Neutral Citation Number: [2021] EWHC 67 (Admin)

Case No: CO/1026/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/01/2021

Before:

JAMES STRACHAN QC (Sitting as a Deputy Judge of the High Court)

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Between:

THE QUEEN	
-on the application of-	**Claimant**
DOREEN GILL	
- and -	
LONDON BOROUGH OF BRENT	**Defendant**

- -
- -

Mr Andrew Parkinson (instructed by **Richard Buxton Solicitors**) for the **Claimant**
Mr Simon Bird QC (instructed by **London Borough of Brent Legal Department**) for the **Defendant**

Hearing date: 20 October 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 2pm on 18 January 2021.

MR JAMES STRACHAN QC (Sitting as a Deputy Judge of the High Court):

Introduction

1. The Claimant seeks to quash a decision of the Defendant given by notice dated 30th January 2020 to grant conditional outline planning permission for the redevelopment of Preston Library, Carlton Avenue East, Wembley HA9 8PL ("the Site"). The description of the development in the decision notice (reference number 19/1305) is:

> "Redevelopment of Preston Library including erection of a part 2 to part 4 storey building comprising a library on ground floor and 12 self-contained flats, provision for amenity space, parking, cycle and refuse storage, new access and associated landscaping."

2. The Claimant is a local resident who lives near to the Site. She is a regular user of the existing library. She objected to the application for planning permission. She contends that the officers' report ("the OR") to the Defendant's planning committee significantly misled the members in three respects that render the decision unlawful, namely:

   (1) Ground 1 - it wrongly advised them that the proposed development complied with Policy DMP19 of the Defendant's adopted Development Management Policies Development Plan Document ("the DMP DPD") in terms of amenity space, as that advice misinterpreted the policy.

   (2) Ground 2 – the OR failed to assess the amenity space available for each flat in a manner consistent with the Defendant's Design Guide Supplementary Planning Document ("the SPD") without giving any explanation for taking a different approach from that document.

   (3) Ground 3 – the OR wrongly advised them that the expectation under Policy DMP19 for private amenity space for family housing above ground floor level was 20 sqm, rather than 50 sqm, and the OR failed to apply Policy DMP19 consistently in this respect with other planning decisions.

3. The hearing of the claim took place by video conferencing with the co-operation of the parties. The Claimant was represented by Mr Parkinson. The Defendant was represented by Mr Bird QC. I am grateful to each of them for the clarity and helpfulness of their written and oral submissions.

4. At the hearing, Mr Parkinson sought permission to amend the Claimant's Statement of Facts and Grounds to include Ground 3. That application was not opposed by the Defendant. As Ground 3 essentially articulates what was already implicit as a ground of challenge, I granted permission for the amendment. At the same time, Mr Bird sought permission to rely upon a second witness statement from David Glover, a Development Management Manager of the Defendant who had already filed one witness statement. That application was not opposed by Mr Parkinson, provided that he was granted permission to rely upon a second witness statement of Michael Rushe in response. Mr Rushe is an architect who had already filed one witness statement for the Claimant. Both witness statements principally concern the way in which the

Defendant has previously approached Policy DMP 19. I granted permission for both witness statements to be adduced.

Factual Background

5. The Site currently accommodates a single storey building in use as a library. The library is registered as a community asset by the Defendant.

6. On 4th April 2019 the Defendant submitted a planning application for the Site's proposed redevelopment so as to provide a library and one flat on the ground floor of a new building, with a further 11 residential units in the floors above. The mix of units proposed was: 6 x 1 bedroom flats, 2 x 2 bedroom flats, and 4 x 3 bedroom flats. The flats would have private balconies and there would be a garden terrace area at second floor level on the eastern portion of the new building.

7. The application was the subject of objection on various grounds, including the amount of amenity space proposed. Notwithstanding those objections, the Defendant's planning committee resolved to grant planning permission on 21 August 2019. A planning permission was issued by decision notice dated 30 August 2019.

