Neutral Citation Number: [2024] EWHC 2640 (Admin)

Case No: AC-2024-LON-000957

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 October 2024

Before :

MRS JUSTICE LANG DBE

- -

Between :

THE KING	**Claimant**
on the application of	
RORY WALSH	
- and -	
HORSHAM DISTRICT COUNCIL	**Defendant**
YMCA DOWNSLINK GROUP	**Interested Party**

- -
- -

Ben Fullbrook (instructed by **Richard Buxton Solicitors**) for the **Claimant**
Clare Parry (instructed by **Horsham District Council Legal Services Department**) for the **Defendant**
The **Interested Party** did not appear and was not represented

Hearing date: 8 October 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 21 October 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE LANG DBE

Mrs Justice Lang :

1. The Claimant seeks judicial review of the decision of the Defendant ("the Council"), dated 31 February 2024, to grant planning permission to the Interested Party ("IP") for the conversion of its existing grass football pitch to an artificial 3G surface, with new perimeter paths, fencing, floodlighting and goal storage area, at Horsham YMCA Football Club, Gorings Mead, Horsham, West Sussex ("the Site").

2. The Claimant lives near the Site and will be directly affected by the proposed development. He has made representations to the Council opposing the grant of permission.

3. The main issue in this claim is the deterioration and loss of a veteran ash tree as a result of the proposed development. The Council's Planning Committee North ("the Committee") resolved to grant planning permission contrary to the planning officers' recommendation that the IP had failed to demonstrate "wholly exceptional reasons" for the "loss or deterioration" of a veteran tree, as required by the National Planning Policy Framework (December 2023) ("the Framework"), at 186(c)[1].

4. On 3 May 2024, I granted the Claimant permission to apply for judicial review on three grounds, namely:

   i) The Council failed to give legally adequate reasons for its finding that the test in the Framework, at 186(c), was met.

   ii) The conditions attached to the permission failed to secure one or more measures which the Council considered to be necessary.

   iii) The Council's decision to grant the permission was irrational.

5. Following the grant of permission, the Council filed evidence with its Detailed Grounds of Resistance stating that the Council had entered into an agreement, pursuant to section 106 of the Town and Country Planning Act 1990 ("TCPA 1990"), on 20 May 2024. It imposes additional obligations on the IP in order to address the concerns which the Claimant had raised about deficiencies in the conditions attached to the permission, in Ground 2 of the claim. Although the section 106 TCPA 1990 agreement does not provide equivalent protection to planning conditions, the Claimant accepts that it is sufficient to render Ground 2 academic. Therefore Ground 2 is no longer pursued.

Planning history

6. The Site, which is approximately 3.5 acres in size, has been used for football since 1929. Existing facilities include a covered seated stand, a ground capacity for 1,575 people, a club house and changing facilities.

7. The site is bounded by mature trees across the south, west, and partially the northern, boundaries of the Site. There are four trees (T3 and T4 oak trees and T5 and T6 ash trees) on the southwestern boundary that are subject to a Tree Preservation Order.

[1] In the preceding version of the Framework (September 2023), the relevant paragraph was 180(c).

There is a veteran ash tree, listed as T10, in the southwestern corner. The base of T10 sits below the level of the existing grass football pitch within a trench.

8. The original planning statement submitted by the IP acknowledged that T10 was a veteran tree and that the proposed development would lead to its loss by virtue of works in its Root Protection Area, in order to create a retaining structure.

9. Subsequently, the IP submitted an addendum planning statement with a revised proposal that T10 should be retained, but heavily reduced in size, leaving a manageable core which could potentially have some ecological benefit to the locality. As part of a compensatory strategy, the IP proposed to plant 12 trees in an alternative location at the Site.

10. In the Officers' Report for the Committee meeting on 3 October 2023 ("OR1"), the planning officers summarised the consultation responses received. The impact on T10 led to objections from the Council's landscape architect, ecology officer and arboricultural officer.

11. In his initial response, dated 19 January 2023, the arboricultural officer advised that T10 was structurally sound and free from disease. He considered that the 12 new trees proposed would be insufficient to mitigate the loss of T10, as it would take many decades for them to reach a similar stature and level of ecological benefit as T10. In his comments on the revised proposal, dated 20 September 2023, he said as follows:

> "The proposed assisted decline option for T10 the Veteran Ash refers to the above-ground feature of the tree, where it is proposed that the tree would be heavily reduced in size with a bulk of the main stem being retained as a monolith. This assessment hasn't considered the level of root severance required to build the new pitch as proposed; due to the tree's location in regards to the existing pitch, a high percentage of the tree's key rooting area would be lost to the development.
>
> Due to the age of the tree and the high level of root severance required to implement this development coupled with the above-ground surgery works, in my opinion, it is likely that the tree will not be able to recover from these works and will die within a few years of the development, if not sooner; ultimately the tree in its living form would be lost to the development….".

12. OR1 set out the relevant provisions of the Framework relating to veteran trees at OR1/6.15 and 6.16. and identified that there was a "clear presumption against the loss of such an important and irreplaceable habitat asset".

13. OR1 explained that the IP had examined alternative ways of developing the site without impacting on T10 but concluded it could not do so (OR1/6.24-6 and 6.91-94). The pitch sub-base required the installation of a pre-cast concrete retaining wall down to a stable base to a depth of 2.5m, through the tree roots. Alternative site configurations had been considered, as well as 16 alternative sites.

14. OR1 set out the IP's proposals for compensating so far as possible for the loss of T10 by planting twelve new trees and the veteranisation of mature trees on the site (OR1/6.27-6.31, 6.96). However, it also reminded Members that "the presence of a potentially suitable compensation strategy is not reason to justify the loss of the veteran tree" (OR1/6.31, 6.96).

15. The public benefits of the proposals, which amounted to intensifying the year round use of the sports pitch, did not amount to "wholly exceptional reasons" necessary to justify the loss of the tree (at OR1/6.32).

