Neutral Citation Number: [2019] EWHC 742 (Admin)

Case No: CO/3912/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT IN WALES

The Law Courts
Civic Centre, Mold, CH7 1AE

Date: 26 March 2019

Before :

HIS HONOUR JUDGE KEYSER Q.C.
sitting as a Judge of the High Court

- -

Between :

RENEW LAND DEVELOPMENTS LIMITED	**Claimant**
- and -	
WELSH MINISTERS	**Defendant**
-and-	
(1) CONWAY COUNTY BOROUGH COUNCIL	**Interested**
(2) CARTREFI CONWY CYF	**Parties**

- -
- -

Thea Osmund-Smith (instructed by **Aaron & Partners**) for the **Claimant**
Gwion Lewis (instructed by **Government Legal Department**) for the **Defendant**
The Interested Parties did not appear and were not represented.

Hearing dates: 15 March 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

HIS HONOUR JUDGE KEYSER Q.C.

JUDGE KEYSER QC:

Introduction

1. This claim, commenced on 5 October 2018 and continued pursuant to permission granted by HHJ Jarman QC, sitting as a Judge of the High Court, on 20 November 2018, is a challenge by Renew Land Developments Ltd ("Renew") under section 288 of the Town and Country Planning Act 1990 ("the Act") to the decision dated 28 August 2018 of Kay Sheffield, a Planning Inspector appointed by the defendant, the Welsh Ministers, dismissing an appeal by Renew and the second interested party, Cartrefi Conwy Cyf ("Cartrefi"), against a refusal of planning permission by the first interested party, Conwy County Borough Council ("the Council").

2. At the hearing, Renew was represented by Miss Osmund-Smith and the Welsh Ministers by Mr Gwion Lewis. I am grateful to both counsel for their helpful written and oral submissions.

Background

3. The application for planning permission was made jointly by Renew and Cartrefi. It sought outline planning permission for residential development (of the order of 80 to 100 units; the amount remained to be determined) and alterations to the road layout at a site off Llysfaen Road, Old Colwyn. Details of the access formed part of the application, but all other matters were to be reserved for further approval.

4. The application site, though in a predominantly residential area, comprised the former Plas Gwilym Quarry and covered an area of approximately 4.41 hectares. As well as the quarry bowl, the site included two additional areas on higher ground: pasture land to the south, and a grassed amenity area to the north-east. Both at the time of the Council's refusal of planning permission and at the time of the Inspector's decision on appeal, the application site was in commercial use.

5. The application for planning permission was subject of a report dated 11 October 2017 to the Council's planning committee. Much of the report was in terms favourable to the application. Thus, in the section dealing with Planning Considerations and the policies in the local development plan, paragraph 60 observed: "Policy DP/1 sets out the sustainable development principles and DP/2 and HOU/1 set a presumption in favour of residential development on suitable sites within urban areas. The development is considered to be acceptable in principle ..." Paragraph 61 identified a shortfall in supply of housing: a 3.1-year supply as against a requirement in Technical Advisory Note (TAN) 1 of a 5-year supply. Paragraph 62 considered the potential loss of employment on the land but concluded: "there is a clearly identified need for housing within Conwy and the housing land supply falls below the five year supply required. Consequently, housing demand outweighs the retention of the existing employment use in this instance." Among other matters, paragraph 69 mentioned amenity concerns that had been raised and concluded: "In overall terms, the amenity benefits are therefore positive." And paragraph 82 said: "given the site's context, surrounding uses, topography and its historic use as a quarry, it is not considered that the visual impact would be unacceptable."

6. However, the report highlighted two areas of concern: the lack of provision of play space for children on the site, and the loss of informal amenity land that would be entailed by developing the site. Thus, paragraph 15 said:

> "The SPS [Supporting Planning Statement] advises that it is not possible to provide the necessary level of open space on site due to the limited developable area due to topography and the need to ensure that each property benefits from sufficient sunlight. The applicant also acknowledges that the development would result in a loss of existing designated informal play space. The applicant suggests that both could be provided off-site through payment/planning obligation."

In paragraph 56, which summarised the responses to consultations, the concerns of the Council's Open Spaces Manager were recorded: "The site includes a 0.85ha grassed area which is widely used for ball games and informal play. The nearest equipped play area is at Peulwys Lane, which is over half a kilometre away, and along a fairly busy estate road. Objects to the proposal as it stands." The area of 0.85 hectares is the north-east of the application site and is owned by Cartrefi. (It is shown coloured red on the plan exhibited to a witness statement dated 4 October 2018 of David Kelsall, the development and new business manager of Cartrefi.) The following text appeared under the heading "Open Space":

> "78. Policy CFS/11 states that housing developments of 30 or more dwellings must include provision for open space. The supporting text states that the Council will seek children's play space in the form of on-site provision, and sports space through a financial contribution.
>
> 79. The applicant's Planning Statement refers to some communal amenity open space and landscaping within the development, but makes no reference to play areas. SPCS [i.e. the Council's Strategic Planning and Communities] advises that there is a deficiency of play space in the community, and that the development would result in the loss of c. 0.85a of existing open space."
>
> 80. The Open Space Manager advises that the nearest equipped play area is at Peulwys Lane, which is over half a kilometre away, and long a fairly busy estate road. The agent advises that enquiries have been made regarding the provision of a suitable alternative play area. However, to date, no such suitable sites have been identified. The application is therefore contrary to Policy CFS/11."

7. The concluding part of the report was in the following terms:

> "92. The development would provide benefits in terms of helping to address the shortfall in the housing land supply, as well as providing a beneficial use for under-used previously developed land. The proposal would also remove concerns over

> the future stability/maintenance of the rock arch and of the parapets above it. In the longer term, the proposal would provide an alternative access to the existing sub-standard Craig Road / Llysfaen Road junction."
>
> 93. However, as the application currently stands, there are a number of critical questions and issues which remain unresolved. These include:
>
> (i) Ensuring adequate provision of open space;
>
> (ii) Ensuring that sustainable drainage can be provided as far as possible;
>
> (iii) Clarification of highway authority requirements and delivery mechanisms.
>
> 94. Given the number and nature of these concerns, Officers are unable to support the application in its current form. The recommendation is therefore to refuse planning permission."

