the case pointing away from this conclusion, Policy 7.18 itself will have been complied with.

48. Here, the relevant policies at the local level, which appear to give effect to Policy 7.18 under the arrangements envisaged for "LDF preparation" in its part C, are Policy 5.6 of the core strategy and Policy 2.18 of the development management development plan document.

49. Policy 5.6 of the core strategy was relevant because Warren Farm is one of the sites in the "network of sports grounds and other active recreation areas" given protection under the policy, and one of the identified "key sports fields in the borough". And the specific requirement for improvements to the sports facilities on this site may be said to represent the particular form of "better quality provision" envisaged by Part B of Policy 7.18 of the London Plan.

50. Policy 2.18 of the development management development plan document – read together with Policy 2.18 of the London Plan – was relevant, not only because the site was Metropolitan Open Land but also because, as a sports ground, it was "designated and safeguarded as Community Open Space" under Policy 5.6 of the core strategy – as is explained in the supporting text for that policy. Warren Farm can be said to have been subject to the protection of those policies, both as a sports ground and as Community Open Space.

51. Also relevant was Policy 3.19 of the London Plan, because it applies to "Sports Facilities" and, in part C, has a cross-reference to the other policies of the London Plan,

including its provisions on "protecting open space" – clearly a reference to Policy 7.18.

52. How do these policies operate in a development control decision? The policies of the London Plan – Policy 7.18, Policy 2.18 and Policy 3.19 – are broadly strategic in content and purpose, the local policies – Policy 5.6 of the core strategy and Policy 2.18 of the development management development plan document – refining the strategic approach to the local circumstances in the borough of Ealing, and, in the case of Policy 5.6 of the core strategy, to Warren Farm itself. The strategic imperative in Part B of Policy 7.18, which relates explicitly to "Planning decisions", is that the "loss" of "protected open spaces" is generally to be "resisted" unless "equivalent or better quality provision is made …". Neither Policy 2.18 nor Policy 3.19 precludes development, in principle. Part B of Policy 3.19, in principle, supports development whose effect would be to "increase or enhance the provision of sports and recreation facilities", and resists development whose effect would be "a net loss of sports and recreation facilities, including playing fields". Part C acknowledges the relevance of the local planning authority's own assessment of "needs and opportunities for … sports facilities". Neither of the two local policies is hostile to all development. Policy 5.6 of the core strategy, in general, seeks not merely to "protect" but also to "promote" the borough's network of sports grounds, and sites identified as being of "strategic and local importance for outdoor sports". And specifically at Warren Farm, it promotes development of a particular kind – "improved changing rooms, outdoor sports areas and social facilities", whilst acknowledging the designation and safeguarding of the borough's sports grounds as Community Open Space. Development of the specified kind is not treated as inimical to that safeguarding, but wholly consistent with it. Part H of Policy 2.18 of the development management development plan document countenances "development ancillary to the open space", but emphasizes the need to keep the "size" of "development within green and open spaces" and its "impact upon visual openness" to a "minimum".

53. Did the officer misconstrue these policies, including Policy 7.18 of the London Plan, and did she fail to apply them lawfully? In my view it is quite clear that she did not commit either of those errors.

54. It is necessary to read the officer's advice under the heading "Appropriateness of Development on Community Open Space" with her corresponding conclusions on the "Appropriateness of Development on Metropolitan Open Land", where she had confirmed that the site was "designated open space" as Metropolitan Open Land and Community Open Space, and noted the protection afforded to it by Policy 2.18 of the development management development plan document. She went on, in dealing with "Very Special Circumstances", to refer to the fact that existing facilities at Warren Farm had deteriorated through lack of investment and the "strategic sports function" had ceased, despite the requirement for improved facilities in Policy 5.6 of the core strategy.

55. When she returned to the site's status as Community Open Space, she explained the meaning and significance of that designation, referring to its definition in the "Local Plan Glossary (appendix 4 of the Core Strategy)" as land "protected from development so that it is available as open space for the community, but not with full public access".