16. OR1 summarised the IP's reasons for the development as follows:

> "Viability and Need for Development
>
> 6.80 It is advised that the YMCA Football Club has been on the current site since 1929 and now forms part of the YMCA Downslink Group (YMCA DLG), and is one of the biggest youth charities in the South East of England supporting 10,000 children less than 18 years of age and young people aged 18-25 years each year. The supporting statement advised that the provision of the AGP would allow the YMCA Downslink Group to provide greater opportunities for sport and additional funding for youth and support services that they require as well as supporting a Youth Pathway for young players in the Horsham Area to enable them to develop football skills and to meet their individual expectations at the highest levels.
>
> The YMCA Downslink have advised that due to the level of demand at the club 'they are unable to cater for the football clubs needs as well as the needs of the charity due to the quality of the grass pitch and limitations on hours of play each week on the existing grass pitch. It is advised that there is a significant local need and lack of provision of fully sized 3G AGPs which are available for community use and that this has an impact on the health and wellbeing of local residents, including vulnerable children that are supported by the YMCA Downslink Group. Although the Football Club is well run by a Management Committee and is staffed entirely by volunteers over the past five years, the cost of running the club has exceeded the club's income'.
>
> 6.81 Financial information detailing the level of income per annum and the underlying losses per year greater than any financial income received by the club (as set out in Para 3.15 of the Planning Addendum Statement). It is advised that existing revenues from the club are not sufficient to sustain the operation of the club in its current form despite 400 hrs of volunteer hours that support the club. The Addendum goes on to say that 'a "do nothing" scenario is unsustainable in the medium term'. Finally, the Addendum states at paragraph 3.17

> that without the significant investment of the 3G pitch the club 'may not be sustainable and could cease to exist'."

17. At OR1/6.82, limited weight was given to the viability of the club because of insufficient evidence:

> "6.82 Whilst headline figures of the club's underlying losses of £34,200/year and required annual income of £120,000 are provided within the Addendum, no further detailed viability case has been presented by the applicants. It is not therefore possible to independently assess the viability of the club. Accordingly, limited weight can be given to the applicant's case that the club might cease to exist in the future if the 3G pitch is not provided."

18. In the 'Conclusions', OR1 advised that the development was acceptable save for the deterioration and loss of T10 which was in conflict with Policy 31 of the Horsham District Planning Framework and the Framework, at 180 (OR1/6.90).

19. At OR1/6.91, OR1 referenced the IP's justification for the managed decline of T10, namely, that the proposals would bring "substantial public benefits" and the financial benefits would address current annual losses.

20. However, OR1 concluded that the "wholly exceptional reasons" test had not been met, for the following reasons:

> "6.94 Officers accept that the Applicants have explored all reasonable alternatives to avoid the need to manage the decline of the veteran Ash tree, and agree that the proposed replacement of the existing grass pitch with a 3G pitch constitutes a public benefit by allowing for increased use of the site for activities that promote exercise, health and overall well-being. However this, and the fact that alternative options have been discounted, is not necessarily unusual or unique such as to meet the high bar 'wholly exceptional reasons' test of Paragraph 180(c). Whilst it is an aspiration of the Council to increase the number of 3G pitches in Horsham, it is not the case that there are no existing 3G pitches, or that this site represents the only option for increasing the number of such pitches generally.
>
> 6.95 Fundamentally, the tree is in good health and has not been identified as having Ash Die Back. It would not be appropriate to agree to the loss of this tree on the basis that it might get Ash Die Back in future, as there is no evidence it certainly will. The tree in all other respects is a healthy specimen with strong amenity and ecological value due to its veteran status.
>
> 6.96 Accordingly, the recommendation of officers is that 'wholly exceptional reasons' have not been demonstrated to justify the deterioration and likely premature loss by way of

> managed decline of this important and irreplaceable veteran tree. Whilst opportunities for compensation by way of new tree planting and the veteranisation of existing trees exist, such compensation must only be considered once the principle of the loss/deterioration of the veteran tree has been accepted. The fact that compensation exists cannot form part of the justification to lose the tree in the first instance.
>
> 6.97 The proposal therefore fails to comply with the requirements of Paragraph 180(c) of the NPPF and policies 31 and 33 of the HDPF, and is recommended for refusal. "

21. At its meeting on 3 October 2023, the Committee resolved to defer the application "to consider the viability and future of the club in respect of the provision of the 3G pitch and to consider methods for a less invasive means of providing the proposed retaining wall and to allow consideration and formulation of appropriate conditions should the application be approved".

22. In response to the Committee's request the IP provided financial information covering the previous five years, including management accounts for the Football Club, and an alternative method of constructing the retaining wall to seek to reduce impact on the veteran tree.

23. The Claimant submitted written representations with a critique of the IP's business methods, describing it as a viable but badly run company. Neither the OR nor the Committee referred to these representations, and the Claimant has not challenged this decision on the grounds that his representations were not considered or accepted.

24. The application was considered again by the Committee on 5 December 2023. The planning officers submitted a second report ("OR2") which gave the following advice:

    i) The alternative method of construction would help to partly address the issue with root severance. However to be satisfied the arboricultural officer would need to supervise the digging of a trial trench (OR2/3.1, 6.20). As the football club were mid-season that was not suitable (OR2/6.22). The report therefore proceeded on the assumption the tree would undergo managed decline (OR2/6.23, 6.25, 6.27).

    ii) The football club income is around £80,000 per annum and it has a deficit of £25,000 to £40,000 per annum excluding the effect of one off-covid grants (OR2/6.3).

    iii) The IP advised that, as a charity, regulated by the Charities Commission, the IP was expected to operate on a sound basis. The IP stated that "without a 3G pitch the Football Club level of deficit would become unsustainable ….and the YMCA Football Club "would not be viable and would probably have to close" (OR2/6.4).

iv) Without the 3G pitch, the IP was forecasting accelerating losses of £45,000-£50,000 per annum (OR2/6.8). With the 3G pitch, it was forecasting an annual profit of around £10,000 from year 2 (OR2/6.6, 6.30).

v) The temporary income from short term letting of car parking spaces was not specifically identified in those figures and amounted to around £15,240 - £21,600 per annum, which was less than the average losses for the Football Club of some £34,000 per annum over the previous 5 years (OR2/6.14, 6.29).

