



Neutral Citation Number: [2023] EWHC 209 (Admin)

Case No: CO/1473/2022

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

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 3 February 2023

**Before:**

**HIS HONOUR JUDGE JARMAN KC**

Sitting as a judge of the High Court

**Between:**

**R (on the application of MR ALAN PEARCE)**

**- and -**

**WEST BERKSHIRE COUNCIL**

**-and-**

**ALLIANCE LEISURE SERVICES LIMITED**

**Claimant**

**Defendant**

**Interested  
Party**

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**Ms Melissa Murphy KC** (instructed by **Sharpe Pritchard**) for the **claimant**

**Mr Matthew Fraser** (instructed by **defendant**)

The interested party did not appear and was not represented

Hearing date 19 January 2023  
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**Approved Judgment**

This judgment was handed down remotely at 10.00am on Friday 3 February 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

## **HH JUDGE JARMAN KC:**

### *Introduction*

1. The claimant challenges the grant of planning permission (the permission) on 16 March 2022 by the defendant as local planning authority for the erection of a single storey sports pavilion, car park and artificial turf pitch at Newbury Rugby Football Club, West Berkshire (the rugby club). He does so with the permission of Mr James Strachan KC, sitting as a judge of the High Court Judge, on two grounds only.
2. The first is that members of the planning committee of the authority which resolved to grant the permission, were materially misled in doing so by the authority's planning officers who said that they should treat the application for the permission as a stand-alone proposal with no formal link to the future of a football ground known as the Faraday Road Stadium (the football stadium), which is some distance away from the club and is the former home of Newbury Football Club. This ground is also put as a failure of the planning committee to take into account a material consideration, namely the future of that stadium.
3. The second is that the planning committee misinterpreted relevant policy in CS18 of the Core Strategy of the authority and paragraph 99(b) of the National Planning Policy Framework (NPPF). The former restricts developments resulting in the loss of green infrastructure including outdoor sports facilities, and the latter restricts playing fields being built on, subject to certain exceptions.
4. The authority disputes each of those grounds and submits that the first mistakenly assumes that the permission permits the loss and replacement of facilities at the football stadium, whereas all it does is to permit the development of a grass pitch at the club which is currently used for rugby training. The authority does not dispute that it has aspiration to the develop the football stadium, which it owns, but submits that that will be a matter for any future planning application for such development, and no such application has yet been made.
5. In respect of the second ground, this arises out of paragraph 6.20 of a planning officer's report made in early stages of dealing with the application for the permission which sets out the position of Sport England in a joint statement with the authority in 21 July 2021. That joint statement said that the application for the permission would be co-joined with a planning condition for the authority to deliver a new grass pitch within two years of completion of the permitted development. However, that position then changed and it was clear from Sport England's later consultation response to the application for permission dated 12 November 2021 that such a condition was no longer sought. The relevant policies were correctly applied as not requiring any new off-site grass pitch to replace the pitch in respect of which the permission was sought.

### *Factual background*

6. The factual background may be shortly stated. The football stadium was closed in 2018, apparently as part of the aspiration of the authority as owner to develop it in conjunction with an adjacent industrial estate. The facilities then became derelict and the clubhouse badly damaged by fire. Planning permission has been granted to make some alterations so that the football stadium can be used for informal recreation, and that is its current

use. In November 2020 the authority produced a development brief which included the building of offices and dwellings on the football stadium site. No application to develop it has yet been made, and there was no evidence before me as to when or how one might be made.

