Neutral Citation Number: [2022] EWHC 3211 (Admin)

Case No: CO/1173/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/12/2022

Before :

THE HONOURABLE MR JUSTICE SAINI

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Between :

THE KING ON THE APPLICATION OF PHILIP ADDISON	**Claimant**
- and -	
LONDON BOROUGH OF SOUTHWARK	**Defendant**
(1) GREENDALE PROPERTY COMPANY LIMITED **(2) DULWICH HAMLET FOOTBALL CLUB LIMITED** **(3) HEALEY DEVELOPMENT SOLUTIONS (DULWICH) LIMITED**	**Interested Parties**

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Ruchi Parekh (instructed by **Public Access**) for the **Claimant**
Richard Moules (instructed by **London Borough of Southwark**) for the **Defendant**
Andrew Byass (instructed by **Mishcon de Reya LLP**) for the **Third Interested Party**

Hearing date: 6 December 2022

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Approved Judgment

Mr Justice Saini :

This judgment is in 7 main parts as follows:

I.	Overview:	paras [1]-[5]
II.	Legal Principles:	paras [6]-[11]
III.	Factual Background and the Reports:	paras [12]-[22]
IV.	Ground 1: mistake of fact:	paras [23]-[36]
V.	Ground 2: failure to apply policies on Other Open Space:	paras [37]-[39]
VI.	Ground 3: failure to apply policies on play and informal recreation:	paras [40]-[54]
VII.	Ground 4: failure to discharge the public sector equality duty:	paras [55]-[69].

I. <u>Overview</u>

1. The Claimant challenges the decision of the Defendant, the London Borough of Southwark ("the Council") dated 21 February 2022 to grant planning permission for the redevelopment of the Champion Hill Stadium and the neighbouring Astroturf pitch at Greendale, both in the area of East Dulwich, London. The Stadium is the ground of Dulwich Hamlet Football Club ("DHFC") which plays in the National League South.

2. The focus of the claim for judicial review is the legality of the Council's approach to the Astroturf pitch, and proposed replacement of it as part of re-provisioning of sports and recreation facilities. The Astroturf pitch, although in a state of some disrepair, is currently used extensively for various recreational purposes. It has only been freely accessible to the public since 2018 but was a real asset for the local community as free and open recreational space during the Covid Pandemic. Under the planning permission, DHFC's current football pitch will be moved onto the Astroturf pitch and the public will be provided with a smaller artificial pitch and a multi-functional *kickabout* space. There was a substantial consultation exercise undertaken by the Council and a large number of objections were received relating to the impact of the proposal on open spaces and the loss of the Astroturf.

3. The First Interested Party ("IP1") is the freeholder of the land on which the existing stadium and an adjacent car park are situated. The Second Interested Party ("IP2") is the football club, DHFC, that leases those facilities from IP1. The Council is the freeholder of the land on which the Astroturf is situated. The Third Interested Party ("IP3") is the development manager of IP1. IP2 and IP3 were the joint applicants for the relevant planning permission. I will refer to the Council and IP3 collectively below as "the Respondents". Counsel for IP3 adopted the submissions of Counsel for the Council, and in their skeleton arguments they each make submissions in common, in opposing the claim.

4. There are 4 issues raised by the pleaded claim:

   (i) Did the Council make a mistake of fact in relation to open space deficiency?

   (ii) Did the Council fail properly to apply Policy 3.27 of the Southwark Plan (2007)?

(iii) Did the Council consider compliance with London Plan Policy 3.6, London Plan Policy 3.19, and Strategic Policy 11 of the 2011 Core Strategy?

(iv) Has the Council breached the Public Sector Equality Duty ("PSED")?

5. In addition, there is an issue as to whether the Court should refuse relief pursuant to s.31(2A) of the Senior Courts Act 1981 ("the SCA 1981"), if the Claimant succeeds on the PSED ground. Although Counsel for the Claimant took the 4 issues in a different order in her oral submissions, I will adopt the above order below.

II. Legal Principles

6. Although there were differences of emphasis, there was ultimately no identifiable dispute as to the law in relation to each of the 4 grounds of challenge. I was taken to the principles which apply in challenges to decisions of local planning authorities to grant planning permission as set out by Holgate J in R (Nicholson) v Allerdale Borough Council [2015] EWHC 2510 (Admin) at [10]-[11]. In particular, it is well-established in the planning context that reports should be read as a whole and fairly, without being subjected to the examination which may be applied to the interpretation of a statute or a contract. Additionally, in construing reports, it has to be borne in mind that they are addressed to a "knowledgeable readership", including council members "who, by virtue of that membership, may be expected to have a substantial local and background knowledge". To the same effect in Mansell v Tonbridge and Malling BC [2018] P.T.S.R. 1452 at [41] it was emphasised that officers' reports should not be subjected to 'hypercritical' scrutiny by the courts.

7. A mistake of fact can give rise to a separate head of challenge in the planning context as in conventional public law: Watt v LB Hackney [2016] EWHC 1978 (Admin); [2017] JPL 192, applying E v Home Secretary [2004] EWCA Civ 49; [2004] QB 1044 (CA).