25. Under the heading 'Conclusion and planning balance' OR2 summarised the officers' findings and recommended that planning permission be refused, for the following reasons:

> "6.29 In order to evidence a 'wholly exceptional reason', the applicants have advanced a case that without the 3G pitch the financial viability of the Football Club will be at serious risk. To support their case, and as requested by the committee resolution, the applicants have submitted a summary of their financial accounts for the last five years. These financial accounts show that the Horsham YMCA Football Club operates with an annual deficit of £25,000-£40,000 which the YMCA Downs Link Group are currently funding. These underlying annual losses have averaged £34,184 per annum over the last five years, some £170,290 cumulatively over five years. These losses are tempered to a significant degree by the short term let of car parking spaces on the site which according to the applicant's supplementary data seemingly yielded £15,240 in 2022/23 and is on course to yield approximately £21,000 in 2023/24.
>
> 6.30 The applicants nevertheless advise that without the additional revenue which would come forward via the 3G pitch revenue stream (including other benefits that would arise from both bar sales and room hire) the Horsham YMCA Football Club is 'forecast to see accelerating losses of around -£45,000-£55,000 per annum, culminating in four-year losses of £200,000'. It is assumed that these figure do not include any ongoing income from the letting of the car parking spaces. Conversely, the 3G Pitch would help generate a profit of £10,000 annually from year two.
>
> 6.31 The Applicants advise that without a 3G pitch the Football Club level of deficit would become unsustainable for YMCA DLG' (Downslink Group) and the YMCA Football Club 'would not be viable and would probably have to close'. The detailed financial accounts submitted are considered sufficiently detailed to demonstrate that the implementation of the proposed 3G Pitch would stem the current losses and therefore increase the viability of the Football Club.

6.32 As previously advised, Officers accept that the applicants have explored all reasonable alternatives to avoid the need to manage the decline of the veteran Ash tree and agree that the proposed replacement of the existing grass pitch with a 3G pitch constitutes a public benefit by allowing for increased use of the site for activities that promote exercise, health, and overall well-being. However, this, and the fact that alternative layout options have been discounted, is not necessarily unusual or unique such as to meet the high bar 'wholly exceptional reasons' test of Paragraph 180(c). Whilst it is an aspiration of the Council to increase the number of 3G pitches in Horsham, it is not the case that there are no existing 3G pitches, or that this site represents the only option for increasing the number of such pitches generally.

6.33 Fundamentally, the tree is in good health and has not been identified as having Ash Die Back. It would not be appropriate to agree to the loss of this tree on the basis that it might get Ash Die Back in future, as there is no evidence it certainly will. The tree in all other respects is a healthy specimen with strong amenity and ecological value due to its veteran status. Whilst opportunities for compensation by way of new tree planting and the veteranisation of existing trees exist, such compensation must only be considered once the principle of the loss/deterioration of the veteran tree has been accepted. The fact that compensation exists cannot form part of the justification to lose the tree in the first instance.

6.34 Accordingly, whether 'wholly exceptional reasons' have been demonstrated now rests on the financial/viability argument that the Football Club may cease to exist without the additional income stream from a 3G pitch. Officers do not dispute the figures provided by the applicants that show an average £34,000 per year loss, or that the installation of a 3G pitch would allow for a modest annual profit to be made for the Football Club. The aforementioned losses are though currently being tempered by the applicants ability to short-let the club's car park which they state brought an income of some £15,240 in 2022/23 and a likely £21,000 in 2023/24. This significantly reduces the annual losses mentioned above.

6.35 Having carefully considered the applicants submissions, officers are of the view that the degree of losses and the limited levels of profit that would result from the additional income generated by the 3G pitch are not sufficient to demonstrate the necessary 'wholly exceptional reasons' test of Paragraph 180(c), particularly as the applicants have identified an additional income stream that has seemingly helped reduce the current losses to less than that set out in the above tables.

> 6.36 The proposal therefore fails to comply with the requirements of Paragraph 180(c) of the NPPF and policies 31 and 33 of the HDPF and is recommended for refusal."

26. At the Committee meeting on 5 December 2023, the planning officers advised Members that if they voted to approve the application, there must be a motion that demonstrates wholly exceptional reasons to justify the potential loss or deterioration of T10.

27. The Minutes do not record any of the details of the debate or any further advice received. According to the Minutes:

> "Members discussed the application, and it was proposed and seconded that the application be approved as the proposed development demonstrated wholly exceptional reasons to justify the potential deterioration and/or loss of the veteran Ash tree, by reason of enabling the viability of a long-standing community facility and provision of significant new infrastructure to the benefit of the physical and mental health of the community, with appropriate compensatory measures secured."

28. The Committee then delegated the decision to the Head of Development and Building Control to approve planning permission, subject to the agreement of the list of conditions, in consultation with local members.

29. On 30 January 2024, planning officers approved a "Post Committee Report" ("OR3"), which stated:

> "RESOLVED:
>
> At its meeting on the 5th December 2023, the Planning (North) Committee resolved to approve the application contrary to the officer recommendation for the reasons set out below:
>
> *'The proposed development demonstrates wholly exceptional reasons to justify the potential deterioration and/or loss of the veteran Ash tree by reason of enabling the viability of a long-standing community facility and provision of significant new infrastructure to the benefit of the physical and mental health of the community, with appropriate compensatory measures secured in accordance with Policies 31 and 33 of the HDPF2015 and Paragraph 186 (c) of the NPPF 2023 (formerly paragraph 180 (c) 2021)'.*
>
> In accordance with the resolution of the committee, the local members have been consulted on the draft conditions (as set out in Appendix 2 of the Addendum report). No further comments have been received from the local members. The Chair of Planning has also raised no objections to the conditions."