8. On 11 October 2019 the Claimant applied for permission to claim judicial review challenging that decision on various grounds, including an error in treating the proposal as compliant with Policy DMP19. The Claimant submitted that the Defendant had erred in looking at the adequacy of the amenity space by considering the average amount available per unit, rather than assessing the amount actually available to each unit. The Defendant accepted this error had occurred. It consented to the quashing of the planning permission on that ground. This was achieved by a consent order dated 28th November 2019. Consequently the planning application fell to be redetermined by the Defendant.

9. For that redetermination officers prepared the OR in issue in this claim, along with a Supplemental Officers' Report ("SOR"). Officers recommended planning permission be granted.

10. In the introduction section of the OR background information was set out, including the history of the previous claim and the error in the previous report. It stated (amongst other things):

> "… it is accepted that the [previous] report took an erroneous approach by misapplying policy DMP19 in relation to the assessment of the adequacy of the proposed external amenity space. The report assessed the adequacy of the amenity space on the basis of the average space available per unt rather than the amount of space actually available to each unit as required by policy DMP19. On the basis of this error the application was concluded to be policy compliant in terms of external amenity space when it was not."

11. Having set out a recommendation, a description of the proposal and the Site, the OR then identified 8 key issues for members to consider under the heading: 'Summary of Key Issues'. The 8 issues were: (1) representations received; (2) the proposed

library; (3) design, layout and height; (4) quality of the resulting residential accommodation; (5) neighbouring amenity; (6) highways and transportation; (7) trees and landscaping; and (8) environmental impact, sustainability and energy. A brief commentary on each issue was provided, with more following in the subsequent parts of the OR.

12. In relation to (4), the summary commentary stated:

> "4. **Quality of the resulting residential accommodation:** The residential accommodation proposed is of sufficiently high quality. The mix of units is in accordance with the standards within the London Plan and is in accordance with the Core Strategy target mix. The flats would have a satisfactory outlook and acceptable light. The amount of external private/communal space complies with DMP19 CHECK and site is also within walking distance from Preston Park."

13. The OR set out a section on consultations, including a summary of objections received and the officers' response arranged in tabular form. For the entry identifying an objection to the amenity space, the OR advised members: "See Standard of Accommodation section of the report." That section followed later in the report itself.

14. The OR then identified relevant policies, including Policy DMP19, and other material considerations including the SPD. Analysis was then provided under the general heading "Detailed Considerations'. This dealt in turn with various key issues that arose. Under the heading "Standard of Accommodation", there was a sub-heading on 'Amenity Space'. This analysis also contains the relevant parts of DMP19 in issue here and it is therefore convenient to set it out in full:

> "Amenity Space
>
> 53. Policy DMP19 states the following
>
> > "*All new dwellings will be required to have external private amenity space of a sufficient size and type to satisfy its proposed residents' needs. This will normally be expected to be 20sqm per flat and 50sqm for family housing (including ground floor flats)"*
>
> 54. The policy requirement in relation to external private amenity space is for it to be "sufficiency of size". Whilst there is a normal "expectation" for 20sqm per flat and 50sqm for family housing (including ground floor flats), that is not an absolute policy requirement in all cases. This is reinforced by the supporting text to the policy which provides that:
>
> > *"10.39 New development should provide private amenity space to all dwellings, accessible from a main living room without level changes and planned within a building to take a maximum advantage of daylight and sunlight. Where sufficient private amenity space cannot be achieved to meet*

the full requirement of the policy, the remainder should be applied in the form of communal amenity space."

55. The wording of the policy means that there is more than ones [sic] means by which the policy requirement for sufficiency may be met and this includes, where necessary and appropriate, the use of communal amenity space. Furthermore, the reference to "normally" within the policy, allows for a departure from the target of 20sqm and 50sqm respectively, without giving rise to a policy conflict.