8. Where a ground of challenge is that a planning authority failed in its duty to make sufficient inquiry, the question to be asked is whether the inquiry made by the planning authority was so inadequate that no reasonable planning authority could suppose that it had sufficient material available upon which to make its decision: R (Hayes) v Wychavon DC [2014] EWHC 1987 (Admin)**;** [2019] PTSR 1163 at [31]. That principle applies both in the general planning context and in respect of a complaint, in relation to the PSED, to the effect the public authority failed to make sufficient inquiries.

9. Section 149 of the Equality Act 2010 ("EA 2010") imposes the public sector equality duty ("PSED") in the following terms:

> "149. Public sector equality duty
>
> (1) A public authority must, in the exercise of its functions, have due regard to the need to—
>
> > (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
> > (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

(2) […]

(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

(a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
(b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
(c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low."

10. The relevant protected characteristics are age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex, and sexual orientation: s.149(7) EA 2010. As to challenges based on breach of the PSED, the general principles are well-established: R (Bracking) v Secretary of State for Work and Pensions [2013] EWCA Civ 1345 at [25]. In Powell v Dacorum Borough Council [2019] HLR 1, by reference to Bracking, the court underlined the context-specific nature of the PSED. There is not a *one size fits all* approach and matters of *substance* and not *form* are to be the focus of any consideration of the legality of a public authority's compliance with the PSED.

11. Finally, Section 31(2A)(a) SCA 1981 provides that the High Court must refuse to grant relief on an application for judicial review "if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred". In Gathercole v Suffolk CC [2021] P.T.S.R. 359, the Court of Appeal explained that s.31(2A) SCA 1981 was intended to ensure that even if there had been some flaw in the decision-making process which might render the decision unlawful, the decision must not be quashed if other circumstances meant that quashing it would be a waste of time and public money because it was highly likely that the same decision would have been made without the error. It underlined that it was important that a Court faced with an application for judicial review did not shirk from fulfilling the obligation imposed by s.31(2A).

III. Factual background and the Reports

12. At present the application site comprises:

(i) Champion Hill Stadium which consists of a main stand and smaller covered stand with capacity for 3,000 spectators, plus a clubhouse containing a gym, squash courts and function room;

(ii) the current football pitch of Dulwich Hamlet FC which (unlike the stands) is on land designated as Other Open Space ("OOS") in the Southwark Plan (2007);

(iii) Greendale artificial pitch (the Astroturf pitch, referred to above) which is on land designated as Metropolitan Open Land ("MOL"), and not OOS.

13. As I have noted above, the Astroturf was not originally formally open for public access, but in 2018 the Council unlocked the gates. The Astroturf is in a poor state for repair, unsuitable for formal sports, but is available (with warning notices in place) for informal play and recreation. The Astroturf had been used previously for club training, but this use ceased in August 2017 due to the poor state of the playing surface.

14. Metropolitan Open Land (MOL) such as the Astroturf pitch is given the same very high level of protection as the Green Belt in terms of the policy protection it receives, requiring the "strongest protection" and the refusal of inappropriate development save if stringent "very special circumstances" can be demonstrated: London Plan policy 7.17(B). This is a stringent test and the fact that it was met in this case is a factor of some importance in the context of the specific complaints raised by the Claimant.

15. The proposed development would comprise the following:

(i) a new football stadium (the new pitch would be where the Astroturf is currently located);
(ii) 219 residential units (a minimum 73 (35.4%) of which would be affordable) (the housing would be where the stadium is currently located);
(iii) a multi-functional "kickabout" space (essentially part of a substitute for the Astroturf pitch);

(iv) a publicly accessible linear route/Green Link; and

(v) the replacement of an existing telecommunications mast to a location outside the MOL.

The Reports

16. The parties have made extensive reference to five reports in their oral and written submissions. I will refer to material parts of these reports below but at this stage, I identify the reports by adopting the parties' abbreviations: (i) the Mayor of London's Stage 1 Report (11 November 2019) ("the Stage 1 Report"); (ii) the Officer's Report to the Planning Committee of 8 July 2020 ("the OR"); (iii) the Addendum Officer's Report of 24 July 2020 ("the Addendum OR"); (iv) the Mayor of London's Stage 2 Report (14 February 2022) ("the Stage 2 Report"); and (v) the Delegated Officer's Report of 21 February 2022 ("the Delegated OR").

17. Although I will need to turn to these reports (and in particular the OR) in more detail below, at a high-level, one can summarise the position in neutral terms as follows. Members were told in the OR Executive Summary that the Astroturf was designated as MOL and it would be lost. Members understood the poor condition of the Astroturf (which is unsuitable for formal sports) and the fact it had only been publicly accessible with warning notices in place since 2018. They also understood the nature of the use of the Astroturf and the reasons why some consultees objected in very strong terms to its

loss. In this regard, one of the issues considered was the re-provision of sport and recreation facilities and how this addressed the concerns raised by consultees in relation to the Astroturf. Members understood this was a case where sport and recreation facilities were being *re-provided*, in particular that the application proposed a multi-functional kickabout space that would be free, open to the public and not require booking, plus a 3G pitch (that is, an artificial grass pitch) which it was said would be of significantly better quality and the community use of which would be regulated by planning obligation.