30. Permission was then granted by way of a decision notice dated 31 January 2024. The informative to the permission records that the alternative construction method proposed by the applicant and recorded in OR2 was to be adopted. Condition 13 made provision for landscaping and replacement of damaged plants. Condition 17 made provision for mitigation works, including the appointment of an appropriate person to provide on-site ecological expertise during any works to T10.

31. The permission did not contain the conditions which were recommended by the Council's ecology consultant. The subsequent section 106 TCPA 1990 agreement sought to remedy that omission by a series of covenants in Schedule 2 (listed in paragraph 23 of the Detailed Statement of Facts and Grounds).

Policy

32. In section 15 of the Framework titled "Conserving and enhancing the natural environment', paragraph 186(c) provides:

> "When determining planning applications, local planning authorities should apply the following principles:
>
> …..
>
> (c) development resulting in the loss or deterioration of irreplaceable habitats (such as ancient woodland and ancient or veteran trees) should be refused, unless there are wholly exceptional reasons and a suitable compensation strategy exists.
>
> (d) ….."

33. Footnote 67 gives, as examples of "wholly exceptional reasons":

> "infrastructure projects (including nationally significant infrastructure projects, orders under the Transport and Works Act and hybrid bills), where the public benefit would clearly outweigh the loss or deterioration of habitat."

34. The Glossary defines a veteran tree as follows:

> "**Ancient or veteran tree:** A tree which, because of its age, size and condition, is of exceptional biodiversity, cultural or heritage value. All ancient trees are veteran trees. Not all veteran trees are old enough to be ancient, but are old relative to other trees of the same species. Very few trees of any species reach the ancient life-stage."

35. Natural England and the Forestry Commission have produced standing guidance ("the Guidance"), which includes the following:

> "**Making decisions**
>
> When making planning decisions, you should consider:

- conserving and enhancing biodiversity
- avoiding and reducing the level of impact of the proposed development on ancient woodland and ancient and veteran trees

You should refuse planning permission if development will result in the loss or deterioration of ancient woodland, ancient trees and veteran trees unless both of the following applies:

- there are wholly exceptional reasons
- there's a suitable compensation strategy in place (this must not be a part of considerations of wholly exceptional reasons) - see paragraphs 33 and 34 of the planning practice guidance on compensation guidance

You should make decisions in line with paragraph 180 (c) of the NPPF.

Ancient woodland, ancient trees and veteran trees are irreplaceable. Therefore, you should not consider proposed compensation measures as part of your assessment of the merits of the development proposal.

…..

Avoid impacts, reduce (mitigate) impacts, and compensate as a last resort

You and the developer should identify ways to avoid negative effects on ancient woodland or ancient and veteran trees. For example, selecting an alternative site for development or redesigning the scheme.

You should decide on the weight given to ancient woodland and ancient and veteran trees in planning decisions on a case-by-case basis. You should do this by taking account of the NPPF and relevant development plan policies.

If you decide to grant planning permission that results in unavoidable loss or deterioration where wholly exceptional reasons are demonstrated, you should use planning conditions or obligations to make sure the developer:

- avoids damage
- mitigates against damage
- compensates for loss or damage (use as a last resort)

> This is known as the mitigation hierarchy. You should apply the mitigation hierarchy in line with NPPF paragraph 180a to avoid significant harm to biodiversity."

Ground 1

Legal principles

36. There is no general common law duty to give reasons for a decision to grant planning permission. However, in *R (CPRE Kent) v Dover DC* [2017] UKSC 79, [2018] 1 WLR 108, the Supreme Court held that, in the interests of openness and fairness, a formulated statement of reasons should be given in certain cases, typically where permission has been granted in the face of substantial public opposition, and against the advice of officers, for projects which involve major departures from the development plan. Members are entitled to depart from their officers' recommendations for good reason, but the reasons should be capable of articulation and scrutiny (per Lord Carnwath JSC at [59] – [60]).

37. In *CPRE Kent*, at [35], Lord Carnwath held that the standard of reasons to be applied was that set out by Lord Brown in *South Bucks District Council v Porter (No. 2)* [2004] 1 WLR 1953, at [36]:

> "36. The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

38. Lord Carnwath also referred, at [36], to the observations of Sir Thomas Bingham MR in *Clarke Homes Ltd v Secretary of State for the Environment* [2017] PTSR 1081, at 1089, identifying the central issue as:

> "whether the decision of the Secretary of State leaves room for genuine as opposed to forensic doubt as to what he has decided and why. This is an issue to be resolved …… on a straightforward down-to-earth reading of his decision letter without excessive legalism or exegetical sophistication."

39. Acknowledging the differences between a stand-alone decision letter of the Secretary of State or an inspector which sets out all the relevant background and a decision of a local planning authority, Lord Carnwath said, at [42]:

> "In the case of a decision of a local planning authority that function will normally be performed by the planning officers' report. If their recommendation is accepted by the members, no further reasons may be needed. Even if it is not accepted, it may normally be enough for the committee's statement of reasons to be limited to the points of difference. However, the essence of the duty remains the same, as does the issue for the court: that is, in the words of Lord Bingham MR in the *Clarke Homes* case, whether the information so provided by the authority leaves room for "genuine doubt … as to what (it) has decided and why."