7. In February 2020, the authority approved the West Berkshire Council Playing Pitch Strategy (the strategy) to deal with a need for pitches in the area. It is a strategic assessment which provides an up-to-date analysis of supply and demand for grass and artificial playing pitches in West Berkshire. It is evidence based using national guidance and input from Sport England and governing bodies of sport including football and rugby.
8. It emphasises that specific priorities should be identified because of a limited amount of funding available for such provision, and that the listed priorities should be used as the main reference point when dealing with the provision of pitches. It also emphasises that one project impacts on others bearing in mind that limited funds are available. The top priority in the strategy is a proposal to relocate and upgrade (to “3G” AstroTurf) the single adult-sized grass pitch that existed at the football stadium together with necessary facilities, on an alternative site nearby. The upgrade is to an artificial pitch to 3G AstroTurf standard. 3G denotes the third generation of artificial grass, which is accredited by football and rugby governing bodies in the UK. 3G pitches are popular in the UK because they allow play in all weather, and can be used more frequently than grass pitches without becoming damaged. The reason given in the strategy for this top priority is the development planned on the football stadium site, which would result in the loss of one adult pitch of good quality.
9. The proposal in the strategy includes the relocation of the single adult sized grass pitch with changing accommodation and the other necessary league requirements on a site no more than 20 minutes’ drive time away from the football stadium, which should be available before any construction work starts there. The strategy also states that the authority believes that this proposal, amongst others, would ensure compliance with national and local planning policy and Sport England policies.
10. The authority then considered options for a sports ground at various sites. In April 2021, it decided to delegate authority to the interested party (Alliance) to enter into an agreement with the rugby club to take a lease of land there to provide a 3G AstroTurf pitch, for which planning permission would be needed. Alliance was appointed the authority’s agent to draw up a scheme and to make the necessary application. The scheme that was drawn up was to replace one of the three grass training pitches at the rugby club with a 3G AstroTurf pitch. The playing pitch is unaffected.
11. In July 2021, members and officers of the authority met with representatives of Sport England, and stated that the proposed pitch at the rugby club would be better than that previously provided at the football stadium. Sport England stated that any permission for the new pitch should be conditioned so that the pitch should be open before the football stadium site is released for redevelopment, and that a new grass pitch should be identified elsewhere and delivered within two years to make up for the loss of the grass pitch.
12. The joint statement was then agreed, which included the following:

“... we are jointly supporting the development of proposals at Newbury Rugby Club as an enhanced replacement to meet the community’s needs for Faraday Road Stadium, in line with the Playing Pitch Strategy. ...

The new Sports Hub at Newbury Rugby Club will be co-joined with a planning condition for WBC to deliver a new grass pitch within 2 years of the completion of Newbury Rugby club development. This is to offset the loss of a pitch at the Rugby Club to accommodate the sports hub proposals. West Berkshire Council confirm that a re-development of the Faraday Road Stadium will not commence until the completion of the proposed facilities at Newbury Rugby Club.

13. The planning application was then submitted by Alliance as agent for the authority and was validated in September 2021. Sport England was consulted on the application as a statutory consultee. It responded in November 2021, saying that it had considered the application against NPPF paragraph 99 and its own policy. Sport England’s policy is to oppose any permission for development which would lead to the loss of, or would prejudice the use of, playing fields. The policy is subject to five exceptions, the fifth of which is:

“The proposed development is for an indoor or outdoor facility for sport, the provision of which would be of sufficient benefit to the development of sport as to outweigh the detriment caused by the loss, or prejudice to the use, of the area of playing field.”

14. Sports England also referred to pre-application consultations, in which it and others questioned the extent to which the proposed pitch at the rugby club could be considered as partial mitigation for the loss of the football stadium. However, it also referred to a clear strategic need for the proposed pitch as a standalone scheme to address pitch capacity shortages in the area. It stated that because there is no formal link between the application and any separate planning application which may emerge in the future in relation to the football stadium, it did not object. It suggested certain conditions, but these did not include a condition along the lines referred to in the joint statement to ensure the delivery of a new grass pitch elsewhere in the area within two years.
15. Sports England also stated that the proposed new pitch at the rugby club could in the future be considered as partial mitigation for any subsequent planning application for the redevelopment of the football stadium, provided it was a better provision than that which would be lost by that redevelopment and subject to a community use scheme.
16. The application was first considered by the authority’s planning committee for its Western area in December 2021. The officer’s report for that consideration, which was supplemented by an updated report, recommended approval, and in doing so set out consultation responses, including that of Sport England. Paragraph 6.20 of that report states:

“6.20 In a submitted joint statement, West Berkshire Council and Sport England outlined that they were jointly supporting the development of proposals at Newbury Rugby Club as an

enhanced replacement to meet the community's needs for Faraday Road Stadium, in line with the Playing Pitch Strategy. The Council would be required to deliver a new grass pitch within 2 years of the completion of Newbury Rugby club development. This is to offset the loss of the grass pitch at the Rugby Club to accommodate the sports hub proposals, a matter directed by the [strategy]. West Berkshire Council also confirmed that a re-development of the Faraday Road Stadium will not commence until the completion of the proposed facilities at Newbury Rugby Club.”