56. The S[outh] K[enton] P[ark] R[esidents] A[ssociation] have raised concern with the external amenity space being miscalculated within the original committee report. The committee report made reference to 24sqm per unit and being in line with DMP19. However, this represented an average and not the amount available to each home. It is accepted that the committee report had incorrectly concluded that the proposal would result in amenity space provision of 24sqm per unit, which would suggest that it exceeds the levels set out in policy.

57. This has been recalculated and it is recognised that there would be an overall deficit of 39sqm of amenity space below Policy DMP19 levels for the proposed development. This is also material in accordance with emerging policy BH13.

58. A table breaking down the amenity space per flat is set out below

Unit	Floor	No. beds	Standard	Private amenity	Shortfall
1	Ground	3	50	105	
1.1	1st	3	20	10	10
1.2	1st	2	20	7	13
1.3	1st	1	20	5	15
1.4	1st	1	20	5	15
1.5	1st	1	20	5	15
2.1	2nd	3	20	10	10
2.2	2nd	1	20	5	15
2.3	2nd	1	20	5	15
2.4	2nd	1	20	5	15
3.1	3rd	2	20	18	2
3.2	3rd	3	20	58	
Total					125
Communal Space					86
Shortfall					39

59. It should be noted that the family housing amenity space requirement makes specific reference to "including ground floor flats". As such, it is considered that the 50sqm standard

> relates to ground floor flats only. However, should one interpret this policy to include all provision of family homes, the shortfall would increase to 99sqm.
>
> 60. Objectors also question the quality of amenity space for the ground floor flat, which has a fire exit (from the library) which opens onto it. The presence of a fire exist is not considered to result in a poor quality of external amenity space given the likely (low) intensity of use of this exit.
>
> 61. While there is a shortfall below the level set out in policy, all units have private external amenity space of at least 5sqm, have access to the communal roof terrace [sic]. The site is also approximately 430 m from the entrance to Preston Park which will supplement the on-site amenity space. As such, the quality of accommodation is considered to be good and the shortfall below Policy DMP levels is considered to be acceptable."

15. At the end of the appraisal section (dealing with a number of different issues and policies), officers summarised their views as follows:

> "**Summary**
>
> 106. Following the above discussion, officers consider that taking the development plan as a whole, the proposal is considered to accord with the development plan, and having regard to all material planning considerations, should be approved subject to conditions. The levels of external amenity space within the proposed development do not accord with those specified within Policy DMP19. However, given the level and quality of amenity space proposed and the proximity to nearby public open space (Preston Park), the quality of accommodation for future residents is considered to be good. The limited conflict is substantially outweighed by the very considerably [sic] benefits of the proposed development."

16. The SOR identified receipt of one additional objection and two further comments from households who had objected previously since the OR had been published. It summarised the content of those objections and the officer response. They included an objection of overdevelopment of the site, failure to provide the amenity space standards and miscalculation of amenity space. The officer response was to refer to paragraphs 53-61 and the table at paragraph 58 in the OR.

17. The planning application was considered by the Defendant's planning committee at a meeting on 22nd January 2020. The committee accepted the officers' recommendation and resolved to grant planning permission. The decision notice was issued on 30 January 2020.

18. The Claimant filed her claim form on 12 March 2020 advancing Grounds 1 and 2. The Defendant opposed the grant of permission and filed Summary Grounds of Resistance dated 30 March 2020. The Claimant's solicitors wrote to the Court adding

two other officer reports of the Defendant to the claim bundle which they considered illustrated the correct application of Policy DMP19. Permission was granted for the claim to proceed by Lang J by Order dated 19 May 2020. The Defendant filed Detailed Grounds of Resistance and the first witness statement of Mr Glover on 22 June 2020. The Claimant filed a witness statement from Mr Rushe dated 20 July 2020 in response. This led to the production of second witness statements of Mr Glover and Mr Rushe from the Defendant and Claimant respectively to which I have already referred, with the provision of a number of different reports from the Defendant on various other schemes dealing with amenity space and Policy DMP19.