18. The reports identified a number of planning policies and recorded the objections in relation to the loss of the Astroturf (I will turn to the policies alleged to have been ignored or misapplied below). Ultimately, the Council concluded that there were "Very Special Circumstances" to justify the impact on the MOL. In particular, the Council concluded that there would be a conflict with OOS policy, but that this was mitigated by the significant qualitative improvements the re-provisioned sport and recreation facilities and Green Link would deliver.

19. The Council specifically considered the recreational use of the Astroturf and the ability of the new kickabout space to compensate for its loss. It decided that the kickabout space would be free, not require booking and represent a significant qualitative improvement. Accordingly, the Council concluded it would be suitable for many of the informal games and activities currently taking place on the Astroturf. Further, the Council evaluated the other new facilities and concluded they would deliver a wide range of important sporting and community benefits.

20. The Council granted planning permission subject to a planning obligation securing a Community Use Agreement (to which I will need return below in more detail) and the mitigation in the agreement under section 106 of the Town and Country Planning Act 1990 ("the s.106 agreement") was explained to Members.

21. The Council's overall judgment was that, although the proposal conflicted with the development plan as a whole, the significant benefits of the proposal justified the grant of planning permission.

The Community Use Agreement

22. The Community Use Agreement was secured in the following manner. Schedule 12, paragraph 1.1.2 of the s.106 agreement requires the football club to submit a draft Community Use Scheme which has been prepared in consultation with the Community Use Review Committee for approval by the Council before implementing the Football Site. Clause 1.1 of the s.106 agreement provides that the Community Use Review Committee shall include representatives from Sport England, London County Football Association, the Council, Football Foundation, and any other organisation required by the Council. Clause 1.1 also provides that the Community Use Scheme is required to set out details of (i) affordable rates to be charged to the local Community for use of the Leisure Facilities which shall not exceed those rates charged in similar facilities owned by the Council; (ii) mechanisms to minimise Pitch hire costs for the Community ("*Pitch*" being defined in Clause 1.1 to mean the multi-use 3G all-weather pitch); (iii) number of hours per week during which the Pitch will be available for use by the Community with the number being no less than 36 hours per week in Season and 38 hours per week

in Close Season; (iv) the availability between the hours of 8 am and 6 pm for 25 hours per week during term time in Season and 36 hours per week during term time in Close Season of the Pitch, classrooms and changing rooms for use free of charge by state funded schools located within the Borough; (v) support and assistance to be provided to the Community Use Review Committee to enable them to carry out an annual review of the Community use of the Pitch and Leisure Facilities including details of usage, bookings, maintenance and rates; (vi) range of activities to be offered at the New Stadium including lessons and courses and block bookings for the Community; and (vii) the measures to be taken to ensure the New Stadium programme of Community use shall be subject to continual development, and how the general intention will be to manage a balanced programme encouraging use by the Community. The "*Community*" defined as follows: "Community means but is not limited to schools, registered charities, voluntary organisations, non-profit organisations, residents associations, clubs, groups or individuals based in the London Borough of Southwark and "Community Users" shall be construed accordingly".

IV. Ground 1: mistake of fact

23. The Claimant argues that the Council made a mistake of fact on the question whether the application site was in an area of *open space deficiency*. Counsel for the Claimant forcefully submitted that there was a mistake in this regard as to an existing fact. It was said that contrary to what was said in the OR/525, the site *is* an area with an open space deficiency. That paragraph which is said to include the error reads as follows (with my underlined emphasis of the pleaded error):

> "525. Many of the objectors have pointed to the popularity of the artificial pitch during the Covid lockdown. Site visits do confirm that the pitch is very well-used at the moment and its size and open access is able to accommodate many different groups at once, playing ball games, riding bikes, and walking dogs. The remainder of Greendale fields is less easily accessible because much of it is heavily planted or overgrown. In determining this application, the Committee is being asked to balance the benefits of open access for informal use, against the benefits of more controlled access for formal sport. <u>The area is not one with an open space deficiency</u>, with large nearby parks including Goose Green, Ruskin Park and Dulwich Park with space for informal sport and play. The borough has a recognised need for additional 3G football pitches. Balancing informal play with formal sport, both of which contribute to healthy lifestyles, is a factor in weighing the benefits and dis-benefits of the scheme".

24. Counsel for the Claimant, in her focussed and well-structured arguments, submitted that whether or not an area is one of "open space deficiency" must be taken to be a reference to the assessment within the Council's Open Space Strategy publication ("the OSS"), not least because a principal issue in this case was the loss of open space; and because the OSS is the only planning document within which an assessment of open space deficiency (or otherwise) in the Council's areas is to be found. I was taken to the part of the OSS which identifies Camberwell (the relevant locality for the planning permission

in issue) as a sub-area "deficient in quantity of open space". Counsel for the Claimant submitted that it is the OSS that informs decision-makers as to which areas within the Council are meeting the borough standard for public park provision and natural greenspace and which areas are failing to do so. It was said that at least one consequence of undertaking such formal assessment must be that it is then used, where appropriate, to inform the planning decision-making process. It was argued, moreover, that the issue specifically under consideration at OR/525 was the loss of the Astroturf, not in terms of MOL, but in terms of its accepted use for informal play. This loss was being justified by express reliance on the alleged availability of large nearby parks. The reference to "deficiency" must therefore necessarily be taken to be a reference to the assessment of public park provision in the OSS. The mistake was said to have played a material part in the Council's reasoning in that the mistake of fact was expressly relied on in the overall planning balance to justify the loss of the Astroturf. The overall planning judgment was, it was argued, clearly vitiated by this mistake.