8. The Council's Refusal of Outline Planning Permission was issued on 18 October 2017. The reason for refusal was:

> "The proposed development would result in the loss of existing open space identified as play space within Conwy County Borough Council's Open Space Assessment, of which there is a shortfall within the settlement of Old Colwyn. The application makes no provision for the replacement of this lost open space nor does it make adequate on-site provision for play space as part of the development. The proposal is therefore contrary to Policy DP/3, CFS/11 and CFS/12 of the adopted Conwy Local Development Plan 2013, Technical Advice Note 16: Sport, Recreation and Open Space and Planning Policy Wales, Edition 9."

Accordingly, there were two limbs of the reason for refusal: first, the loss of existing open space; second, the inadequate provision for play space. As I shall explain below, only the former limb is of continuing relevance.

Relevant policies etc.

9. It is necessary to refer in more detail to some of the policies in the Council's local development plan and to two other associated documents.

10. Policy DP/3, headed "Promoting Design Quality and Reducing Crime" states in paragraph 1(b) that new development will be required to meet the council's approved standards of open space provision.

11. Policy CFS/11, headed "Development and Open Space", was mentioned both in the Council's officers' report and in the reason for refusing planning permission. Paragraph 1 states that new housing development of 30 or more dwellings shall make on site provision for the recreational needs of its residents in line with the council's standards for open space. (It sets out those standards but I do not need to repeat them here.) Paragraph 2 states that in exceptional and justified circumstances consideration will be given to the provision of a commuted sum as an alternative to on-site provision.

12. Policy CFS/12, headed "Safeguarding Existing Open Space", was mentioned in the reason for refusing planning permission but not in the officers' report. It reads:

> "Planning Permission will not be granted for development which results in the loss of open space except where there is an over-provision of open space in the particular community, and the proposal demonstrates significant community benefits arising from the development, or where it will be replaced by acceptable alternative provision within the vicinity of the development or within the same community."

The text accompanying Policy CFS/12 included the following:

> "4.5.10.10 The term 'open space' as referred to in Policy CFS/12 includes the following types as described in TAN 16: public parks and gardens, outdoor sports facilities, amenity green space and provision for children and young people. Such areas are of great significance to the local communities in the Plan Area. This is not only for the sports and recreational opportunities they offer, but the impact open space has on the attractiveness of the built and natural environment. Therefore, existing open space should not be lost unless the open space assessment clearly demonstrates an over-provision of open space necessary for the community's requirements. In such cases, developers will also need to demonstrate how their proposals will bring about significant benefits for those communities which will be losing the open space, such as provision of a satisfactory level of affordable housing, neighbourhood shops or other leisure facilities as and where appropriate.
>
> 4.5.10.11 If there is an under provision of open space in the community, the developer will need to provide an acceptable alternative site within the vicinity of the development, or within the same town or community council area. Any alternative site should be equivalent to, or better than, that taken by development and be easily accessible to the local community by sustainable transport modes."

13. Technical Advice Note (Wales) 16: Sport, Recreation and Open Space (TAN 16) requires local planning authorities to carry out Open Space Assessments to inform their local development plans. It advises that locally generated standards should be based on robust evidence derived from the Open Space Assessment and should include quantitative elements, a qualitative component and an accessibility component.

14. The reason for refusing planning permission mentioned, as the officers' report had not, the Council's Open Space Assessment ("OSA"). This is *Revised Background Paper 19* of August 2012, which relates to the local development plan. It is not itself part of the plan, nor is it strictly a policy document, but it constitutes relevant material to be taken into consideration in determining planning applications and in particular in assessing the Council's supply of open space and the compliance of applications with relevant policies. Section 2.1 of the OSA stated:

> "Categorisation of the types of public open space are currently recorded as:
>
> • Playing pitches—outdoor marked playing pitches
>
> • Outdoor sports facilities—natural or artificial surfaces including tennis courts, bowling greens, athletics tracks and other outdoor sports facilities
>
> • Children's playing space—equipped play areas, areas for wheeled play and less formal areas."

Section 3.1 stated:

> "Not all the areas of public open space are owned by the Council. If a formal agreement exists to state they are available for public/dual use they are considered as contributing to public open space provision."

15. The OSA does not refer in terms to the application site. However, at paragraph 6.1 it includes Table 1, which is said to show the amount of open space by reference to the categories in the local development plan and the local standards for amenity space within the main settlements in Conwy. The entry for Old Colwyn shows 3.43 hectares for Play Space.

16. The OSA was not prepared for the purposes of and in accordance with TAN 16. Section 5.1 explained that an Open Space Audit and Assessment to meet the requirements of TAN 16 would be prepared in due course, but that it had been considered appropriate in the meantime to produce the Background Paper rather than delay work on the local development plan. In fact, no Assessment compliant with TAN 16 has ever been produced.

The appeal

17. Renew and Cartrefi (together, "the appellants") appealed against the Council's refusal of planning permission. The appeal was dealt with by the written representations procedure. The appellants' Statement of Case was dated April 2018.

18. So far as the refusal rested on an objection concerning the lack of provision of play space, contrary to policy CFS/11, the appellants proposed to address the objection by means of a planning obligation by way of a unilateral undertaking dated 27 July 2018 under section 106 of the Act.

19. So far as the refusal of planning permission rested on the loss of existing open space, the Statement of Case noted at paragraph 3.4:

> "It is the Council's case that the proposed development will result in the loss of existing open space, 'play space' as identified in the Council's Open Space Assessment, of which there is a shortfall within the settlement of Old Colwyn, and that the appeal proposal makes no provision for the replacement of this lost open space."

Paragraph 3.6 stated in terms:

> "A portion of the application site, 0.85ha is identified within the Council's Open Space Assessment as play space."

The Statement of Case observed that the OSA had been written in 2012 and had not been updated and that it did not include a qualitative assessment or an assessment of accessibility.