Legal and Policy Framework

19. The legal principles applicable to this challenge are not dispute. The relevant principles were authoritatively summarised in *Mansell v. Tonbridge & Malling BC* [2019] PTSR 1452 in which Lindblom LJ stated at [41]-[42]:

> "41. The Planning Court – and this court too – must always be vigilant against excessive legalism infecting the planning system. A planning decision is not akin to an adjudication made by a court (see paragraph 50 of my judgment in *Barwood v East Staffordshire Borough Council*). The courts must keep in mind that the function of planning decision-making has been assigned by Parliament, not to judges, but – at local level – to elected councillors with the benefit of advice given to them by planning officers, most of whom are professional planners, and – on appeal – to the Secretary of State and his inspectors. They should remember too that the making of planning policy is not an end in itself, but a means to achieving reasonably predictable decision-making, consistent with the aims of the policy-maker. Though the interpretation of planning policy is, ultimately, a matter for the court, planning policies do not normally require intricate discussion of their meaning. A particular policy, or even a particular phrase or word in a policy, will sometimes provide planning lawyers with a "doctrinal controversy". But even when the higher courts disagree as to the meaning of the words in dispute, and even when the policy-maker's own understanding of the policy has not been accepted, the debate in which lawyers have engaged may turn out to have been in vain – because, when a planning decision has to be made, the effect of the relevant policies, taken together, may be exactly the same whichever construction is right (see paragraph 22 of my judgment in *Barwood v East Staffordshire Borough Council*). That of course may not always be so. One thing, however, is certain, and ought to be stressed. Planning officers and inspectors are entitled to expect that both national and local planning policy is as simply and clearly stated as it can be, and also – however well or badly a policy is expressed – that the court's interpretation of it will be straightforward, without undue or elaborate exposition. Equally, they are entitled to expect – in

every case – good sense and fairness in the court's review of a planning decision, not the hypercritical approach the court is often urged to adopt.

42. The principles on which the court will act when criticism is made of a planning officer's report to committee are well settled. To summarise the law as it stands:

(1) The essential principles are as stated by the Court of Appeal in *R. v Selby District Council, ex parte Oxton Farms* [1997] E.G.C.S. 60 (see, in particular, the judgment of Judge L.J., as he then was). They have since been confirmed several times by this court, notably by Sullivan L.J. in *R. (on the application of Siraj) v Kirklees Metropolitan Borough Council* [2010] EWCA Civ 1286, at paragraph 19, and applied in many cases at first instance (see, for example, the judgment of Hickinbottom J., as he then was, in *R. (on the application of Zurich Assurance Ltd., t/a Threadneedle Property Investments) v North Lincolnshire Council* [2012] EWHC 3708 (Admin), at paragraph 15).

(2) The principles are not complicated. Planning officers' reports to committee are not to be read with undue rigour, but with reasonable benevolence, and bearing in mind that they are written for councillors with local knowledge (see the judgment of Baroness Hale of Richmond in *R. (on the application of Morge) v Hampshire County Council* [2011] UKSC 2, at paragraph 36, and the judgment of Sullivan J., as he then was, in *R. v Mendip District Council, ex parte Fabre* (2000) 80 P. & C.R. 500, at p.509). Unless there is evidence to suggest otherwise, it may reasonably be assumed that, if the members followed the officer's recommendation, they did so on the basis of the advice that he or she gave (see the judgment of Lewison L.J. in *Palmer v Herefordshire Council* [2016 EWCA Civ 1061, at paragraph 7). The question for the court will always be whether, on a fair reading of the report as a whole, the officer has materially misled the members on a matter bearing upon their decision, and the error has gone uncorrected before the decision was made. Minor or inconsequential errors may be excused. It is only if the advice in the officer's report is such as to misdirect the members in a material way – so that, but for the flawed advice it was given, the committee's decision would or might have been different – that the court will be able to conclude that the decision itself was rendered unlawful by that advice.