25. Although a number of arguments were developed in response, the overarching and simple responsive submission made by the Respondents was that when referring to the location as not being an area with an open space deficiency in OR/525, all that Members were being told was that there was sufficient open space in the vicinity of the Site, i.e. in the "area" in general terms.

26. In my judgment, Ground 1 is without merit. It proceeds on the basis of reading a single part of the OR and adopting the hypercritical approach criticised in the case law. The Claimant's submissions treat a few words as if they were part of a contract and statute. The Respondents are right in my judgment to submit that the OR was not referring to the "*sub-areas*" in the OSS. The Claimant's inference is not supported either by the wording and purpose of the OSS, or the words of the OR read fairly and as a whole.

27. The Claimant's argument wrongly treats the "*sub-areas*" in the Council's OSS as being fixed units against which planning applications should be assessed. The OSS created 8 sub-areas based on the old community council areas and conducted an audit of each sub-area. Contrary to the Claimant's submission, the sub-areas are not intended to be used as firm boundaries for judging planning applications: they are merely a mechanism for setting out information. As explained further below, I accept the Respondents' submission that this is clear from the terms of the OSS itself and from Policy 3.27 and Appendices 11 and 12 of the Southwark Plan.

28. On its own terms the OSS demonstrates that the sub-areas are not intended to be seen as firm boundaries or self-contained units of assessment because the document clearly recognises that inhabitants of one sub-area will use accessible open space in adjacent sub-areas.

29. An example is helpful in this regard. The application site sits on the boundary of the Camberwell sub-area (which is below the borough standard in public parks and natural green space) and very close to the Dulwich sub-area (which is in line with the borough standard for public parks and above the borough standard for natural green space). The sub-areas for both Camberwell and Dulwich are large, and encompass a range of developed and undeveloped land with different distributions of open space. In that context, the OSS states that the Camberwell sub-area is "*relatively well-served by open space…… and (has) relatively good access to larger spaces outside the sub-area*". The

OSS also notes that the Camberwell sub-area is bordered by Ruskin Park to the south, providing good access to larger open spaces outside of the sub-area. Accordingly, the OSS itself makes clear that the accessibility of open space to residents of the Camberwell sub-area depends on the quantity and quality of open space in their vicinity, irrespective of which "*sub-area*" that open space is within.

30. Policy 3.27 and Appendices 11 and 12 of the Southwark Plan also demonstrate that the sub-areas in the OSS are not intended to be used as firm boundaries for judging planning applications in the manner submitted by Counsel for the Claimant. Policy 3.27 did not apply to the loss of the Astroturf because the Astroturf is not designated as OOS. Nevertheless, where Policy 3.27 does apply, the assessment is not by reference to the "*sub-areas*" in the OSS. Instead, I note that the supporting text to Policy 3.27 makes clear that "*any loss of Other Open Space needs to be replaced within a local catchment area, which is generally considered to be within a 400m radius*". Appendices 11 and 12 of the Southwark Plan also identify the relevant distances by which to judge the "*catchment area*" when assessing park deficiency.

31. Consequently, the Respondents are right to argue that it would be contrary to the terms of the OSS and inconsistent with the adopted development plan to require the Council to use the "*sub-areas*" in the OSS as firm boundaries for judging planning applications. In short, the Claimant's arguments are inconsistent with the terms of the OSS.

32. Consistently with this understanding of the OSS, the reference in the material part of the OR/525 (which I have set out above at [22]) to the "*area*" was not a reference to any particular "*sub-area*" within the OSS. Rather, the OR used the term "*area*" to refer to the amount of open space within the vicinity of the application site. The basic point being made was that those who live close to the application site have access to large numbers of open spaces within walking distance, including the nearby parks of Goose Green, Ruskin Park and Dulwich Park which provide reasonably accessible alternative spaces for informal sport and play. Members must be taken to have a material local knowledge and they were well able to reach a planning judgement on the accessibility of parks in the vicinity.

33. That this is the correct interpretation of this part of the OR is also clear from the surrounding context. The impugned sentence appears in a paragraph within the section of the OR entitled "*Overall conclusion and planning balance*". That section draws together the main conclusions of the preceding chapters of the OR and covers a range of planning issues. It is important therefore to identify the particular issue that this part of the OR was addressing. That is stated in terms as being the balancing of "*the benefits of open access [to the Astroturf] for informal use, against the benefits of more controlled access for formal sport*", having regard to the informal use made of the Astroturf during the Covid lockdowns. The overall conclusions section had already dealt with other issues in earlier paragraphs e.g. the loss of MOL (of which the Astroturf was a large part) at OR/511; the impact of the loss of OOS caused by redeveloping the existing football pitch at OR/512; the benefits to be provided by the new sports facilities at OR/ 513; and the outdoor amenities to be provided for new residents at OR/515.

34. In other words, the OR dealt appropriately with the loss of the Astroturf as MOL which was the relevant development plan designation. In context it is clear in my judgment that the separate issue considered in OR/525 was the impact of the loss of the informal use

of the Astroturf which consultees had raised as another material planning consideration i.e. it was a consideration outside the development plan. There is no reason why consideration of that issue ought to have been by reference to the Council's OSS, especially since the Astroturf is not designated as OOS in the development plan.