20. The appellants made two main points in response to the Council's objection under policy CFS/12. The first was that, when read with the accompanying text in para 4.5.10.11 of the local development plan, policy CFS/12 did not require like-for-like replacement of open space; rather, any alternative provision should be "equivalent to, or better than" the lost space. The new development would provide formal on-site play facilities pursuant to the Unilateral Undertaking; these were of at least equal value to the community to the informal amenity space that would be lost by the development. This contention gained support from the appellants' second point in response to the objection under policy CFS/12.

21. That second point was a fall-back position. The appellants said that the 0.85ha was and could only be identified as *informal* open space, because it was not owned by the Council and could be fenced by the owner, Cartrefi, at any time. In that event it would cease to be play space and its only amenity would be the visual amenity of undeveloped open space; and even that amenity would be compromised by the fencing. It was possible and indeed probable that the owner would fence the land, if its unfenced state was liable to affect adversely any future application for permission to develop it. If the land were to be fenced, it would no longer fall within the definition in the 1990 Act as land "used for the purposes of public recreation". The Statement of Case said:

> "3.18 The portion of the appeal site in question is not formally allocated and safeguarded specifically within the Local Plan; it is only by way of the landowner leaving it unfenced and in allowing people to use it that it has value as 'play space', albeit informal as no formal play provision is made.
>
> 3.19 This being the case, as previously discussed, the use of the land as open space can be lost without the need for any formal planning permission as the land could be fenced under permitted development rights."

On the other hand, the provision of formal play facilities under the Unilateral Undertaking would both guarantee the future retention of public space, which was an advantage in comparison with the uncertain availability of the 0.85ha in perpetuity, and provide improved facility as compared with the merely open space already existing.

22. In the Council's Statement of Case for the appeal, paragraphs 3.2 to 3.15 dealt with the loss of existing open space. The conclusion was:

> "3.14 Phase 1B of the appeal proposal would be situated on a gently-sloping grassed area, which is maintained by Cartrefi Conwy and identified in the 2012 OSA as a Play Area. A footway/cycleway with street lighting runs along the northern boundary of Phase 1B, and there is a small car park at the western end.
>
> 3.15 The proposal would result in the loss of this provision, which amounts to approximately 0.85ha, in an area where there is a significant shortfall, without any replacement provision that is equivalent either in terms of size or suitability. The area shaded green on the site sketch layout submitted with the application comprises the rock face and its immediate surroundings, whose suitability to provide usable recreational space would be severely constrained by topographic and safety constraints. The proposal is therefore contrary to Policy CFS/12."

23. The Council's response to the appellants' fall-back position was summarised at paragraph 4.8 of its Statement of Case:

> "The appellants have not provided evidence of any intention to fence off the open space, and the indication given in their Statement of Case is based on no more than speculation. … The Council therefore considers that the prospect of it being fenced off in advance of development is unlikely, and as such, the weight to be afforded to it as a material consideration is low."

The Decision

24. In her Decision Letter, the Inspector noted (paragraph 5) that the main issue was "whether the development would make satisfactory provision of open space." She noted (paragraph 8) that the local planning authority's concerns were twofold, namely (1) lack of play space to serve the development and (2) "the loss of 0.85ha of designated informal open space". In paragraph 9 she said that she accepted that by reason of the Unilateral Undertaking "the development would make adequate provision for the recreational needs of its residents, in accord with Policy CFS/11". That left for consideration the objection under policy CFS/12 on the basis of loss of designated informal open space.

25. The Inspector made a number of points material to her decision. There was an overall deficit of open space provision in the community (paragraph 10). Although the informal open space, which formed part of the appeal site, was not formally allocated and protected in the local development plan, it was included as a play area in the OSA (paragraph 10). The OSA is a quantitative (by implication, not a qualitative) assessment of open space. If a formal agreement existed to state that open space not owned by the council was available for public/dual use, it was considered as contributing to public open space provision (paragraph 11). There was no evidence to suggest that the open space that fell within the appeal site was not based on a formal agreement with the landowner (paragraph 11). Although the OSA was several years old, there was no evidence to contradict the Council's contention that any update would still identify significant shortfalls in the overall provision of open space in Old Colwyn.

26. The Inspector's reasoning was set out in the following paragraphs:

> "13. It is accepted that the obligation in the UU [Unilateral Undertaking] to provide an equipped play area would give the facility formal status. However, the equipped play area would constitute an up-grade of an existing area of informal open space and would not provide additional land for use as open space. It is acknowledged that the equipped play area would provide a facility not currently available in the vicinity of the site, to the benefit of residents of the wider area as well as future occupants of the development. Nevertheless, it would constitute a loss of informal open space additional to that which would be lost within the appeal site itself. I am not persuaded that the provision of an equipped play area would adequately compensate for the loss of a significant area of informal open space in a community where there is an overall deficit in open space provision.
>
> 14. I therefore find the development would result in an unacceptable loss of public open space, contrary to policy CFS/12 of the LDP and the guidance in Planning Policy Wales (PPW9) and Technical Advice Note (TAN) 16: Sport, Recreation and Open Space which seek to protect formal and informal public space from development except where it will be replaced by acceptable alternative provision within the vicinity of the development or within the same community.
>
> 15. I have noted he Appellants' intention to fence off the area of open space which falls within the appeal site thus preventing public access to it. These works would be allowed under permitted development rights. Although the Council is of the view that the prospect of these actions being carried out in advance of the development is unlikely, I am satisfied by the evidence that it is the intention of the Appellants to do so and as a fall-back position it is a material consideration in the determination of the appeal. It is accepted that such actions would prevent public use of the land. Nevertheless the land would be devoid of built development and depending on the type

> of fence erected it would continue to make a contribution to visual amenity."
>
> "Conclusions
>
> "19. The development would result in the loss of informal open space in a community where there is already an overall deficit in open space provision. This carries significant weight against the appeal.
>
> 20. It is acknowledged that the land could be fenced off preventing its use as informal open space. In addition the development would contribute to housing land supply including an element of affordable housing. The provision of an equipped play area which would be of benefit to the local community as well as future occupants of the proposed dwellings also adds weight in support of the appeal. However I do not consider these factors to be sufficient to outweigh the loss of open space.
>
> 21. For the reasons given above, and having had regard to all other matters raised, the appeal is dismissed."