40. Consistently with Lord Carnwath's citation of Lord Bingham's observations in *Clarke Homes* (above at [38]-[39]) Ms Parry submitted that, given that the standard of reasoning to be applied to the Committee's decision is comparable to that of an inspector's decision, it is relevant to consider the correct approach to a reasons challenge to an inspector's decision. There is no place in planning challenges for hypercritical scrutiny and decisions should not be laboriously dissected in an effort to find fault: *St Modwen Developments Ltd v Secretary of State for Communities and Local Government* [2017] EWCA Civ 1643, per Lindblom LJ at [7].

41. Counsel referred to the following authorities which applied the principles in *CPRE Kent* and *South Bucks*:

    i) *R (Watton & Cameron) v Cornwall County Council* [2023] EWHC 2436 (Admin), where Sir Duncan Ouseley, sitting as a Judge of the High Court, held, applying the *South Bucks* test, that the officer's report should have addressed expert evidence submitted by the objector/claimant (at [30]);

    ii) *R (Cross) v Cornwall Council* [2021] EWHC 1323 (Admin) where Tipples J. held that a Planning Committee's reasons were inadequate because it was not apparent why Members departed from the recommendation in the officer's report on a principal controversial issue (at [90] – [91]);

    iii) *R (Tesco Stores Ltd) v Reigate and Banstead BC* [2024] EWHC 2327 (Admin) in which Mr James Strachan KC, sitting as a Deputy Judge of the High Court,

summarised the standard of reasons expected of a Planning Committee when disagreeing with an officer's recommendation. He concluded, at [118]:

> "the Committee was entitled to disagree with officers as to the overall outcome without having to give additional reasons to those that they gave. The terms of the resolution taken with the OR and Addendum mean that members were, in effect, relying on the same benefits that officers had identified; but whilst officers considered that the benefits did not outweigh the harm to the heritage assets that had been identified, members did. In my judgment, that sort of different view even when set in the context where members were required to approach the question of harm to the heritage assets in the way that they did, does not require further clarification or explanation to be lawful. The natural reading of the resolution and the OR and Addendum is simple and straightforward. The Committee reached a different judgment as how the balance should be struck but that different judgment did not require more in terms of reasons than were given in the resolution."

42. In *R (Gare) v Babergh DC* [2019] EWHC 2041 (Admin) Mr M. Rodger QC, sitting as a Judge of the High Court, held that the requirements of the *South Bucks* test are more exacting than the standard applied to advice given in officer reports (at [41]). See also *TV Harrison CIC v Leeds City Council* [2022] EWHC 1675 (Admin), per Eyre J. at [71] – [72].

Claimant's submissions

43. The Claimant submitted that the Council was under a common law duty to give reasons for the refusal of permission. The reasons given were legally inadequate for four reasons (the fourth reason was not pursued).

44. First, the reasons did not explain why Members in Committee concluded that the proposed development would "enable" the viability of the club, and why this amounted to a "wholly exceptional reason" for granting planning permission. Nor did they explain why they disagreed with planning officers, who found that the proposed development would merely "help to secure the viability" of the club and considered that this did not amount to a "wholly exceptional reason".

45. Second, the reasons did not explain what the "significant new infrastructure" in the proposed new development was, or why it amounted to a "wholly exceptional reason", which was not a factor identified by planning officers. This gave rise to substantial doubt as to whether Members erred in law in their understanding of the extent of the infrastructure that was being provided (namely, a pitch surface) and the nature of the wholly exceptional reasons envisaged by the Framework, at 186(c), in particular, footnote 67, which refers to nationally significant infrastructure projects where the public benefit outweighs the loss of habitat.

46. Third, the reasons tended to suggest that the provision of compensatory measures wrongly formed part of the "wholly exceptional reasons" identified by Members.

47. Fourth, the reasons did not explain why a suitable compensation strategy existed in the absence of conditions securing the measures and safeguards recommended by the Council's ecology and arboriculture officers. However, as these matters had been secured by way of the agreement under section 106 TCPA 1990, the Claimant accepted that this complaint had become academic, along with Ground 2.

Defendant's submissions

48. The Defendant submitted that the reasons ought to be read against the officer reports provided to them; it was not necessary for the reasons to repeat the contents of the officer reports; they could be limited to the points of difference (*CPRE Kent*). Reasons could be briefly stated (*South Bucks*); and were to be read in a straightforward manner and not laboriously dissected to find fault (*St Modwen)*.

49. On the Claimant's first submission, the Defendant's response was that there was no real, as opposed to forensic, difference between the planning officers' conclusions that the 3G pitch would "help to secure the viability of the Football Club going forwards" (OR2/6.15) or "increase the viability of the club" (OR/6.31) and the Members' conclusion that it would "enable the viability of the Club".

50. The Committee's reasons for finding "wholly exceptional reasons" were that the proposal (1) would enable the viability of a long-standing community facility, and (2) the provision of significant new infrastructure, which would benefit the physical and mental health of the community. They did not disagree with the officers' identification of the factors in favour of the proposal, nor with the officers' assessment of viability. However, upon evaluating those factors, they reached a different conclusion to officers when applying the policy test of "wholly exceptional reasons". This was an exercise of planning judgment, on which they differed from officers, which they were entitled to do. There was no real doubt as to the reasons for their conclusion, and they were not required to give reasons for their reasons. Reasons challenges are fact-sensitive. This case was analogous to *Tesco Stores v Reigate & Banstead*, as Members' reasons were straightforward and did not require further clarification or explanation to be lawful.

51. Second, the Defendant submitted that there was no basis for the suggestion that Members may have misunderstood what new infrastructure was being provided as it was clearly set out in OR1/1.2-1.4. The benefits that the new infrastructure would bring were set out in the ORs, and were summarised in the reasons as benefiting physical and mental health of the community.

52. Footnote 67 to the Framework is not part of the policy test at 186(c). It does not define "wholly exceptional reasons" nor provide an exhaustive list of the circumstances that would amount to "wholly exceptional reasons". It provides an example of a situation where "wholly exceptional reasons" could arise. The Committee was not required to explain how this case was similar or different to the example in footnote 67 – that would be to require reasons for reasons.

