PRINCE EDWARD PLAYING FIELDS, CAMROSE AVENUE, EDGWARE (THE HIVE FOOTBALL CENTRE)

A D V I C E

---

1. INTRODUCTION

1.1. I am asked to advise Football First Ltd in relation to their planning application comprising: Outline application for access only: Redevelopment to provide four storey building with basement comprising of student accommodation and teaching facilities for the University College of Football Business; hotel; medical diagnostic centre with some associated bedrooms in the hotel; plant and associated works. The Local Planning Authority ("LPA") is the London Borough of Harrow. The application was considered at Planning Committee on 2nd September and, in spite of officers' recommendation to refuse, members resolved to grant permission. Under the Borough's standing orders, where members of Planning Committee resolve contrary to officer recommendation, there is a period for reconsideration. In accordance with these arrangements, the application is due to be reconsidered by Committee in December. I have been asked to consider 4 specific questions which I shall answer in the final section of this Advice, having considered relevant matters of principle.

1.2. Officers have issued a report in which they recommend refusal for 8 reasons. The only suggested reason on which I am asked to advise is No.2: *"The proposed development would result in a direct loss of protected designated open space and would not provide a use which is ancillary or appropriate to the existing open space, contrary to the NPPF (2019), policy 7.18 of the London Plan (2016), policy G4 of the Draft London Plan – Intend to Publish (2019), core policy CS F of the Harrow Core Strategy (2012) and Policy DM18 of the Harrow Development Management Framework Policies Local Plan (2013)."*

1.3. The whole of the site of The Hive is designated as Open Space on the Harrow Policies Map and allocated for Community Outdoor Sports Use in the Harrow Development Management Policies Document. These are parts of the development plan and the designation and allocation trigger the application of associated policies in the NPPF and the Plans and draft Plan listed in the reasons for refusal. These policies are all broadly similar. They resist the loss of open space to built development save where an assessment has been undertaken which shows the space in question to be surplus to requirements and/or there would be replacement by equivalent or better provision in a suitable location or the development is for alternative sports and recreational provision, the benefits of which clearly outweigh the loss of the current or former open space. That is a summary of NPPF paragraph 97 and the other policies are to like effect, with the draft London Plan additionally highlighting the desirability of creating areas of publicly accessible open space, particularly in areas of deficiency. The Core Strategy applies a presumption against loss of either public or private open space, though reconfiguration is permitted where qualitative improvements / improved access can be secured without reducing

the quantity of open space. Core Policy CS9 states that the Prince Edward Playing Fields will be maintained as an important sporting destination and opportunities for enhanced community access will be sought; supporting text is positive about supporting the Barnet FC training centre and football centre of excellence at the Hive. Policy DM18 deals with ancillary development on land identified as open space, which will be supported in certain circumstances and subject to conditions that it is necessary or would facilitate the proper functioning of the open space, is ancillary to the use of the open space, would be appropriate in scale, not detract from the open character of the site or surroundings, not be detrimental to any other function that the space performs and could contribute positively to the setting and quality of the open space.

1.4. Open space is defined in the glossary of the Council's Development Management Policies Document (July 2013) as: "All open space of public value, including not just land, but also areas of water (such as rivers, canals, lakes and reservoirs) which offer important opportunities for sport and recreation and can act as a visual amenity." This same definition is provided in the glossary of the 2019 Revised NPPF.

2. STATUTORY FRAMEWORK FOR DECISION MAKING

2.1. Section 38(6) Planning and Compulsory Purchase Act 2004 provides that planning applications are to be determined in accordance with the development plan unless other material considerations indicate otherwise. The NPPF is an important material consideration. It is notable that the statutory duty does not require that applications must always be determined in accordance with the

development plan. The House of Lords considered the scope of the equivalent Scottish provision in City of Edinburgh Council v. Secretary of State for Scotland and Others [1997] 1 WLR 1447. In a speech with which all the other Law Lords agreed, Lord Clyde said:

> *"The planning issue*
>
> *Section 18A of the Town and Country Planning (Scotland) Act of 1972, which was introduced by section 58 of the Planning and Compensation Act 1991, creates a presumption in favour of the development plan. That section has to be read together with section 26(1) of the Act of 1972. Under the previous law, prior to the introduction of section 18A into that Act, the presumption was in favour of development. The development plan, so far as material to the application, was something to which the planning authority had to have regard, along with other material considerations. The weight to be attached to it was a matter for the judgment of the planning authority. That judgment was to be exercised in the light of all the material considerations for and against the application for planning permission. It is not in doubt that the purpose of the amendment introduced by section 18A was to enhance the status, in this exercise of judgment, of the development plan.*
>
> *It requires to be emphasised, however, that the matter is nevertheless still one of judgment, and that this judgment is to be exercised by the decision taker. The development plan does not, even with the benefit of section 18A, have absolute authority.* ***The planning authority is not obliged, to adopt Lord Guest's words in Simpson v. Edinburgh Corporation, 1960 S.C. 313, 318, "slavishly to adhere to" it.*** *It is at liberty to depart from the development plan if material considerations indicate otherwise. No doubt the enhanced status of the development plan will ensure that in most cases decisions about the control of development will be taken in accordance with what it has laid down. But some of its provisions may become outdated as national policies change, or circumstances may have occurred which show that they are no longer relevant. In such a case the decision where the balance lies between its provisions on the one hand and other material considerations on the other which favour the development, or which may provide more up to date guidance as to the tests which must be satisfied, will continue, as before, to be a matter for the planning authority.*

The presumption which section 18A lays down is a statutory requirement. It has the force of law behind it. But it is, in essence, a presumption of fact, and it is with regard to the facts that the judgment has to be exercised. The primary responsibility thus lies with the decision taker. The function of the court is, as before, a limited one. All the court can do is review the decision, as the only grounds on which it may be challenged in terms of the statute are those which section 233(1) of the Act lays down. I do not think that it is helpful in this context, therefore, to regard the presumption in favour of the development plan as a governing or paramount one. The only questions for the court are whether the decision taker had regard to the presumption, whether the other considerations which he regarded as material were relevant considerations to which he was entitled to have regard and whether, looked at as a whole, his decision was irrational. It would be a mistake to think that the effect of section 18A was to increase the power of the court to intervene in decisions about planning control. That section, like section 26(1), is addressed primarily to the decision taker. The function of the court is to see that the decision taker had regard to the presumption, not to assess whether he gave enough weight to it where there were other material considerations indicating that the determination should not be made in accordance with the development plan."

(Emphasis added)

2.2. Specifically with regard to open space, there is a statutory procedural requirement by virtue of the Town and Country Planning (Development Management Procedure) (England) Order 2015. Art.18(1) and Schedule 4 (z) of the Order requires the LPA to consult Sport England in respect of applications for:

"Development which:

(i) is likely to prejudice the use, or lead to the loss of use, of land being used as a playing field; or

(ii) is on land which has been:

(aa) used as a playing field at any time in the 5 years before the making of the relevant application and which remains undeveloped; or

(bb) allocated for use as a playing field in a development plan or in proposals for such a plan or its alteration or replacement; or

(iii) involves the replacement of the grass surface on a playing pitch with an artificial, man-made or composite surface"

The interpretation paragraph provides at paragraph 1(j) that:

"(i) 'playing field' means the whole of a site which encompasses at least one playing pitch;

(ii) 'playing pitch' means a delineated area which, together with any run-off area, is of 0.4 hectares or more and which is used for association football, American football, rugby, cricket, hockey, lacrosse, rounders, baseball, softball, Australian football, Gaelic football, shinty, hurling, polo or cycle polo;"

2.3. S.54 PACPA 2004 imposes a duty on Sport England to respond to such a consultation.

2.4. Given this statutory framework, it is clear that the LPA must have regard to the consultee response and it is likely to be a material consideration of some weight in the determination of the application.

3. THE SITE AND THE PROPOSAL

3.1. The Hive Stadium opened at the site in 2009 and provides a 17.3ha football and sports complex, including a stadium for Barnet FC and the London Bees Women's FC, grass football pitches, floodlit synthetic football pitches, a hi-tech commercial fitness centre, an advanced medical diagnostic centre, a banqueting suite, eating and drinking facilities, ancillary buildings and community facilities. It has a planning history which reflects this level of development. Of particular note is an appeal decision dated 14th June 2018

allowing the grant of planning permission retrospectively for development undertaken without complying with conditions subject to which planning permission had been granted for the redevelopment of an enlarged football stadium and the facilities listed above in this paragraph.

3.2. Barnet FC moved to the Hive in 2013. Since their move, they have progressed to playing in the National Football League. They are a professional club.