This challenge: grounds and law

27. Section 288(1)(b) of the Act entitles a person aggrieved by a decision of the Welsh Ministers on an appeal under section 78 of the Act to question the validity of the decision on the grounds that the action is not within the powers under the Act or that any relevant requirements have not been complied with in relation to that action. Renew is a person aggrieved for the purposes of section 288.

28. The claimant relies on two grounds of challenge to the Inspector's decision:

    1) The Inspector's treatment of the open space issue was unlawful. The decision letter lacks adequate reasons for finding a conflict with policy CFS/12, demonstrates a misunderstanding of the nature of open space on site, and is irrational in its treatment of the fall-back position. The Inspector's reasons for identifying harm are entirely unclear and unsupported by the evidence before the Inspector, and inconsistent with the Inspector's own findings of fact. Matters of visual amenity as a distinct point were not raised with the claimant, as they should have been.

    2) The Inspector failed to accord statutory priority to the development plan or carry out a planning balance in accordance with section 38(6) of the Planning and Compulsory Purchase Act 2004 ("the 2004 Act") and failed to have regard to material consideration in terms of the undisputed benefits of the scheme.

29. The law is agreed between the parties and is very helpfully set out at paragraphs 15 to 23 of Miss Osmund-Smith's skeleton argument. I note a few salient points at this stage:

30. The approach to a challenge such as the present was explained in *Bloor Homes East Midlands Ltd v Secretary of State for Communities and Local Government* [2014] EWHC 754 (Admin), where Lindblom J set out the applicable principles at [19]:

> "(1) Decisions of the Secretary of State and his inspectors in appeals against the refusal of planning permission are to be construed in a reasonably flexible way. Decision letters are written principally for parties who know what the issues between them are and what evidence and argument has been deployed on those issues. An inspector does not need to 'rehearse every argument relating to each matter in every paragraph' (see the judgment of Forbes J. in *Seddon Properties v Secretary of State for the Environment* (1981) 42 P. & C.R. 26, at p.28).
>
> (2) The reasons for an appeal decision must be intelligible and adequate, enabling one to understand why the appeal was decided as it was and what conclusions were reached on the 'principal important controversial issues'. An inspector's reasoning must not give rise to a substantial doubt as to whether he went wrong in law, for example by misunderstanding a relevant policy or by failing to reach a rational decision on relevant grounds. But the reasons need refer only to the main issues in the dispute, not to every material consideration (see the speech of Lord Brown of Eaton-under-Heywood in *South Bucks District Council and another v Porter (No. 2)* [2004] 1 WLR 1953, at p.1964B-G).
>
> (3) The weight to be attached to any material consideration and all matters of planning judgment are within the exclusive jurisdiction of the decision-maker. They are not for the court. A local planning authority determining an application for planning permission is free, 'provided that it does not lapse into *Wednesbury* irrationality' to give material considerations 'whatever weight [it] thinks fit or no weight at all' (see the speech of Lord Hoffmann in *Tesco Stores Limited v Secretary of State for the Environment* [1995] 1 WLR 759, at p.780F-H). And, essentially for that reason, an application under section 288 of the 1990 Act does not afford an opportunity for a review of the planning merits of an inspector's decision (see the judgment of Sullivan J., as he then was, in *Newsmith v Secretary of State for* [2001] EWHC Admin 74, at paragraph 6).
>
> (4) Planning policies are not statutory or contractual provisions and should not be construed as if they were. The proper interpretation of planning policy is ultimately a matter of law for the court. The application of relevant policy is for the decision-maker. But statements of policy are to be interpreted objectively by the court in accordance with the language used and in its proper context. A failure properly to understand and apply relevant policy will constitute a failure to have regard to a material consideration, or will amount to having regard to an

> immaterial consideration (see the judgment of Lord Reed in *Tesco Stores v Dundee City Council* [2012] PTSR 983, at paragraphs 17 to 22).
>
> (5) When it is suggested that an inspector has failed to grasp a relevant policy one must look at what he thought the important planning issues were and decide whether it appears from the way he dealt with them that he must have misunderstood the policy in question (see the judgment of Hoffmann L.J., as he then was, *South Somerset District Council v The Secretary of State for the Environment* (1993) 66 P. & C.R. 80, at p.83E-H).
>
> (6) Because it is reasonable to assume that national planning policy is familiar to the Secretary of State and his inspectors, the fact that a particular policy is not mentioned in the decision letter does not necessarily mean that it has been ignored (see, for example, the judgment of Lang J. in *Sea Land Power & Energy Limited v Secretary of State for Communities and Local Government* [2012] EWHC 1419 (QB), at paragraph 58).
>
> (7) 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)."

31. As for procedural fairness, a party to a planning appeal is entitled to know the case that he has to meet and to have a reasonably opportunity to adduce evidence and make submissions in relation to that opposing case. Whether there has been procedural unfairness is a fact-specific question. See *Secretary of State for Communities and Local Government v Hopkins Developments Ltd* [2014] EWCA Civ 470, especially per Jackson LJ at [47] and Beatson LJ at [85]-[87].

32. Planning applications are to be determined in accordance with the development plan, unless material considerations indicate otherwise: section 38(6) of the 2004 Act. The position was explained by Lord Clyde, referring to the materially similar provisions of the Scottish legislation, in *City of Edinburgh Council v Secretary of State for Scotland* [1997] 1 WLR 1147, at 1459. His speech was referred to by Sullivan J in *R v Rochdale Metropolitan Borough Council, ex parte Milne* (2001) 81 P&CR 27:

> "46. Since development plans contain numerous policies, the local planning authority must have regard to those policies (or 'provisions') which are relevant to the application under consideration. The initial judgment as to which policies are relevant is for the local planning authority to make. Inevitably

some policies will be more relevant than others, but section 70 envisages that the Council will have regard to all, and not merely to some of the relevant provisions of the development plan.

47. In my judgment, a similar approach should be applied under section 54A. The local planning authority should have regard to the provisions of the development plan as a whole, that is to say, to all of the provisions which are relevant to the application under consideration for the purpose of deciding whether a permission or refusal would be 'in accordance with the plan'.