(3) Where the line is drawn between an officer's advice that is significantly or seriously misleading – misleading in a material way – and advice that is misleading but not significantly so will always depend on the context and circumstances in which the advice was given, and on the possible consequences of it. There will be cases in which a planning officer has inadvertently led a

> committee astray by making some significant error of fact (see, for example *R. (on the application of Loader) v Rother District Council* [2016] EWCA Civ 795), or has plainly misdirected the members as to the meaning of a relevant policy (see, for example, *Watermead Parish Council v Aylesbury Vale District Council* [2017] EWCA Civ 152). There will be others 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 (see, for example, *R. (on the application of Williams) v Powys County Council* [2017] EWCA Civ 427). But unless there is some distinct and material defect in the officer's advice, the court will not interfere."

20. When determining the conformity of a proposed development with a local plan the correct focus is on the plan's detailed policies. The supporting text consists of descriptive and explanatory matter in respect of the policies and/or a reasoned justification of the policies. That text is plainly relevant to the interpretation of a policy to which it relates but it is not itself a policy or part of a policy, it does not have the force of policy and it cannot trump the policy. A development that accords with the policies in the local plan cannot be said not to conform with the plan because it fails to satisfy an additional criterion referred to only in the supporting text. That applies even where the local plan states that the supporting text indicates how the polices will be implemented: see *R(Cherkley Campaign Ltd) v Mole Valley District Council* [2014] EWCA 567; [2014] PTSR D14, Richards LJ at [16] and [21].

21. Relevant policies of a development plan read together may sometimes pull in different directions. Where that is the case, that does not necessarily mean that a particular policy will have automatic primacy over others, such that a breach of that policy (however slight) is conclusive when considering whether a particular proposal is in accordance with the plan as a whole. In the absence of matters such as an order of priority setting one policy higher than another, or an implication that one policy overrides or displaces any other, or identification that conflict with a particular policy will necessarily lead to the development being found not to be in accordance with the development plan as a whole or refusing planning permission, it is a matter for the decision-maker to decide which policies should be given greater weight in any particular decision. Under section 38(6) of the Planning and Compulsory Purchase Act 2004 ("the 2004 Act"), the local planning authority's task is not to decide whether, on an individual assessment of a proposal's compliance with the relevant policies it could be said to accord with each and every one of them, but rather to establish whether the proposal is in accordance with the development plan as a whole. That is classically a matter of planning judgment for the decision-maker: see *R(Corbett) v Cornwall Council* [2020] EWCA 508 at [41]-[45].

The Grounds

22. In oral argument Mr Parkinson dealt with the grounds of challenge in reverse order. Mr Bird dealt with them in numerical order. I find it convenient and logical to deal with Ground 1 first and then to revert to Mr Parkinson's approach and to consider Ground 3 before dealing with Ground 2.

Ground 1 – Misinterpretation of Policy DMP19 and immaterial considerations

23. The Claimant submits the OR significantly misled the committee members by advising them that the development complied with Policy DMP19, whereas on a correct interpretation of the policy it did not. Mr Parkinson naturally places particular reliance on the statement in sub-paragraph (4) the "Summary of Key Issues" of the OR: "The amount of external private/communal space complies with DMP19". He also refers to paragraph 61 of the analysis section in which the OR advised that the shortfall below the expected levels in Policy DMP19 was considered to be acceptable.

24. Mr Parkinson notes paragraph 58 of the OR identified a shortfall of 125sqm of private amenity space against expected standards in Policy DMP19. The Claimant does not accept that figure is correct and contends that: (i) it fails to accord with the Council's guidance on assessing amenity space set out in the SPD and (ii) it erroneously assumes that the relevant standard is 20sqm for family-sized flats above ground floor . These are matters raised under Grounds 2 and 3 with which I deal below. However, for the purposes of Ground 1 only, he argues that even if one takes the Defendant's calculations at face value, the committee members should have been advised that the Development breached Policy DMP19.