17. That paragraph had the potential to cause confusion, as Mr Fraser for the authority realistically concedes, and did so later on, as indicated below. That planning committee accepted the recommendation to approve but referred the application to the next tier up of the authority's planning committees, the District planning committee, because of district wide interest.
18. Also in December, the authority resolved to award the contract for the proposed new pitch and facilities at the rugby club to Alliance and to allocate £3.352 million, subject to planning permission. This sum does not appear to include costs already incurred, or ongoing subsidy payments from the authority.
19. The District planning committee considered the application in March 2022, when senior planning officers were present. A further officer's report was presented, together with the report and the update which were before the Western area committee. The further report referred to the joint statement as supporting the development proposals at the rugby club as an enhanced replacement to meet the community's needs for a replacement facility for the football stadium in line with the strategy. Two recently approved applications for a football facility including a clubhouse, stand and pitches at the football stadium were noted, but the officers advised that considerations on the application being considered did not impact on those two applications for a separate and alternative scheme, and vice versa. Those two applications were made by local community groups who wish to restore the grass pitch at the football stadium. The separation between the authority's decision making as owner on the one hand and as local planning authority on the other must be kept firmly in mind. The authority as owner of the football stadium does not currently intend to implement these permissions.
20. It was further stated that the proposed 3G pitch at the rugby club, together with changing accommodation and the other necessary football league requirements, would create a facility which would comply with the strategy. The development would result in the change of surface from an existing grass pitch to a 3G pitch, which would be constructed to meet FIFA certification for football league matches and training and to meet the World Rugby 22 certification to allow for rugby training provision. This would not accommodate adult rugby matches, but will meet rugby training certification as above. It was noted that the existing grass pitch was also below the size for an RFU compliant adult match facility and smaller than that proposed. It was further stated that the proposal would not replace the football stadium, but the authority intended to ensure that it would fully or partially mitigate the future planning application for the redevelopment of the football stadium and its subsequent loss.

21. The minutes of the District planning committee meeting show confusion amongst some members and some objectors as to what link if any there was between the application, the potential loss of the football stadium to development and the provision of a new grass pitch elsewhere. In replies to questions on this point, a senior officer is recording as saying:

“...in planning terms the application was not to be linked to Faraday Road. Should proposals come forward for a change of use of the Faraday Road site, at that point the requirements of the [strategy] would be material considerations for that change of use. This application was not for a change of use of the Faraday Road stadium and, as objectors had mentioned, there was a live planning permission for the redevelopment of the Faraday Road stadium for continued use for sports purposes.”

22. Another question raised the relevance of the associated costs and budget to the planning requirements. The officer replied:

“...matters that had been raised in terms of funding being used by the Council to provide alternative sports pitches were not material planning considerations. The viability of the proposed facility was a material planning consideration but only in as much as the business plan associated with the ongoing viability of the facility was a consideration of Sport England in terms of their representations on the application.”

23. One of the members raised the possibility of a condition regarding a new grass pitch elsewhere as mentioned in the joint statement. Another officer replied that the authority would be looking for such a pitch, but

“...Sport England had not indicated this would be a requirement. The reason for this was because the current existing grass pitch which was to be lost was not used for rugby matches but was used for training purposes only and the replacement [artificial grass pitch] could still be used for training for rugby as well as for football training and matches. Therefore, no condition to source a replacement grass pitch would be necessary.”

24. The senior planning officer also stated that such a condition may be unreasonable where the applicant was not able to provide land to fulfil a replacement for the rugby pitch within the application site itself.

25. Another member then asked if this could be dealt with by a non-binding informative rather than a condition. This is what was in the event added when it was resolved to grant the permission. No condition on this issue is included, but there is a condition relating to community use as required by Sport England. The decision notice issued on 16 March 2022 included an informative in these terms:

“It is recommended that the applicant secures a replacement rugby grass pitch at the same standard as the rugby grass pitch being lost as a result of the proposed development. The applicant

should seek to ensure that any new or replacement playing field is fit for its intended purpose and should be provided in consultation with the Newbury Rugby Club.”