48. It is not at all unusual for development plan policies to pull in different directions. A proposed development may be in accord with development plan policies which, for example, encourage development for employment purposes, and yet be contrary to policies which seek to protect open countryside. In such cases there may be no clear cut answer to the question: 'is this proposal in accordance with the plan?' The local planning authority has to make a judgment bearing in mind such factors as the importance of the policies which are complied with or infringed, and the extent of compliance or breach. In *City of Edinburgh Council v. the Secretary of State for Scotland* [1997] 1 W.L.R. page 1447, Lord Clyde (with whom the remainder of their Lordships agreed) said this as to the approach to be adopted under section 18A of the Town and Country Planning (Scotland) Act 1972 (to which section 54A is the English equivalent):

> 'In the practical application of section 18A, it will obviously be necessary for the decision-maker to consider the development plan, identify any provisions in it which are relevant to the question before him and make a proper interpretation of them. His decision will be open to challenge if he fails to have regard to a policy in the development plan which is relevant to the application or fails properly to interpret it. He will also have to consider whether the development proposed in the application before him does or does not accord with the development plan. There may be some points in the plan which support the proposal but there may be some considerations pointing in the opposite direction. He will require to assess all of these and then decide whether in the light of the whole plan the proposal does or does not accord with it.'

49. In the light of that decision, I regard as untenable the proposition that if there is a breach of any one policy in a development plan, a proposed development cannot be said to be 'in accordance with the plan'. Given the numerous conflicting interests that development plans seek to reconcile: the needs for more housing, more employment, more leisure and recreational facilities, for improved transport facilities, the protection of listed buildings and attractive land escapes et cetera, it would be

> difficult to find any project of any significance that was wholly in accord with every relevant policy in the development plan. Numerous applications would have to be referred to the Secretary of State as departures from the development plan because one or a few minor policies were infringed, even though the proposal was in accordance with the overall thrust of development plan policies.
>
> 50. For the purposes of section 54A it is enough that the proposal accords with the development plan considered as a whole. It does not have to accord with each and every policy therein."

33. The potential for errors of fact to constitute or give rise to errors of law was explained by Carnwath LJ giving the judgment of the Court of Appeal in *E v Secretary of State for the Home Department* [2004] QB 1044 at paragraph 66:

> "In our view, the time has now come to accept that a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law, at least in those statutory contexts where the parties share an interest in co-operating to achieve the correct result. ... Without seeking to lay down a precise code, the ordinary requirements for a finding of unfairness are apparent from the above analysis of the *Criminal Injuries Compensation Board* case. First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been 'established', in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant (or his advisers) must not been have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the Tribunal's reasoning."

Discussion

34. A number of different points are raised under both Ground 1 and Ground 2, and I shall discuss these below. However, it seems to me that there is a basic point at the heart of Renew's case which, however it might be analysed forensically, may be stated colloquially as follows: it makes no sense to suppose, and the Inspector did not adequately explain how it could be, that a development that was acceptable in principle under policies in favour of residential development on suitable sites within urban areas could be rendered unacceptable on account of a policy for the preservation of open spaces, in circumstances where the Inspector accepted that the landowner both could and would fence the relevant land, and thereby remove it from the stock of available open space, if the development were not permitted.

Ground 1

35. Ground 1 has been treated, reasonably, as falling into two parts, involving the contentions (a) that the Inspector erred in regarding the application site as Open Space for the purpose of policy CFS/12 and (b) that the Inspector failed to deal properly with the fall-back argument. However, I think that the two parts have an underlying coherence that makes it appropriate for them to be considered as aspects of a single ground of challenge.

36. Under ground 1(a), it is said that the Inspector made three mistakes: first, she mistakenly accepted that 0.85 hectares of the appeal site was designated as open space in the OSA; second, she mistakenly concluded or inferred that there was a formal agreement satisfying the OSA, when there was no evidence to support that conclusion; third, she failed to make sufficient enquiry on these matters.

37. It is by no means clear to me that either the parties or the Inspector were mistaken in believing that the 0.85 hectares on the application site was included in the OSA's figure of 3.43 hectares for Old Conwy (see paragraph 15 above). Renew has not shown that it is not included in that figure, and neither the Welsh Ministers nor the Council has accepted that it is not included. Anyway, the parties were at one in telling the Inspector that it was so included. I have set out in paragraph 19 above two examples from the appellants' Statement of Case to the Inspector, the first mentioning the Council's contention without challenging it and the second expressly confirming it. There are numerous other passages in the appellants' Statement of Case and in their Rebuttal Statement that either expressly or by implication made the same point, as Mr Lewis correctly observed.

38. It is also the case that no one put to the Inspector the argument that the land in question was not open space for the purpose of policy CFS/12 or, in terms, that the policy was not engaged.

39. It was the Inspector herself who adverted to the mention of "formal agreement" in paragraph 3.1 of the OSA; neither party to the appeal had directed submissions to that point. Paragraph 11 of the Decision was carefully worded: "There is no evidence to suggest that the open space which falls within the appeal site was not based on a formal agreement with the landowner." In the present proceedings, Renew has relied on the statement of Mr Kelsall (see paragraph 6 above), which states in paragraph 4: "To the best of our [scil. Cartrefi Conwy's] knowledge there is not now, and never has been, any formal agreement between Cartrefi Conwy and the Local Authority for the reservation of any part of the land owned by Cartrefi Conwy and contained within the application site as Public Open Space." Mr Lewis observed that it would have been open to the Welsh Ministers to object to reliance on that evidence, for which no permission had been given. However, he did not in fact object to reliance on it. Neither the Welsh Ministers nor the Council has sought to identify any formal agreement for the purposes of paragraph 3.1 of the OSA.