3.3. The local development plan designation and associated policies predate the Club's return to playing in the National Football League and their commensurate scale of business.

3.4. I do not need to go into details of the proposed development, but it is important to note that the physical form which the new buildings would take. They would be constructed on land between the ends of the stadium stands, in part used as an internal access road, in part for open air storage, turnstiles and in part as parking space. The approach is therefore similar to that taken to the earlier built form, approved on appeal in 2018. At paragraph 13 of the decision letter, the Inspector observed: *"The extension has been built over the existing hardsurfaced area and so there has been no reduction in the amount of open space or playing fields onsite."* The same would be true of the development proposed in the current application.

3.5. Those instructing me have argued in the supporting Planning Statement that the areas of hardstanding proposed for built development do not have *"public value"* or *"offer important opportunities for sport and recreation".* Nor, they say,

do they act as a *"visual amenity."* Accordingly, they argue that there is no conflict with NPPF 97. They also argue that the hotel would support the sport function and not erode the Borough's existing open spaces by inappropriate development and/or that the proposals are ancillary to the sports functions and in other respects conforms to the requirements of Policy DM18.

4. THE DEVELOPMENT PLAN AND MATERIAL CONSIDERATIONS

4.1. The statutory framework within s.38(6) PACPA 2004 requires what is frequently referred to as a planning balance, rather than the *"slavish adherence"* to policy criticised by the House of Lords. In other words, policy should not be applied so strictly as to remove from the equation all common sense and the ability to give weight to the planning benefits which a proposal ***offers***, even if it is contrary to the development plan.

4.2. The Planning Statement submitted in support of the application assesses the practical effects of the proposed development, concluding that there would be no loss of open space of public value which offers the opportunity for sport or recreation, because of the nature of the areas to be used for construction. They are previously developed land ancillary to the function of the site as a sports hub.. The Statement also argues that the proposals would be ancillary rather than detrimental to the open space and therefore in accordance with the Development Management Policies DPD. The argument is put in terms that the land concerned is of no public value and does not at present provide opportunities for sport and recreation so that there is no conflict with policy. This is a matter of planning judgment; the officer disagrees, but members will be free

and need to make up their own minds about that point. I have not seen the site and can only advise on the lawful and appropriate approach to the questions which must be answered by members for themselves. I advise, however, on the worst case assumption (from the Applicant's perspective) that members do not find that the proposals accord with the development plan.

4.3. On the assumption that the proposals are found not to accord with the development plan, that is not the end of the matter because members must go on to consider whether *"material considerations indicate otherwise"* – the planning balance. The Planning Statement lists a number of important public benefits as follows:

- Meeting an identified need for hotel provision in Harrow and London;
- Meeting the needs of visitors to The Hive London using both the sports facilities and using the TIC Medical Centre;
- Boosting tourism in Harrow and increasing tourism expenditure in the local area;
- Bringing significant investment to Harrow;
- Providing recreation and leisure facilities within the hotel which will be available to the local community;
- Creating jobs during the construction phase and through the long-term operation of the facility;
- Allowing the prestigious UCFB to have an on-site campus will boost prestige of The Hive London as a centre for sporting innovation and excellence.

- Enhancing a world leading sports facility;
- Providing additional conferencing facilities for the local community and businesses;
- Providing additional opportunities for further education for local young people in an exciting and growing business area;
- Enhancing a world leading diagnostic screening facility that is used by the NHS;
- Delivering significant economic input into the local community from visitors to the hotel, students and patients of the diagnostic centre; and
- Providing landmark development for the Borough.

4.4. A further important consideration, both in determining whether or not there is a breach of policy and, in the event that it is decided that there is, in deciding about the significance of any such breach, is Sport England's statutory consultation response. The LPA must have regard to the views of this important consultee – its official name is the English Sports Council. As its Policy document makes clear, the consultation requirement was introduced in 1996 because of the Government's concern at the loss of such facilities and it has remained in force. Sport England's policy and practice is highly protective and, in my experience, they are astute to scrutinise planning applications carefully and swift to object if there is any realistic prospect of playing pitch space being lost or its use impaired. In this instance, they have clearly advised the LPA that the proposals accord with their policy exceptions to the general principle of no loss of playing fields and former or allocated playing fields. They have satisfied

themselves that the development would affect *"only land incapable of forming part of a playing pitch"* and would not reduce the size of any pitch, result in inability to use any pitch, reduce the sporting capacity of the pitch, result in the loss of other sporting provision or ancillary facilities or prejudice the use of any remaining areas of playing field on the sites. They have also consulted the Football Foundation, who agree. They properly refer to the *"wraparound"* design of the scheme.