35. There was no mistake of fact in relation to the judgement reached at OR/525. I was referred to the map at OR/10. This shows that the application site sits within a series of contiguous open spaces and within close walking distance of a number of other open spaces. Additionally, the application site is shown on page 44 in the OSS as being within an area defined as being accessible to local, district and metropolitan parks. Accordingly, what the OSS actually shows is that the application site is surrounded by other accessible open space within walking distance which is consistent with the planning judgement at OR/525. The judgements in the OR were therefore based on a correct understanding of the application site's proximity to parks. There is no rationality challenge to this factual assessment.

36. In short, giving the words of OR/525 their ordinary and natural meaning leads to the common-sense position that OR/525 was doing no more than setting out for Members that there was alternative open space in the area of the Site which was also able to be used for informal recreation. Ground 1 fails.

V. Ground 2: failure properly to apply the policies in respect of Other Open Space (OOS)

37. Under this Ground, the Claimant argues that the Council failed properly to apply the Saved Southwark Plan Policy 3.27. As developed by Counsel for the Claimant, the complaint in respect of Saved Southwark Plan Policy 3.27 concerns the final words of clause (vi) of that policy. The policy states that "[d]evelopment on Other Open Space will only be permitted" if it meets certain specified criteria "or (vi) Land of equivalent or better size and quality is secured within the local catchment area for similar or enhanced use before the development commences, provided that this would not result in the creation of or an increase in district or local park deficiency as identified in Appendices 11 and 12".

38. This ground is built on the false premise that the proviso at the end of clause (vi) of Policy 3.27 was relevant. It is common ground that the Astroturf is not designated as OOS. Accordingly, Policy 3.27 does not apply to it.

39. Additionally, clause (vi) of Policy 3.27 is concerned to ensure that development proposals will not create or increase a deficiency in district or local parks with unrestricted access. The Astroturf and the existing DHFC football pitch are not parks and access to the DHFC football pitch (which is OOS subject to Policy 3.27) is not unrestricted. Consequently development of them is not capable of creating or increasing a deficiency in park access. Clause (vi) was not engaged by the proposal even in respect of the existing pitch which is OOS. Ground 2 fails.

VI. Ground (3): failure to apply the policies on play and informal recreation

40. The Claimant argues that the Council failed to consider whether the loss of the Astroturf as an informal recreational facility would be compliant with the development plan.

Specifically, the Claimant submits that the Council did not consider compliance with a number of local plan policies: London Plan Policy 3.6, London Plan Policy 3.19, and Strategic Policy 11 of the 2011 Core Strategy. I will set out below the material parts of these policies relied upon when dealing with the arguments.

41. In summary, the Respondents argue:

    (i) the Council considered the loss of the Astroturf in accordance with its development plan designation as a sports ground on land classified as MOL;

    (ii) the Council also considered the current informal recreational use of the Astroturf as an other material consideration;

    (iii) the Council correctly applied London Plan Policy 3.6 and the Mayor's Supplementary Planning Guidance ("the SPG") to the issue to which they are directed: that is, whether adequate play provision would be made for the new residents of the development;

    (iv) the Council did in fact apply London Plan Policy 3.19 and (consistently with the Mayor's Stage 1 Report) judged that the superior quality of the new sports facilities (whose use would be controlled via the s.106 Agreement) justified the net loss of sports and recreation land; and

    (v) Strategic Policy 11 of the 2011 Core Strategy does not contain a development control test. Insofar as it refers to protecting MOL, the OR lawfully judged that very special circumstances existed which outweighed the harm to the openness of the MOL.

42. I consider the Respondents' submissions to be correct and they provide a complete answer to Ground 3. I will explain my reasons in more detail below.

43. The Astroturf is designated in the development plan as a sports pitch, not for informal recreation. On facts which are common ground, the use of the Astroturf for play and informal recreation is recent, and only commenced after the Council took back IP2's lease of the Astroturf in 2018. The Astroturf is defined in the development plan as a "*sports ground*" and the development plan required the planning application to replace it as such. The OR appropriately dealt with the Astroturf under the heading "*Sports facilities*". The Astroturf is also part of the MOL and its loss was assessed in some detail against the stringent development plan policy concerning MOL. Accordingly, the Council properly considered the relevant planning policy designations applied to the Astroturf.

44. On the facts, it is clear that the existing informal recreational use was understood and considered as an other material planning consideration. It is not in dispute that there are multiple references in the OR by which Members were advised that the Astroturf was used for a wide range of informal sports and "*various recreational purposes*" e.g. playing ball games, riding bikes and scooters and walking dogs. The varied nature of the use of the Astroturf was well understood.

45. In light of that information, the Council did in fact consider the loss of the existing recreational use of the Astroturf. The OR reached the planning judgement that the loss would be mitigated because the proposed kickabout space (which would be free for all to access without booking albeit much smaller in size than the existing Astroturf) would provide an area suitable for many of the informal games and activities currently taking place on the Astroturf. The OR also noted (as identified above) that the immediate surrounding area has other parks (including Goose Green, Ruskin Park and Dulwich Park) which provide space for informal sport and play. The Council gave the loss due weight, but it also gave weight to the improvements to open space as a matter of its planning judgement (including in terms of quality, accessibility and biodiversity).