40. For Renew, Miss Osmund-Smith submits that in respect of the formal agreement the Inspector was in error, because in the absence of explicit evidence on the point she proceeded on the mistaken basis that there was a formal agreement. That was, she says, clearly wrong: the Decision itself acknowledged that the land in question was "informal open space" and "not formally allocated and protected in the LDP" (paragraph 10); and

paragraph 3.13 of the appellants' Statement of Case, which was not challenged by the Council on the appeal, left no doubt as to the position:

> "The land the subject of the allocation has been identified by the Council as ***informal*** play space and could only ever be considered informal because that land is in private ownership. It is within the gift of the landowner to choose to fence off the land at any point in time and restrict access to that space. If the landowner were to do this the land could no longer perform the function of play space; it would remain undeveloped and thus only have a visual amenity value as open space, albeit this would be affected by the erection of said fence."

At the least, Miss Osmund-Smith submits, the Inspector ought to have made an enquiry on the point to ascertain the true position. She referred me to *Save Our Greenhills Community Group v Secretary of State for Communities and Local Government* [2016] EWHC 1929 (Admin), where Dove J said at [39]:

> "When it is alleged that an Inspector has failed in his or her duty to make sufficient enquiries into the planning merits, the question which the court has to answer it whether the enquiry which was made was so inadequate that no reasonable Inspector could suppose that he or she had sufficient material available upon which to decide whether or not to grant planning permission."

41. Ground 1(b) concerns the Inspector's treatment of the appellants' fall-back position. It is related to Ground 1(a), in that they are both directed to saying that the Inspector was wrong to rely on policy CFS/12, albeit that they come at the point from different directions.

42. The law relating to a fall-back position was set out by Lindblom LJ in *Mansell v Tonbridge and Malling Borough Council* [2017] EWCA Civ 1314, at [27]:

> "The status of a fall-back development as a material consideration in a planning decision is not a novel concept. It is very familiar. Three things can be said about it:
>
> (1) Here, as in other aspects of the law of planning, the court must resist a prescriptive or formulaic approach, and must keep in mind the scope for a lawful exercise of planning judgment by a decision-maker.
>
> (2) The relevant law as to a 'real prospect' of a fall-back development being implemented was applied by this court in *Samuel Smith Old Brewery* (see, in particular, paragraphs 17 to 30 of Sullivan L.J.'s judgment, with which the Master of the Rolls and Toulson L.J. agreed; and the judgment of Supperstone J. in *R. (on the application of Kverndal) v London Borough of Hounslow Council* [2015] EWHC 3084 (Admin), at paragraphs 17 and 42 to 53). As Sullivan L.J. said in his judgment in *Samuel*

> *Smith Old Brewery (Tadcaster) v Secretary of State for Communities and Local Government* [2009] J.P.L. 1326, in this context a 'real' prospect is the antithesis of one that is 'merely theoretical' (paragraph 20). The basic principle is that '… for a prospect to be a real prospect, it does not have to be probable or likely: a possibility will suffice' (paragraph 21). Previous decisions at first instance, including *Ahern* and *Brentwood Borough Council v Secretary of State for the Environment* [1996] 72 P. & C.R. 61 must be read with care in the light of that statement of the law, and bearing in mind, as Sullivan L.J. emphasized, '… "fall back" cases tend to be very fact-specific' (ibid.). The role of planning judgment is vital. And '[it] is important … not to constrain what is, or should be, in each case the exercise of a broad planning discretion, based on the individual circumstances of that case, by seeking to constrain appeal decisions within judicial formulations that are not enactments of general application but are themselves simply the judge's response to the facts of the case before the court' (paragraph 22).
>
> (3) Therefore, when the court is considering whether a decision-maker has properly identified a 'real prospect' of a fall-back development being carried out should planning permission for the proposed development be refused, there is no rule of law that, in every case, the 'real prospect' will depend, for example, on the site having been allocated for the alternative development in the development plan or planning permission having been granted for that development, or on there being a firm design for the alternative scheme, or on the landowner or developer having said precisely how he would make use of any permitted development rights available to him under the GPDO. In some cases that degree of clarity and commitment may be necessary; in others, not. This will always be a matter for the decision-maker's planning judgment in the particular circumstances of the case in hand."

43. On the appeal to the Inspector, the appellants relied on their permitted development rights to enclose the area of open land in question within a fence. The Council did not counter the fall-back position by denying that the appellants were able to fence the land and thereby destroy its character as open space; rather it contended that there was no real possibility or likelihood that the appellants would in fact do so. In passages that I have set out above, the Inspector found that the appellants did indeed intend to fence the land and that this would prevent public use of the land. However, she said that the undeveloped state of the land "would continue to make a contribution to visual amenity" and that neither this nor any other material planning consideration was "sufficient to outweigh the loss of open space" (paragraph 20).

44. Miss Osmund-Smith submits that the Inspector's approach was unlawful for at least four reasons. First, it was irrational, because the Inspector at one and the same time concluded that the fall-back position would in fact result in the loss of open space and

that the application for residential development ought to be rejected because it would result in the loss of open space in breach of policy CFS/12. Second, it was irrational, because the fall-back would result in there being no open space at all, whereas the application would secure some formal play space for the use of the whole community. Third, it was procedurally unfair, because the Inspector relied on a "visual amenity" benefit as a factor militating against development, whereas there had been no visual amenity objection in the Officers' Report, the Council's Refusal or the Council's Statement of Case on the appeal, but did not give to the appellants the opportunity to comment on visual amenity. Fourth, it was not accompanied by sufficient reasons; reliance is placed on the well-known decision in *South Bucks District Council v Porter (No. 2)* [2004] UKHL 33, [2004] 1 WLR 1953, and, in particular, on the speech of Lord Bridge of Harwich in *Save Britain's Heritage v Number 1 Poultry Ltd* [1991] 1 WLR 153 at 167, cited by Lord Brown of Eaton-under Heywood in the *South Bucks* case at [30].

45. For the Welsh Ministers, Mr Lewis submits that the Inspector's approach involved no error of law. The first question for her to decide was whether the fall-back position was a material planning consideration. She concluded that it was. No criticism is made of that conclusion. As she had also concluded, on an agreed basis, that the proposed development would be contrary to policy CFS/12, she next had to perform the exercise of weighing up the material planning considerations and deciding whether they justified a departure from the local development plan. This was not a case where the fall-back position was something with substantially the same planning consequences as the proposed development, such as implementation of an extant planning permission for a development with similar relevant impact; it was merely that the land be fenced under permitted development rights. The Inspector was entitled to conclude that what was proposed under the fall-back position, which would leave the land undeveloped, did not compel acceptance of the breach of planning policy entailed by the proposed development. Her reliance on residual planning benefits in terms of visual amenity is not a matter of which Renew can make complaint, because her comments in that regard do no more than reflect the very observation of the appellants themselves in paragraph 3.13 of their Statement of Case on the appeal.