53. Third, the Committee's reasons clearly identified the two reasons for the finding of "wholly exceptional reasons", namely, (1) the viability of a long-standing community facility, and (2) the provision of significant new infrastructure, which would benefit the physical and mental health of the community. The second limb of the test in Framework 186(c) – "a suitable compensation strategy" – is only addressed after the comma, which is sufficient to indicate that the Committee treated it as a separate consideration, in accordance with officers' advice. This is an example of excessive legalism or hypercritical scrutiny, deplored by the courts.

54. The Claimant's fourth submission was not pursued.

Conclusions

55. It was common ground between the parties that the Council was under a common law duty to give reasons for the refusal of permission, applying the principles in *CPRE Kent*.

56. In my view, the reasons given by the Committee met the standard set out by Lord Brown in *South Bucks*, as adapted to local planning authorities in *CPRE Kent*, per Lord Carnwath at [42]. Initially, I was concerned by the brevity of the reasons but, as Lord Brown said, "[r]easons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision". In this case, despite their brevity, the reasons given were intelligible, adequate, and enabled the reader to understand the conclusions reached on the principal important controversial issues.

57. Applying the analysis of Lord Carnwath in *CPRE Kent*, a local planning authority's reasons are not to be read as a standalone document, as if they were an inspector's decision. They are to be read in the context of the published ORs, which in this case advised Members on the relevant factors and the policy tests to be applied.

58. The Committee's reasons for finding "wholly exceptional reasons" were that the proposal (1) would enable the viability of a long-standing community facility, and (2) the provision of significant new infrastructure, which would benefit the physical and mental health of the community.

59. The Committee's reasons did not set out the benefits to "the physical and mental health of the community" in detail. However, the published ORs set out the considerable benefits of the proposal for children and young people, at OR1/6.80 (at [16] above). The proposal was endorsed in strategic terms by the Council's Community and Culture Officer (OR1/3.6). OR2 stated at 6.11:

> "6.11 The applicants advise that the YMCA Football Club is not therefore viable without further additional income, and that the 3G pitch would provide the necessary income revenues to help sustain the club and secure its viability going forwards. It is advised by the applicants that the provision of a 3G pitch would also provide the following:

> • 'A community asset where a diverse group of people, young and old from across Horsham can benefit from sporting and other social activities.'
>
> • Provide the YMCA Downslink Group with a facility where vulnerable local young people can enjoy sport and benefit from improvements to their physical and mental health and be supported on a path to independence."

60. Officers were satisfied that the IP's proposals would have the public benefits identified by the IP: see OR1/6.32, OR1/6.94 and OR2/6.32. There is no suggestion in the Minutes of the meeting, or any other contemporaneous evidence, that Members disagreed with the officers' findings in regard to the public benefits. On a fair reading, it can be inferred that the Committee agreed with the ORs' description of the public benefits. In the light of this, I do not consider that the Committee was required to re-state the benefits in detail.

61. The Committee's reasons did not set out details as to how the proposal would "enable the viability of a long-standing community facility". I note that the Committee took the trouble to defer the application at its first meeting to obtain more financial information from the IP, and so Members wished to investigate viability.

62. The IP's further financial information was set out in considerable detail at OR2/6.2 to 6.15. The Football Club income is around £80,000 per annum and it has a deficit of £25,000 to £40,000 per annum (OR2/6.3). As a charity, regulated by the Charities Commission, the IP is expected to operate on a sound basis. The IP stated that "without a 3G pitch the Football Club level of deficit would become unsustainable ….and the YMCA Football Club 'would not be viable and would probably have to close'" (OR2/6.4). Without the 3G pitch, the IP was forecasting accelerating losses of £45,000-£50,000 per annum (OR2/6.8). With the 3G pitch, it was forecasting an annual profit of around £10,000 from year 2 (OR2/6.6, 6.30).

63. At OR2/6.13, officers factored in the income which the IP was receiving as a result of temporary, short-term lets of car parking spaces to local businesses. The officers' assessment was as follows:

> "Based on annualising the above car parking income, the additional income from the short term let of the car parking spaces amounts to around £15,240 - £21,600 per annum, less than the average losses for the Football Club cited above of some £34,000 per annum."

64. Officers concluded, at OR2/6.15:

> "The financial information provided has been assessed and your officers note the financial benefits arising from the provision of the 3G Pitch which would help to secure the viability of the club going forwards."

65. In the section of OR2 headed 'Conclusion and Planning Balance', officers gave the following advice on financial matters to Members:

> "6.29 In order to evidence a 'wholly exceptional reason', the applicants have advanced a case that without the 3G pitch the financial viability of the Football Club will be at serious risk. To support their case, and as requested by the committee resolution, the applicants have submitted a summary of their financial accounts for the last five years. These financial accounts show that the Horsham YMCA Football Club operates with an annual deficit of £25,000-£40,000 which the YMCA Downs Link Group are currently funding. These underlying annual losses have averaged £34,184 per annum over the last five years, some £170,290 cumulatively over five years. These losses are tempered to a significant degree by the short term let of car parking spaces on the site which according to the applicant's supplementary data seemingly yielded £15,240 in 2022/23 and is on course to yield approximately £21,000 in 2023/24.
>
> 6.30 The applicants nevertheless advise that without the additional revenue which would come forward via the 3G pitch revenue stream (including other benefits that would arise from both bar sales and room hire) the Horsham YMCA Football Club is 'forecast to see accelerating losses of around £45,000-£55,000 per annum, culminating in four-year losses of £200,000'. It is assumed that these figure do not include any ongoing income from the letting of the car parking spaces. Conversely, the 3G Pitch would help generate a profit of £10,000 annually from year two.
>
> 6.31 The Applicants advise that without a 3G pitch the Football Club level of deficit would become unsustainable for YMCA DLG' (Downslink Group) and the YMCA Football Club 'would not be viable and would probably have to close'. The detailed financial accounts submitted are considered sufficiently detailed to demonstrate that the implementation of the proposed 3G Pitch would stem the current losses and therefore increase the viability of the Football Club."