She referred back to her previous advice on the approach to managing development on such land under Policy 2.18. She told the committee that her assessment of the proposal against that policy as it related to Metropolitan Open Land applied equally here, and did not have to be repeated. This was all perfectly clear advice, consistent with a correct understanding and lawful application of development plan policy. It cannot be criticized here. And indeed, Mr Willers did not seek to do so.

56. The officer then focused on the policy of the development plan that contained specific provisions for decision-making on proposals for development at Warren Farm – Policy 5.6 of the core strategy. Again, in my view, her approach and conclusions are unassailable. She obviously grasped that under Policy 5.6 the site was safeguarded from development other than the required improvement to its facilities as a sports ground. This was correct. She acknowledged that the site's "use as a sports ground" was "recognised through its [Community Open Space] designation". She then summarized the relevant provisions in Policy 5.6. She did that accurately. She stressed the council's approach, under the policy, of "protecting and promoting" the network of sports grounds in the borough, the identification of "priority sites for investment" in the council's Facilities Strategy, and the fact that Warren Farm was one of the "key sports fields" in the borough "where investment should be secured to improve changing rooms, outdoor sports areas and social facilities". This was a true summary. The officer advised the committee that the proposal "clearly accords with these objectives". As an exercise of planning judgment under Policy 5.6, this too is beyond criticism in a legal challenge. Development of the kind proposed – as she saw – was not at odds with the protection of the site under Policy 5.6, both as a sports ground and as Community Open Space. It was explicitly compatible with that protection, and inherent in it. In fact, it was positively required.

57. Lastly, the officer considered the effect of Policy 3.19 of the London Plan. Her advice here was that the proposed development was consistent with the objective of the policy to "increase or enhance the provision of sports and recreation facilities", and that, so far as "community access" was concerned, the revised scheme complied better with the policy than the previous proposal because "the design and layout of the buildings would be improved and a level playing field formed". Once again, the advice given to the committee was unimpeachable. It demonstrated a lawful exercise of planning judgment, giving effect to Policy 3.19, properly construed.

58. There are, in my view, three conclusions to be drawn.

59. First, the officer's advice shows a true understanding and lawful application of every policy in the development plan bearing on the acceptability of this development on Community Open Space and an existing sports ground, including the relevant protective provisions in those policies. To argue the contrary would be impossible.

60. Secondly, therefore, although the officer did not refer in her conclusions to Policy 7.18 of the London Plan, her assessment and advice reflected a true understanding and lawful application of that policy, including its objective, in Part B, to resist the "loss of

protected open spaces" in decision-making on applications for planning permission, and its instruction to local planning authorities, in Part C, to include in their local development frameworks "appropriate designations and policies for the protection [of] open space to address deficiencies". We heard no cogent submission to suggest that any relevant provision in Policy 7.18 is not fully embodied in the policies to which the officer did refer in her assessment. Such a submission would have been untenable. The officer obviously understood that if the proposal complied with the policies to which she referred – in particular, Policy 5.6 of the core strategy with its requirement for improved facilities at Warren Farm – it necessarily complied with Policy 7.18 as well – including the requirement in Part B of that policy for "better quality provision" to justify a "loss of protected open [space]". In the circumstances, the fact that she did not mention Policy 7.18 in her conclusions is not a flaw in her report that could possibly invalidate the council's grant of planning permission. In so far as it was relevant to QPR's proposal, Policy 7.18 was, in substance, lawfully applied in the making of the council's decision.

61. And thirdly, whether on the judge's analysis or mine, it follows that this ground of the claim for judicial review is misconceived. As the judge rightly concluded, there was no misinterpretation or misapplication of Policy 7.18, or of any other development plan policy relevant to QPR's proposal.

Conclusion

62. For the reasons I have given, I would uphold the judge's decision on ground 1 of the claim for judicial review, dismiss the appeal, and also dismiss the claim on ground 2.

Lord Justice Patten

63. I agree.

Lady Justice Hallett

64. I also agree.