46. In my judgment, the Inspector's decision falls to be quashed on Ground 1, for the reasons set out in the following paragraphs.

47. The "open space" objection to the proposed development under policy CFS/12 rested on the supposition that the application site included 0.85 hectares of play space within a total of 3.43 hectares of play space in Old Colwyn identified in the OSA. That land could only have been included as being a "less formal area" within the third of the categories identified in paragraph 2.1 of the OSA. As it was land in private ownership, it could only have been considered as "contributing to public open space provision" if it were subject of a "formal agreement" with the landowner: see paragraph 3.1 of the OSA. As has been mentioned, the appellants' case on appeal proceeded on the basis that the figures in the OSA did indeed include the 0.85 hectares. If that were all that was to be said, the Inspector's approach would, in my view, have been unimpeachable: both parties accepted that the land was included in the OSA's figures and that policy CFS/12 was engaged; if there were any mistake of fact, the appellants shared responsibility for it and could not now complain of it. As for the question of a formal agreement, in and of itself this was a side-show, because the actual question, on which

there was no ostensible dispute, was whether the policy was engaged. If the policy was engaged, then in the absence of any contrary information the Inspector was entitled to proceed on the basis that any prior conditions for inclusion of the land in the OSA had been satisfied.

48. However, that was not all that was to be said. The plain averments in the appellants' Statement of Case, which were not materially contradicted by the Council, tended strongly to indicate that there was no "formal agreement" of any sort in place in respect of the land. Actually, the formality of any agreement does not seem to me to be the most important question: the OSA was not a lawyers' document and ought not to be construed like one; it would be idle to worry about the precise meaning to be attached to the word "formal" in this context. However, the substance of the matter is important. The object of policy CFS/12 and of the OSA is to preserve the bank of public open space. Most such public open space will of course be in public ownership. Where it is not, the land will be included in the bank of public open space only if the owner has made an agreement for its use as public open space. The Inspector accepted the premise of the appellants' fall-back case as set out in paragraph 3.13 of their Statement of Case. This necessarily meant that, if there were any agreement at all on the part of the landowner, it could have amounted to no more than an agreement that people could play on the land until the landowner decided to stop them by enclosing the land. It is not strictly impossible that there was such an agreement. However, it is highly implausible; to see this, one has only to try to imagine someone actually making such an agreement with a public body. The implausibility is heightened by the repeated reference to the land in question as "informal" play space and by the absence of any actual reference to an agreement. Furthermore, an agreement of that nature, amounting to no more than a permissive licence terminable at will, is plainly not a proper basis for the application of a policy protecting public open space (as though a policy against development would apply if the landowner had "agreed" that it would not stop people playing on the land until it decided to do so, but would not apply if a landowner with a right to fence simply took no action until it decided to fence).

49. It has not been suggested that the Inspector was wrong to accept the fall-back. However, acceptance of the fall-back shows that, whether or not the 0.85 hectares was included in the OSA's figure of 3.43 hectares for Old Colwyn, it was not a public open space because the landowner could exclude the public from it at will. That being so, it was in my judgment an error of law and also irrational to accept that policy CFS/12 was truly engaged, notwithstanding that the parties appeared to have supposed that it was.

50. I should make it clear that this is not to say that, because there would be no conflict with policy CFS/12 if the fall-back materialised, the proposed development did not give rise to a policy conflict at the time of the decision. Mr Lewis rightly criticises such an argument in paragraph 44 of his skeleton argument. The point is rather that the very fact that the fall-back was capable of materialising showed that the supposed policy conflict was illusory.

51. Further, at the very least, the incoherence of the Inspector's conclusion regarding the fall-back and any proposed reliance on policy CFS/12, especially when taken with the comments in the appellants' Statement of Case regarding the informal and precarious nature of any public user of the 0.85 hectares, ought to have led her to make further enquiry of the parties as to the status of the land, and her reliance on policy CFS/12 in the absence of such enquiry was in my judgment irrational.

52. I accordingly agree with Ground 1(a).

53. I also agree with Ground 1(b). If the appellants were able to fence the land and were intent on doing so, it makes no practical sense to say that the development would involve the loss of a public open space. I agree with Miss Osmund-Smith's submission that it was irrational for the Inspector to conclude on the one hand that the fall-back was made out but to conclude on the other hand that the development would result in a loss of open space in conflict with policy CFS/12. I also agree that it was irrational to conclude that the development would result in an unacceptable loss of public open space, in circumstances where the proposed development included formal designation of some play space and where the fall-back, which was found to represent the actual intentions of the landowner, would involve the entire loss of the existing informal provision and of the potential formal designation.

54. All of these reasons are ways of saying that the point put colloquially in paragraph 34 above is in my judgment unanswerable.

55. In those circumstances, Miss Osmund-Smith's argument concerning the Inspector's treatment of the "visual amenity" issue is of secondary importance. However, I agree with that argument also.

    1) The Inspector mentioned visual amenity in connection with the fall-back position in paragraph 15 of the Decision. It is unclear whether she considered the loss of visual amenity a sufficient reason for refusing permission or merely a disadvantage of development as compared to non-development; she did not say.