66. Thus, officers accepted that the IP was losing about £34,000 per annum, and even after adding in the temporary car parking revenue of £15,240 - £21,600 per annum, the IP would be suffering an annual loss. Officers also accepted that the increase in activities generated by the proposed 3G pitch would give rise to a modest surplus each year.

67. The Claimant's first submission was that the Committee should have explained in its reasons why it concluded that the proposed development would "enable" the viability of the club in circumstances when officers concluded that it would merely "help to secure the viability of the Football Club going forwards" (OR2/6.15) (*emphasis added*). I agree with the Defendant that there is no real, as opposed to forensic, difference between the Committee's conclusion on viability, and the conclusion of the officers above, at OR2/6.15, and particularly at OR2/6.31, where officers accepted that "the implementation of the proposed 3G Pitch would stem the current losses and

therefore increase the viability of the Football Club". There is no suggestion in the Minutes of the meeting, or any other contemporaneous evidence, that Members disagreed with the officers' financial analysis. On a fair reading, it can be inferred that the Committee agreed with it. In the light of the detailed account in the ORs, I do not consider that there was any requirement for the Committee to re-state the details of the IP's financial position, in the event that planning permission either was, or was not, granted for the proposed development.

68. The Committee was required to apply the policy test of "wholly exceptional reasons" to the factors relied upon in support of the proposal. In my view, it is sufficiently clear from the reasons that, when Members evaluated the factors in Committee, they came to a different conclusion to officers. Officers considered that the determinative factor was the financial/viability argument (OR2/6.34) and that "the degree of losses and the limited levels of profit that would result from the additional income generated by the 3G pitch are not sufficient to demonstrate the necessary 'wholly exceptional reasons' test of Paragraph 180(c)" (OR2/6.35). In contrast, the Committee concluded that the "proposed development demonstrates wholly exceptional reasons to justify the potential deterioration and/or loss of the veteran Ash tree by reason of enabling the viability of a long-standing community facility and provision of significant new infrastructure to the benefit of the physical and mental health of the community". Thus, Members were satisfied that the proposed development would enable the club to become financially viable (because it would generate more income), and that the further facilities would benefit the physical and mental health of the community. In applying the policy test, Members placed weight on the benefit of the facilities to the physical and mental health of the community. In my view, the reasoning of the Committee, read together with the ORs, is both adequate and intelligible.

69. In applying the policy test, Members made an exercise of planning judgment, on which they differed from officers, as they were entitled to do. If they had been asked to give further reasons to explain why they differed from officers, they could have done no more than repeat their stated reasons, identify the factors identified in the ORs, and confirm that, in their view, these factors did amount to "wholly exceptional reasons". However, decision-makers are not required to give reasons for their reasons. The Claimant emphasised the fact that officers are "professionals" but Parliament has conferred the ultimate decision-making power on elected Members, not on local authority officers, and Members may lawfully reach a different view to that of their officers, and often do.

70. In my view, this case is analogous to *R (Tesco Stores Ltd) v Reigate and Banstead BC*, where members were relying on the same benefits that officers had identified; but whilst officers considered that the benefits did not outweigh the harm to the heritage assets that had been identified, members did. Mr James Strachan KC, sitting as a Deputy Judge of the High Court, concluded that that sort of different view did not require further clarification or explanation to be lawful, as the natural reading of the resolution and the officers' report was "simple and straightforward". The Committee "reached a different judgment as how the balance should be struck but that different judgment did not require more in terms of reasons than were given in the resolution". In my view, a similar analysis should be applied in this case.

71. Contrary to Mr Fullbrook's submission, I consider that this case is distinguishable on the facts from *R (Cross) v Cornwall Council* where Tipples J. held that a Committee's

reasons were inadequate because it was not apparent why Members departed from the recommendation in the officers' report. In *Cross*, the Committee did not give a statement of reasons. The Judge found that the Council could not rely upon the reasons given in the Minutes as they were inaccurate:

> "85. In these circumstances, the reasons for the decision to grant planning permission for the proposed development were those identified by Councillor Parsons, and they were adopted by the Committee as a whole when it voted in favour of the proposal to refuse the planning application. However, those reasons were not the same as the reasons recorded in the minutes….the reasons set out in the minutes, are not the reasons which were voted on by the Committee and the public record of those reasons in the minutes is wrong. Further, as the minutes are inaccurate and post-date the meeting I agree with Mr Fullbrook that they are an extraneous document which cannot assist in identifying what the Committee's reasons for approving the application were."

72. Further, the Judge found that the reasons contained in the Committee's resolution were inadequate because they did not explain "why the siting, scale, materials and design of the proposed development would not result in a prominent and incongruous addition to the coastal plateau which harmed the landscape of the AONB" and why "the social and economic benefits of the proposed development were outweighed by the landscape harm to the AONB".

73. I agree with Ms Parry that these were fact-sensitive conclusions based on the particular evidence in *Cross*, and they do not set out any general principle. This case is distinguishable because the Committee's reasons accurately set out Members' reasoning; the relevant factors were sufficiently identified by officers in the ORs and not disputed by Members and therefore they did not have to be re-stated in the Committee's reasons; and it was clear that planning permission was granted because the Committee made an exercise of judgment that those factors amounted to "wholly exceptional reasons".

74. In his second submission, the Claimant criticised the Committee's reference in its reasons to "significant new infrastructure" being provided by the IP, on the grounds that it gave rise to substantial doubt as to whether the Committee failed to understand the limited extent of the new infrastructure being provided and the nature of the "wholly exceptional reasons" envisaged by the Framework, in particular footnote 67.