4.5. Whilst I appreciate that Sport England's consultation remit is narrower than the development plan protection of open space, this response, which takes a practical and accurate view of the proposals, is clearly an important consideration. The officer records it under the Consultations section of the report, but does not engage with it in the reasoning on Open Space. In my opinion, this is a significant omission from the report.

4.6. Similarly, the officer does not engage with the previous appeal decision. Exactly the same mechanistic approach to Open Space policy was taken in the report on the previous development which went to appeal in 2018 and the recent approach of a planning inspector to the argument is a further important material consideration which should be taken into account in reaching a balanced judgment on the development plan conflict. In *Bloor Homes East Midlands Ltd v SSCLG (Admin) [2014] EWHC 754 (Admin)* at 19, Lindblom J (as he then was) summarised the law on consistency in decision making as follows*: "Consistency in decision-making is important both to developers and local planning authorities, because it serves to maintain public confidence in the*

operation of the development control system. But it is not a principle of law that like cases must always be decided alike. An inspector must exercise his own judgment on this question, if it arises (see, for example, the judgment of Pill L.J. Fox Strategic Land and Property Ltd. v Secretary of State for Communities and Local Government [2013] 1 P. & C.R. 6, at paragraphs 12 to 14, citing the judgment of Mann L.J. in North Wiltshire District Council v Secretary of State for the Environment [1992] 65 P. & C.R. 137, at p.145)."

4.7. In my view, therefore, the officer's report is materially deficient and members should consider the Sport England response and the rejection of the officer's approach to application of the open space development plan policies carefully.

4.8. If, having considered all the matters in the Planning Statement, the officer's report and the matters set out in this Advice, members came to the conclusion that there was no objection to the proposal on open space designation grounds, as a matter of planning judgment, that decision would, in principle, be lawful.

5. CONCLUSION

5.1. I am asked a number of specific questions on points which I have dealt with above. For completeness, I provide the following answers:

(1) **Are the LPA correct that there would be a "direct loss of protected designated open space"?**

This is a question of fact / opinion, which is a matter which must be determined by the members. I cannot express a meaningful view of my

own, not least because I have not visited the site, but what I can say is that it would be lawful for members to reach the view that there would be no such loss, having regard to the policy definitions.

(2) **Are the LPA correct that there is a conflict between adopted and emerging policies and the NPPF and the proposed development which would justify refusal of planning permission?**

This question really turns on the answer to the question of fact / opinion referred to under Question 1.

(3) **Even if there is a conflict with adopted and emerging policies and the NPPF, can Officers and/or Members come back to the view that the benefits that arise from the development are sufficient to outweigh the policy conflict such that they can support the application?**

Yes. This is a matter of the planning balance. S.38(6) PACPA 2004 does not require that a planning decision must be taken in accordance with the development plan, because it is expressly provided that *"other material considerations"* may *"indicate otherwise".* The public benefits listed above are all material planning considerations which must be taken into account when undertaking the balance. The weight to accord to any material consideration is a matter for the decision maker and the Court will only interfere in the case of a decision which is irrational, which is a very high test indeed: see Bloor Homes (above). Other important material considerations in this case, as well as benefits of the scheme, are the Sport England consultation response and the decision of the previous planning inspector.

(4) **Given the findings in respect of the North Stand application (Appeal ref: APP/M5450/W/17/3188361) and the Academy application (LPA ref: P/2764/17), is it reasonable for applicants to expect that there is consistency in how open space policies are applied on the same site? Given that the local policies remain the same, is there any obligation for Officers to follow precedent?**

There is no entitlement, as a matter of law, for cases to be decided consistently, but the previous approach is a material consideration and, if members are to reach a different decision now, they must explain why they have done so, setting out any material differences.

MORAG ELLIS QC
25 October 2020

Francis Taylor Building
Inner Temple
London
EC4Y 7BY

DX 402 4DE

PRINCE EDWARD PLAYING FIELDS, CAMROSE AVENUE, EDGWARE (THE HIVE FOOTBALL CENTRE)

A D V I C E