    2) Mr Lewis submitted that visual amenity was not entirely separable from policy considerations concerning public open space, because as the text accompanying policy CFS/12 makes clear open space has an impact "on the attractiveness of the built and natural environment" (see paragraph 12 above). I do not think that this submission assisted him. The Inspector accepted the fall-back position, which involved fencing the land. If the land were fenced, it would cease to be public open space within the OSA. Therefore, residual visual amenity would be relevant only as a substantive matter in its own right, not as an aspect of the benefit of preserving public open space in accordance with a policy in the local development plan. It was not disputed that the refusal of permission for development would preserve the visual amenity of undeveloped land. The question was what, if anything, was the relevance of that fact. No objection to the development on the ground of visual amenity had been advanced by the Council. Mr Lewis submitted that the Inspector was not required to and did not make any determination on that point: she was entitled simply to consider that, having regard to the residual visual amenity that would be preserved, the fall-back was not a sufficiently weighty consideration to outweigh the policy contravention involved in the proposed development. However, once it is acknowledged that the open space will be lost both under the development and under the fall-back, the preservation of the visual amenity of undeveloped land can only militate against the grant of permission on the appeal if it is considered to be a sufficient free-standing objection to development.

3) The root of the problem, as before, is the illogicality of combining acceptance of the fall-back and the conclusion that the development would result in the loss of a public open space. However, in the circumstances, if the Inspector was going to rely on a visual amenity argument as a reason for refusing permission, she ought, for the reasons mentioned in this paragraph, to have raised this with the appellants and given them an opportunity to address it, and her failure to do so constitutes material unfairness.

Ground 2

56. In view of my conclusion on Ground 1, Ground 2 does not strictly fall for consideration. Accordingly I shall consider it only briefly.

57. Ground 2, headed "Planning balance" in Renew's Statement of Facts and Grounds, has two limbs. (I regard paragraph 30 of that document, which relates to the error of applying policy CFS/12, as relating more easily to Ground 1 and have considered it in that context.) The first limb is that, if indeed there was a conflict with policy CFS/12, the Inspector failed to undertake the analysis required by *City of Edinburgh Council v Secretary of State for Scotland* and *R v Rochdale Metropolitan Borough Council, ex parte Milne* (see paragraph 32 above), in that she did not determine whether the development would conflict with the local development plan as a whole. Rather, she identified a single policy conflict and concluded that it outweighed all other considerations. In the circumstances, she failed to accord priority to the development plan. The second limb of Ground 2 is that, in performing the balance of competing considerations, the Inspector failed to identify all of the benefits of the proposed development, which indeed the Council itself had acknowledged in the Report to Committee.

58. Thus stated, Ground 2 proceeds on the assumption that (contrary to Renew's primary case) the Inspector was correct to say that the development would result in the loss of public open space (see paragraphs 19 and 20 of the Decision). As I have tried to explain, I do not see that the Inspector could have been correct, because the so-called public open space was land in private ownership that the owner could enclose at any time. However, if it be supposed that the Inspector was technically correct and that there was a policy conflict, the conclusion in paragraph 20 of the Decision was not in my judgment unlawful either as failing to accord priority to the development plan or as failing to have regard to material considerations. Those are the two bases on which Ground 2 was advanced: see paragraphs 31 to 33 of the Statement of Facts and Grounds. Ground 2 was not advanced on the basis of irrationality and accordingly I do not consider it on that basis.

59. Decision letters are to be read fairly, as a whole and in a straightforward and down-to-earth manner and the courts should avoid excessively legalistic textual criticism of them, such as might be suitable when interpreting a statute or, perhaps, a contract: *South Lakeland District Council v Secretary of State for the Environment* [1992] 2 A.C. 141 at 148; *Seddon Properties Ltd v Secretary of State for the Environment* (1981) 42 P&CR 26 at 28; *Clarke Homes Ltd v Secretary of State for the Environment* (1993) 66 P&CR 263 at 271-272. In that spirit, it seems to me that an Inspector is not to be expected to set matters out as though he or she were answering an examination question; cf. dicta of Hoffmann LJ in *South Somerset District Council v David Wilson Homes (Southern) Ltd* (1993) 66 P&CR 83 at 85. Unless there are good reasons for reaching a contrary

conclusion, it is to be supposed that the Inspector was well aware of the priority of the development plan and of the relevant policies mentioned in the appeal documentation; these are matters that do not have to be spelled out.

60. As for the first limb of Ground 2, I agree with Mr Lewis that the Inspector's reasoning sufficiently showed the "building blocks" of her decision and that it is implicit in her reasoning that she regarded the conflict with policy CFS/12 as putting the proposal in conflict with the development plan as a whole.

61. As for the second limb of Ground 2, the Inspector was not required to refer to every single point that had been raised in the papers. She referred to the main points in the dispute and made clear both what she considered to be the most important factors and why she was deciding the appeal as she was. She also made clear that she had taken account of all the other matters that had been raised but not specifically referred to in the Decision. The weight to be given to the various matters was a matter for her judgement alone. I do not consider that it is at all plausible to suggest that the Inspector failed to have regard to relevant matters or that the reasons for her decision are unclear. Moreover, even if it were thought that the reasoning was in any relevant respect unclear, it has not been shown that Renew has been substantially prejudiced by any lack of clarity.

Conclusion

62. For the reasons stated, the claim succeeds on Ground 1 although I would have dismissed Ground 2. I shall accordingly quash the Inspector's Decision and remit the matter for redetermination by the Welsh Ministers.

63. Since I provided this judgment in draft to the parties, they have provided me with short submissions on the issue of costs. For the Welsh Ministers, Mr Lewis submits that it would be reasonable and proportionate for the claimant to receive only three-quarters of its costs of the claim, because it was unsuccessful on Ground 2, the costs of responding to which were not insignificant. In my judgment, the claimant ought to receive all of its costs, subject to assessment on the standard basis failing agreement. The starting point is that a successful party ought generally to receive its costs. It can be deprived of some of those costs if it fails on a discrete and sufficiently circumscribed issue and the court considers it fair and reasonable to disallow the costs of that issue or make a percentage reduction to reflect the partial failure. However, it is commonplace that claimants will succeed on some but not all of the arguments they advance in support of their claims. This in itself is not a sufficient reason to justify a partial departure from the general position that costs follow the event. In the present case, the two substantive grounds of challenge and their sub-divisions really amounted to different ways of analysing the flaws in the policy objection to the proposed development. The fact that I have rejected certain arguments as to the correct analysis of the flaws is really no more than what has sometimes been referred to as the ebb and flow of litigation and does not constitute a sufficient reason for refusing the claimant any part of its costs.