75. I accept Ms Parry's submission that there was no basis for the submission that Members failed to understand the extent of the new infrastructure being provided as it is clearly set out in OR1, as follows:

> "1.2 The application seeks full planning permission for the conversion of the existing grass pitch at the Horsham YMCA Football Club to an Artificial Grass Pitch (AGP) surface with a footprint of 104.5m x 70m, with new perimeter paths. The new 3G pitch would be located on top of the existing grass pitch replacing the existing 11 v 11 pitch.

> 1.3 The proposals also include 6 x 15m high floodlighting columns mounted with an LED sports lighting system to replace the existing 6 floodlight columns; and a 1.2m high twin bar sports rebound spectator fence to three sides of the pitch, with a 4.5m high fence to the western and eastern end between the perimeter path and the existing car park. A 1.5m high ball stop netting is proposed above the 4.5m fence at both ends of the pitch (6m in total) with an additional 6m high ball stop fence to protect the neighbouring property on Gorings Mead.
>
> 1.4 A sports equipment store with dimensions of 2.44m x 6.10m x 2.59m (height) is also proposed. The pitch would have 3m high retractable nets to facilitate the independent use of cross court pitches. A new 1.2m wide porous asphalt access path is also proposed around the pitch, along with a porous asphalt goal storage area to the north of the pitch. A retaining wall along the southwest corner of the site is proposed to support the existing ground levels which fall away. "

76. Contrary to Mr Fullbrook's submission (skeleton argument paragraph 38(c)), the pitch surface was not the only new infrastructure being provided. Members should not be taken to have misunderstood the extent of the proposal merely because they did not set out details of it in their reasons. This is an example of the type of excessive and hypercritical scrutiny of decisions which is deplored by the courts.

77. In my judgment, the Claimant attributes excessive weight to footnote 67. It does not form part of the policy test in paragraph 186(c) of the Framework. It merely provides illustrations of situations where "wholly exceptional reasons" may arise, by way of guidance. It does not set a standard to be met. Thus, there is no policy requirement that only or mainly "nationally significant infrastructure projects" can amount to "wholly exceptional reasons". The Claimant cannot and does not submit that the proposed development could not properly be considered when applying the policy test in paragraph 186(c) of the Framework. The term "infrastructure" means the physical structures and systems required for a country or an organisation to operate. It is not limited to national structures and systems. For these reasons, it was not necessary for the Committee to justify its finding of "wholly exceptional reasons" as a departure from the illustrations in footnote 67. The Committee made an exercise of judgment that the proposal was "significant new infrastructure" at the club which would benefit the local community. The nature of the infrastructure and the benefits it would provide were described in detail in the ORs and those matters did not have to be re-stated by the Committee in its reasons.

78. The Claimant's third submission was that the Committee's reasons "tend to suggest" (skeleton argument, paragraph 42) that the provision of compensatory measures formed part of the "wholly exceptional reasons" identified by the Committee. In *Juden v London Borough of Tower Hamlets* [2021] EWHC 1368 (Admin), Sir Duncan Ouseley, sitting as a High Court Judge, confirmed at [102] that "wholly exceptional reasons" and the "provision of compensatory measures" are separate and cumulative requirements in the policy test. The Guidance states that compensatory measures should not be considered as part of the assessment of "wholly exceptional reasons".

79. I accept Ms Parry's submission that there is no proper basis for the Claimant's criticism. Officers expressly and clearly advised Members, at OR1/6.31, 6.96 and OR2/6.33, that compensation measures should only be considered once the principle of the loss or deterioration of the tree has been accepted, and cannot form part of the justification to lose the tree in the first instance. There is nothing in the evidence to suggest that Members disagreed with or overlooked the officers' advice. On the contrary, on a fair reading, the wording of the resolution separates consideration of "wholly exceptional reasons" from "compensatory measures" by a comma and the word "with". In my view, this submission is an example of excessive legalism which has been deprecated by the courts in planning cases.

80. The Claimant rightly conceded that his fourth submission had become academic in the light of the section 106 TCPA 1990 agreement.

81. For the reasons set out above, Ground 1 does not succeed.

Ground 3

82. The Claimant submitted that the Council's decision that there were "wholly exceptional reasons" to justify the loss or deterioration of T10 was irrational. The policy test, read with footnote 67, sets an extremely high hurdle. The benefits of the proposal are localised and limited: the proposal involves the resurfacing of an existing football pitch. No reasonable planning authority could conclude that these benefits were exceptional, let alone wholly so.

83. Ms Parry rightly submitted that a challenge to a planning judgment on rationality grounds is a formidable task. The exercise of planning judgment and the weighing of the various issues are matters for the decision-maker and not for the Court: *Seddon Properties Ltd v Secretary of State for the Environment* (1981) 42 P & CR 26. As Sullivan J. said in *Newsmith v Secretary of State for the Environment, Transport and the Regions* [2001] EWHC Admin 74, at [6]:

> "An application under section 288 is not an opportunity for a review of the planning merits….."

84. In *R* (*Morge) v Hampshire County Council* [2011] UKSC 2, where Lady Hale observed, at [36], that "planning decisions are taken by democratically elected councillors, responsible to and sensitive to the concerns of, their local communities" and it is "their job, and not the court's to weigh the competing public and private interests involved".

85. In my view, the Claimant's submission unfairly minimises the numerous benefits that would flow to members of the local community from the proposal: see [59] – [65] above. I accept the Council's submission that the conclusion that the proposals demonstrated wholly exceptional reasons for the loss or deterioration of T10 was within the range of reasonable responses open to the Committee. The fact that others may have reached a different conclusion on the same issue does not begin to show that the Committee's conclusion was not open to them.

86. For the reasons set out above, Ground 3 does not succeed.

Final conclusion

87. The claim for judicial review is dismissed.