46. As to the matters which the Claimant identifies in his pleadings as "*relevant policies*", in my judgment, the Council did in fact address those policies and, insofar as applicable, lawfully took them into account. I will address each in turn.

London Plan 2016 Policy 3.6

47. In summary, this requires housing development to make provision for play and informal recreation based on the expected population and it cross-refers to the SPG. The Addendum OR noted Friends of Greendale's reliance on the SPG and at para. 21 concluded that the proposal was acceptable given that it provided the required play space for new residents and the play area in the new green link would be open to the wider public. The Council therefore applied Policy 3.6 and the SPG to the issue to which they are directed (whether adequate play provision would be made for the new residents of the development). Insofar as the "*strategic*" aim of Policy 3.6 is to ensure that children have safe access to good quality, well-designed, secure and stimulating play and informal recreation provision, the Council was also satisfied that the kickabout space would be suitable for many of the games and activities taking place on the Astroturf, that the 3G pitch was a qualitative improvement and that the publicly accessible play space in the green link and the wider development was a benefit. Furthermore, as I have identified above, the s.106 Agreement included specific provisions to ensure access to the new facilities for the Community.

London Plan Policy 3.19

48. Under this policy, the "strategic aim" is to "increase participation in, and tackle inequality of access to, sport and physical activity in London particularly amongst groups/areas with low levels of participation". I was taken in argument to Limb B of the policy which provides that "development proposals that increase or enhance the provision of sports and recreation facilities will be supported". It also provides that "proposals that result in a net loss of sports and recreational facilities, including playing fields should be resisted" and that "wherever possible, multi-use public facilities for sport and recreational activity should be encouraged".

49. OR/193 expressly referred to Policy 3.19 advising that it "states that proposals resulting in a net loss of sports and recreation facilities should be resisted". OR/194 set out that many of the public and amenity group objections "raised the point that the development would reduce the area of publicly accessible sports facilities (the existing artificial pitch) as the replacement facility in the form of the informal kick-about space would be of a

small size and not adequate to compensate for the loss, and the proposed pitch would now have to be booked". It highlighted that local residents and children use the existing artificial pitch extensively for various recreational purposes and that it has been an important resource during the Covid-19 crisis. OR/195-197 explained that Sport England did not object to the application because "the proposals have the potential to improve and enhance community sport on this site and prevent the closure of the Club. The provision of an artificial 3G pitch for the community will secure sport-related benefits for the local community and also meet identified sports development priorities…". OR/198 noted the specific concern of objectors in relation to the Astroturf and also explained the condition of that pitch:

> "198. Local residents argue that the existing artificial pitch is used extensively for various recreational purposes and point out that the proposal would change the structure by introducing a booking system to use the 3G pitch and therefore removing the spontaneous informal sporting activity previously available. It should be noted however that the existing pitch has only been freely accessible to the public since 2018. Previously, it, and the surrounding areas of Greendale, was fenced off and informal access was only possible because parts of the perimeter fence had been broken down. The pitch is in a poor state of repair, and notices advise the public that they use it at their own risk. The pitch would not be safe or suitable for formal sports. It has to be recognised that the state of the pitch is a result of long term neglect by DHFC under their previous lease from the council".

50. OR/199 advised in terms that "adopted and emerging policies contain a presumption against the loss of sports facilities, including playing fields". The same paragraph expressed the judgement that the replacement indoor facilities do not involve a net loss of floor area and moreover they would be of a superior standard resulting in a "net benefit in terms of sporting provision, enabling a higher level of participation". OR/200-201 also highlighted the benefits of the new classrooms and the proposed partnering with local schools. OR/202-203 described the proposed 3G pitch, and explained that Sport England considered the proposal met an evidenced strategic need for additional 3G pitches and that despite the loss of the full sized grass pitch "the outcome of this development will have significant benefit to the Club and local community which outweigh the loss of grass pitch provision through this proposal". OR/204-206 expressly considered the concern raised by some consultees that the informal multi-functional kickabout space would not compensate for the loss of the Astroturf. OR/204 noted that Sport England had not objected and OR/205 recognised the proposed kickabout space would be smaller than the Astroturf, but reached the judgement that the kickabout space would be a suitable replacement. OR/206 also addressed the loss of the Astroturf in terms of a net loss of playing fields and noted the obligation for the applicant to use reasonable endeavours to secure a lease of not less than 125 years of the St Olave's and St Saviour's Sports grounds for additional community use.

51. Standing back, it is clear that the OR correctly referred to the material parts of the London Plan Policy 3.19, advised that it contained a presumption against the loss of sports facilities and advised that there would be a net loss of grass pitch provision and that the

kickabout space would be smaller than the Astroturf. Notwithstanding that net loss, the OR judged that the new facilities would be superior, that they would enable a higher level of participation in sport (including increasing the scope for women and girls to participate in football and other sports (OR/491)), and that they would be suitable to enable the existing activities on the Astroturf to continue. On balance, the proposal was therefore judged substantially to comply with Policy 3.19. There was no legal error in this assessment.