### *Legal principles*

26. There was no dispute before me as to the relevant legal principles, which have been set out in *Mansell v Tonbridge and Malling Borough Council* [2017] EWCA Civ 1314 and *R. (on the application of William Corbett) v The Cornwall Council v Stephen Tavener* [2020] EWCA Civ 508. At paragraph 49 in the latter case, Lindblom LJ said:

“When the adequacy of a planning officer’s report to committee is called into question, the court does not expect to find a flawless discussion of every planning issue. The principles are well known (see *Mansell*, at paragraph 42 in my judgment and paragraph 63 in the judgment of the Chancellor of the High Court). The court must ask itself whether the officer’s advice is “significantly or seriously misleading – misleading in a material way”, such as “where the officer has simply failed to deal with a matter on which the committee ought to receive explicit advice if the local planning authority is to be seen to have performed its decision-making duties in accordance with the law”. Only if there is “some distinct and material defect” in that advice will the court intervene (paragraph 42(3)).”

### *Ground 1*

27. Ms Murphy KC, for the claimant, submits that the application for the permission was re-cast to overcome Sport England’s objections and deficiencies in the proposed new pitch at the rugby club if intended to be a replacement for the football stadium. This was materially misleading, because the point of the sports hub proposal was to fulfil the top priority in the strategy, namely, to provide a replacement for the football stadium. The officers advised that the permission sought complied with the strategy, which compliance was a material consideration in favour of the development. Read as a whole, the officer’s report gave the impression that the proposed pitch at the rugby club was intended to be a replacement for the football stadium, but did not grapple with whether it was a sufficient replacement or how it was to be secured.
28. However, Ms Murphy continues that the permission sought does not comply with the strategy. The cost of implementing it will be significant, and involves the construction of new facilities and taking on a 40 year lease. The minutes of the District planning committee meeting indicate that a substantial loss year on year is expected. That cost means that in reality, it will be the only new pitch in the area. There was a clear legal error because members were told that the proposal complied with the strategy, when at least it meant that the top priority in the strategy would not be capable of fulfilment. If the proposal was not a replacement for the football stadium, then it imperilled that replacement because funding would be spent on the proposal and not on a replacement. Partial mitigation, rather than replacement, was not compliant with the strategy and the members were not put into a position to know just how partial the mitigation would be.

29. Mr Fraser accepts that the strategy was a material consideration, but that relates to future provision. The application for the permission had to be considered on its own merits in accordance with the development plan. There may need to be further provision elsewhere in accordance with the strategy. The authority does not accept that the permission does imperil that strategy, and it is speculative to say that it does. The permission does not involve the loss of the football stadium and that is why it was considered, as it should have been, on a stand-alone basis. That emphasis was needed to make clear that the permission would not result in the loss of the football stadium within the meaning of CS18 and or result in the football stadium being built upon within the meaning of NPPF paragraph 99.
30. Furthermore, submits Mr Fraser, the future intentions of the authority as the owner of the football stadium, were not relevant to the planning merits of the application for the permission. The claimant's case does not respect the separation between the authority's decision making as owner on the one hand and as local planning authority on the other. Objectors who wish to oppose the redevelopment of the football stadium will be able to do so if and when an application for permission to do so is made. Any such application will have to be assessed against policy including CS18 and NPPF paragraph 99. The purpose of the application was to provide a facility which could, in future, mitigate against any future loss of the football stadium and so comply with the top priority of the strategy. It is a different matter to consider what the proposed development would comprise for the purposes of applying local and national planning policy.
31. I accept those latter submissions. Sport England identified a clear strategic need for the proposed new pitch at the rugby club as a stand alone scheme to address capacity shortages in the area. It does not involve the loss of the football stadium, and any planning application which does involve such a loss will have to be assessed against the planning policies referred to above and what is required to offset any loss of pitch. In my judgment, the joint statement was made to support the development of proposals at the rugby club to provide an enhanced replacement for the football stadium and when it seemed to be envisaged that the proposals might involve the loss of a pitch. However the application which was eventually made was to provide a pitch which was better than the one it replaced and better than what had been provided at the football stadium. Sport England no longer maintained its requirement of a condition to bring forward a grass pitch elsewhere. The proposed pitch was now being put forward as full or partial mitigation for any loss of the football stadium. This in my judgment will depend on the terms and conditions of any permission for development on that site.
32. I accept that these changes caused confusion and that the officer's reports could have been clearer in this regard. However, the confusion was properly dealt with by the officers at the meeting of the District planning committee in March 2022. I am not satisfied that the reports were seriously or significantly misleading in a material way. Although it may well be that funding for the proposed new pitch at the rugby club will have an impact on funding for provision elsewhere, it has not been shown that this means it will be the only new pitch in the area, as Ms Murphy puts it. In my judgment ground 1 has not been made out.