52. For completeness, I note also that the Council's conclusion was shared by the Mayor who stated at paragraph 26 of the Stage 1 Report:

> "London Plan Policy 3.19 and draft London Plan Policy S5 both seek to ensure that the capital has a sufficient supply of good quality sports and recreation facilities. To this end these policies direct decisions to resist the loss or degradation of such facilities and to seek to secure their enhancement. The proposals would result in the removal of the existing astroturf pitches from Greendale Playing fields (which total 7,659 sq. m.) would be replaced with a full size all-weather artificial pitch laying surface of 100 metres by 64 metres and a smaller MUGA within the public realm of the residential component of the scheme totalling 288 sq.m. The applicant has outlined that this all weather pitch would be available to members of the public. A full community use agreement to allow users of the existing playing fields to benefit from the enhanced facilities (including facilities such as the changing rooms) must be robustly secured as part of any future permission. These provisions not only ensure that these proposals do not negatively impact on the use of the existing playing fields but will also actively enhance the experience of using these facilities. The community use agreement will also ensure the playing fields remain accessible to the public. These provisions will be secure via S.106".

Strategic Policy 11 of the Core Strategy

53. OR/138 expressly referred to Strategic Policy 11 in its assessment of the proposal's impact on the MOL (the Astroturf being part of the MOL). OR/172 also explained the requirements of Strategic Policy 11 which *inter alia* protects MOL from inappropriate development. As I have already noted, the Council's planning judgement at OR/166 was that very special circumstances existed to justify the impact on the MOL. Consequently, the proposal complied with MOL policy. Strategic Policy 11 does not establish any other development control test against which the application should have been judged.

Conclusion on the policies challenge

54. Overall, the Council lawfully considered the issue of play and informal recreation as a material planning consideration; and did not fail to apply relevant development plan policies. Ground 3 fails.

VII. Ground 4: failure to discharge the PSED

55. The Claimant argues that the Council failed to comply with the PSED. The OR addresses the PSED at OR/488-494, where it considers the impact of the development on the protected characteristics of age, disability and sex. It does not make any express reference to race. The Claimant complains that the Council's consideration of the PSED was legally flawed for two reasons.

56. First, reference is made to the fact that the OR notes that officers do not have the statistical data to fully verify and understand the demographics of those using the artificial pitch, but that they are informed it is used largely by families and children or youth. It is said that there was a duty to make reasonable enquiries; and the very purpose of the consultation exercises should have been to gather the information needed to assess the impact on groups sharing protected characteristics. Moreover, it is said that the Council does have information regarding the local population of Camberwell at its disposal, and which could have been used to inform its assessment of the impact of the development.

57. Secondly, the Claimant argues the OR does not consider at all the protected characteristic of race. This is notwithstanding the fact that: (1) officers were informed specifically about the use of the Astroturf by youth from the BAME community; and (2) information held by the Council as to the local population reveals a significant proportion of 'non-white' residents within the ward. The objection based on impact on the BAME community is noted for the first time in the Addendum Report. It was argued that it is evident from the OR and Addendum Report that the Council had no regard (let alone "due regard") to the need to advance equality of opportunity between persons who share a protected characteristic (i.e. race) and persons who do not share it. It was argued that no consideration was given to how the BAME community would be impacted by the loss of the Astroturf. It is said that this is a significant omission in light of the objections and information received, and also taking into account that the replacement 3G pitch is available on a formal and paid basis only.

58. In response the Respondents remind me that as a starting point it is important to consider compliance with the PSED in context. They emphasise the following points:

    (i) In terms of the information available, the planning application was the subject of extensive consultation and thousands of representations were received; many of which related to the specific issue of the loss of the Astroturf. Indeed, the Addendum OR referred to a detailed additional objection from the Friends of Greendale which described "*the profile and demographics of the community in the Champion Hill ward*". That objection (dated 23 July 2020) discussed the demographics of the ward and referred to Southwark's Joint Strategic Needs Assessment which states that nearly half of residents in Champion Hill ward are non-white. The Astroturf is also referred to as being used "*by all ethnic groups*" and the newspaper clipping provided (a paid advert by the Friends of Greendale) shows a picture of the Astroturf supposedly in use on the evening of 7 July (2020) referring to the attendees as being 70% BAME;

(ii) the OR contained multiple references to the ways in which families and children or youths use the Astroturf and the importance they attach to it. Paragraph 6 of the Addendum Report also noted the concern that BAME communities would be particularly affected;

(iii) the OR recognised the concern that informal and free recreation space should be available, and that formal sports and recreation facilities should be accessible and affordable;

(iv) against that background the OR considered the mitigation for the loss of the Astroturf. In particular, the OR assessed the kickabout space and judged that it would be suitable for many of the informal games and activities currently taking place and that it would be free for all to access and would not require booking;

(v) the Council also ensured that the s.106 Agreement required approval of a Community Use Agreement thereby guaranteeing that the other new facilities would be available for the Community to use at reasonable prices and times. Moreover, the Community use is to be monitored and the Community use arrangements continually developed;

(vi) the OR considered that the local community, including in particular children and youths, would benefit from the new classrooms, the Club's partnership with local schools and the Club's community work;

(vii) the OR also noted the comparatively recent public access to the Astroturf and its poor condition, in addition to the significant qualitative improvements offered by the new facilities;

(viii) the OR gave weight to safeguarding the Club and recognised the valuable work of the Club in terms of fighting racism and encouraging inclusivity; and

(ix) the Stage 2 Report also expressly referred to the potential disproportionate effects on people sharing protected characteristics who have used the Astroturf as an informal playing surface, but concluded that those effects would be mitigated by the reprovision of facilities and the significant enhancements to management, quality and safety, as well as the robust Community Use Agreement. The Delegated OR noted the Stage 2 Report and at paragraph 10 considered that no new equalities impacts had arisen.