*Ground 2*



33. As for ground 2, Ms Murphy relies upon paragraph 6.20 of the first officer's report and the reference to the requirement of a replacement for the pitch lost at the rugby club. Members were told of a technical objection to a condition to this effect, but there are other ways to secure the replacement, such as a planning obligation by agreement pursuant to section 106 of the Town and Country Planning Act 1990, or by a *Grampian* condition.
34. In response, Mr Fraser submits the reason for the change of position of Sport England regarding such a condition was set out in the officer's report, namely that the grass pitch to be lost was for training and the proposed pitch could be used for rugby training but also for football training and matches. Accordingly the view was taken that such a condition was not necessary or reasonable. Although an officer did raise concerns about a condition which required the provision of a new pitch outside the site in respect of which the application was made, the primary reason given was whether such a condition was necessary. The members accepted the proper advice given and that is why the informative was added.
35. Again, I prefer the latter submissions. Officers gave proper advice, which the members ultimately accepted as they were entitled to. The informative, although non-binding, was sufficient to deal with their concerns.

#### *Conclusion and other points*

36. Accordingly the claim fails on both grounds. There are two procedural points remaining. The first relates to an additional witness statement filed by the claimant. In my judgment, this is not permitted by the standard directions, which deal with evidence from defendants or interested parties. The statement was not referred to or relied upon in the course of submission on the two grounds, and in my judgment permission to rely upon it is unnecessary and inappropriate.
37. The second relates to the £5000 cap set on any costs which the claimant should pay to the authority. This was set by Mr Strachan KC in giving permission, based on financial information of the claimant's means submitted shortly before, but he also gave the authority permission to apply to vary. The authority in September 2022 applied to vary to £20,000, and points to the claimant's statement of means which shows that he can afford that sum.
38. CPR 45.44(1)-(3) provides for such a variation if the court is satisfied that to do so would not make the costs of the proceedings prohibitively expensive for the claimant, that is the likely costs exceed the financial resources of the claimant or are objectively unreasonable having regard to six factors listed at CPR 45.44(3)(b). By CPR 45.44(4) the court must have regard to any financial support which the claimant has. In this case, he says he has received a pledge of £1,000. In respect of the factors, in my judgment the most relevant here are that the claimant is a local resident who is concerned by the potential loss of the football stadium, but will have an opportunity to voice those concerns if and when any application to develop it is made. In my judgment the proposal is important in terms of the environment. The authority estimates the costs of each sides are £20,000. There is no particular complexity, the claim was not frivolous and there was a reasonable prospect of success.

39. CPR 45.44 (5) (c) provides that any application must be determined at the earliest opportunity. It is not clear in this case why it was only at the substantive hearing that the application was heard. Although the claimant knew of the application to vary, the proceedings have progressed with that cap still in place. In my judgment that is an aspect of the situation of the claimant within the meaning of CPR 45.44(3)(b)(i). Although he has a pension and a rental property, those provide only a modest income. He has a home, some cash and a cash ISA. £40,000 would take most of the liquid assets, and would in my judgment be prohibitively expensive. I would vary the cap, but to £11,000, which takes account of the £1,000 pledged.
40. I am grateful to counsel for their helpful submissions. A draft order, together with written submissions on any consequential matters which cannot be agreed, should be filed within 14 days of hand down of this judgment, and any further determination will be on the basis of such written submissions.