59. In light of the above, the Council argues that it did discharge the PSED "in substance" by understanding what would be lost and to whom, evaluating what would be re-provided and ensuring that equalities impacts would be mitigated by securing specific mitigation such as the Community Use Agreement. It is also said to be relevant that in monitoring pursuant to the s.106 Agreement the Council will continue to be subject to the PSED and it will be able to ensure that the use of the new facilities eliminates discrimination and advances equality of opportunity.

60. I accept the Respondents' submissions. In particular, I consider that the evidential record demonstrates that in substance the Council had due regard to the need to advance equality of opportunity between those sharing protected characteristics.

61. I turn to the two specific legal complaints. In terms of the Claimant's first complaint, the relevant legal test is whether the manner of intensity of the Council's inquiry was unreasonable in the circumstances. In my judgment, on the facts, the Council was not required to carry out further investigations or to obtain further statistical data. Indeed, I understood Counsel for the Claimant to accept it was not irrational not to obtain such statistical data. The nature of the (informal and recent) use of the Astroturf and the groups using it was clear from the consultation responses and it was extensively documented in the OR. It was not unreasonable to make the decision on the information available. In fact, I consider the detailed assessment of the adequacy of the new kickabout space and the specific provisions secured as part of the s.106 Agreement demonstrate that the Council understood the impacts of the proposal and that it took practical steps to mitigate the specific impacts. Far from indicating a breach of the PSED, this demonstrates that the Council did not approach equalities as a "box ticking" exercise but instead correctly focused on the substantive/practical impacts of the development and secured meaningful mitigation.

62. As to the second complaint, the absence of an express reference to race in the OR does not in my judgment demonstrate a failure to fulfil the PSED when considered against the totality of the decision-making process. The concern in relation to the BAME community was well known and indeed expressly noted in the Addendum OR and the Delegated OR agreed with the Mayor's Stage 2 Report that the equalities impacts had been considered and appropriately mitigated. In substance the issue was considered because the Council clearly had in mind the impact of the loss of the Astroturf to its users (including those with the protected characteristic of race) and it ensured that specific mitigation was secured.

63. The Claimant relied on R (Williams) v Caerphilly CBC [2019] EWHC 1618 (Admin). In that case, a reference to considering the impact of closing a leisure centre on "*users*" was held not to demonstrate consideration of the specific disadvantage that older or disabled persons would likely face when trying to get to alternative facilities. In other words, the authority had failed in *substance* to consider one of the main impacts of the decision.

64. In my judgment, unlike in Williams, the Council did not overlook a main impact of the proposal. The real point was that local people including many BAME people, use the Astroturf for informal sport and recreation and for them it is important that it is free and does not require booking. The Council expressly considered those matters and its judgement (in agreement with the GLA) was that the kickabout space together with the new and replacement facilities regulated by the Community Use Agreement would appropriately mitigate the impact.

Section 31 (2A) SCA 1981

65. Finally, even if there was some substance to the two pleaded PSED related complaints, I would have refused relief under s.31(2A) SCA 1981 because it is highly likely that the outcome would not be substantially different. Counsel for the Claimant placed strong reliance upon R (Hough) v Secretary of State for the Home Department [2022] 1635 (Admin) in relation to this issue. That case was very different on the facts. There a main impact of the development had not been considered i.e. the effect of a five year use on community relations. Had that issue been considered, there was a real possibility that

additional mitigation would be required even if the decision was still to make a Special Development Order.

66. By contrast, in the present case the Council undertook a detailed consideration of the specific impacts of the loss of the Astroturf (which also affected the BAME community) and secured extensive mitigation and ongoing control via the Community Use Agreement in order to address the relevant main impact.

67. It is significant that the Mayor's Stage 2 Report (which did refer specifically to use of the Astroturf by people with protected characteristics) concluded that the mitigation which the Council proposed to secure was appropriate. The Mayor's assessment was as follows:

> "The removal of the existing non-managed and non-maintained astro-turf on site may result in potential disproportionate effects on people sharing protected characteristics who have used this space as an informal playing surface. However, such effects are likely to be mitigated to some extent by the proposed reprovision of these facilities and significant enhancements to management, quality and safety of the facility. Further to this, it is noted that the s.106 agreement includes obligations to ensure reprovision of the playing surface in conjunction with a robust community use package. Accordingly, GLA officers are of the view that the equality impacts which arise from the proposals are appropriately mitigated and outweighed by the scheme and the associated public benefits that have been secured".

68. Counsel for the Claimant accepted that the Mayor's assessment was relevant to relief. On the present facts, I consider it highly significant. This was a development of strategic importance to the GLA and it received substantial and detailed consideration from the Mayor including in relation to the PSED.

69. The claim is dismissed.