25. In making that submission he recognised that the standards in the policy (i.e. 20sqm per flat and 50sqm for family housing) are expressed as expectations. He accepted a planning application would not necessarily conflict with the policy simply because those amounts were not provided. He argues, however, that the policy explains how any shortfall has to be made-up to secure compliance in paragraph 10.39 of the explanatory text, namely by extra communal amenity space. He submits this is the only way a shortfall in the standards can be addressed to secure compliance with the policy.

26. Mr Parkinson also submitted the OR took into account an immaterial consideration in reaching a judgment on whether Policy DMP19 was complied with, namely the proximity of the development to the nearby public open space at Preston Park. Whilst he accepts such proximity may be relevant to deciding what weight ought to be attached to any breach of Policy DMP19, or the extent to which a breach might be outweighed by other material considerations, he submits it is irrelevant for the purposes of reaching a judgment on whether the policy is complied with in the first place. In short, he submits the only considerations which are material for compliance with Policy DMP19 are:

> (1) whether the expected standards in the policy are met and
>
> (2) if not, whether any shortfall is made-up by the provision of communal space in the development.

27. Consequently, he contends the OR significantly misled the Planning Committee by misinterpreting Policy DMP19 and that it took into account an immaterial consideration in reaching a judgment on whether or not the policy was complied with (namely the provision of off-site amenity space).

28. On the basis that Policy DMP19 is a key development plan policy, he argues it is impossible to know what conclusion the officers, and subsequently the planning

committee, would have reached had they been correctly advised that it was breached. He submits it would have affected the question of whether the development was in accordance with the development plan (taken as a whole), or the degree of conflict with the development plan and therefore whether this error had a material impact on the Defendant's approach to section 38(6) of the 2004 Act.

29. Mr Bird for the Defendant submits the statement in sub-paragraph (4) of the "Summary of Key Issues" was not accurate and this was indicated by inclusion of the words "CHECK. Read with the other parts of the OR, including paragraph 106 in particular, he submits it was clear the OR was advising the Planning Committee of a limited conflict with the policy which was considered to be outweighed by the very considerable benefits of the proposed development. He also did not agree with the Claimant's interpretation of Policy DMP19, including in particular the contention that a shortfall in private amenity space could only be made up by communal open space, but submitted the issue was academic for the purposes of this claim because the OR did advise members that the proposal conflict with DMP19 in any event.

Analysis

30. It is not an encouraging starting point for the Defendant that it accepts that the statement made in sub-paragraph (4) of the "Summary of Key Issues", written for the benefit of members, is inaccurate. It is obviously undesirable for an error of this kind to appear in a summary section of a report. The summary is no doubt intended to be a helpful overview for members of the contents of the OR as a whole. It is even more undesirable in circumstances where a previous determination had been quashed because of an error made in the approach to Policy DMP19. I have therefore approached the Defendant's submission that such an error did not materially mislead members with a good degree of caution.

31. That said, the well-established principles in *Mansell* still apply. The OR must be read fairly and as a whole. The question is whether the OR, read in this way, materially misled members on a matter bearing upon their decision and the error has gone uncorrected before the decision was made. The error in question must be one which is misleading in a material way and this depends on the context and circumstances.

32. In light of those principles, I am satisfied that members were not materially misled by the OR on this issue in light of the following factors:

> (1) Even if read in isolation, the statement as to compliance with Policy DMP19 in sub-paragraph (4) was necessarily qualified, or at least subject to a material degree of uncertainty, by the appearance of the word "CHECK". This word appears in capital letters next to the statement itself. This of itself would be likely to alert a reader that the statement still needs some verification, or that the author had not yet done the checking required to rely upon the statement, or simply that the report may be in imperfect form.
>
> (2) Although the statement in sub-paragraph (4) is in an important section of the OR (intending to summarise key issues), it is not reasonable or appropriate to read it in isolation

from the remainder of the OR, or to assume that members would have done so - particularly in this case. In the 'Introduction' section of the OR, preceding the Summary of Key Issues, members were reminded of the relevant background that had led to the redetermination. It was a legal challenge to the approach to Policy DMP19 and amenity space. Officers identified that the previous error made result in a conclusion that the application was policy compliant in terms of external amenity space "when it was not". This earlier statement in the OR that the scheme was not compliant with Policy DMP19 at the very least creates a tension with the later statement in sub-paragraph (4) of the Summary of Key Issues section, heightening the significance of the word "CHECK" that appeared against that latter statement. A reader would have been aware of such inconsistencies without reading more.

(3) There is no reason to suppose a reader of the OR would have stopped at the Summary section anyway. Although intending to provide a summary of key issues, it was not purporting to be exhaustive or suggesting that it was sufficient merely to read the summary. That would have been inconsistent with the need for members to consider the development properly, and the report as a whole, given its contents. For example, the 'Consultation' section summarising objections cross-refers to the later analysis section in respect of amenity space. Members would be well aware that amenity space was a controversial issue in light of the background and 'Introduction' section. The table summarising the objections expressly refers the reader to the later sections of the OR where the officers' analysis is to be found: "See Standard of Accommodation section of the report". The same is true of the subsequent SOR. It dealt with further objections received. They again included objections in relation to amenity space. The SOR specifically referred members to those paragraphs of the OR (53-61) containing officers' analysis of the proposal against Policy DMP19. It is therefore fanciful to infer that members would not have read the OR as a whole in making their determination.

(4) Paragraphs 53-61 of the OR, read properly, do identify the officers' view that the shortfall in amenity space provision rendered the proposal non-compliant with Policy DMP19 (albeit to a limited degree). This naturally flows from what is stated in paragraph 57. It is not contradicted by anything stated in paragraph 61 when read together. However, it is unnecessary to reach any definitive view on the effect of those paragraphs alone, because they should not be read in isolation either. Read fairly, paragraph 106 of the OR was identifying that officers considered the levels of external amenity space did not accord with those specified within Policy DMP19, but that the limited

> conflict was considered to be outweighed by the benefits of the proposed development. Read together and as a whole, I am satisfied that the OR did advise members of their view that there was a conflict with Policy DMP19, notwithstanding the unfortunate inaccuracy contained in sub-paragraph (4) of the 'Summary of Key Issues' earlier in the report.

33. This conclusion is sufficient to dispose of Ground 1. I agree with Mr Bird that, in these circumstances, the Claimant's contention that Policy DMP19 can only be satisfied by either amenity space that complies with the standards referred to in the policy, or by the provision of communal open space to make up the requisite shortfall, is academic on the facts of this case. However, out of deference to the arguments I heard on that point, I briefly explain why I would not have accepted the Claimant's interpretation:

> (1) First, the mandatory requirement expressed in the wording of Policy DMP19 itself (rather than any explanatory text) is a requirement for "external private amenity space of a sufficient size and type to satisfy its proposed residents' needs." The word "sufficient" would ordinarily indicate the need for the exercise of a planning judgment, particularly given the need for the question of sufficiency to be considered against the "proposed residents' needs".
>
> (2) Second, the next sentence which introduces quantitative standards on which the Claimant relies is importantly qualified by the use of the word "normally", in conjunction with the word "expected": "This will normally be expected to be 20sqm per flat and 50sqm for family housing (including ground floor flats)." As Mr Parkinson himself accepted, the use of the words "normally" and "expected" naturally indicate that there can be exceptions, such that failure to meet the standards does not necessarily mean the policy would be breached. The standards on the amount of amenity space normally expected are therefore not prescriptive minima for all cases.
>
> (3) Third, there is no good reason in this case to give the words used in the policy text itself anything other than their natural and ordinary meaning. There is nothing intrinsically problematic in a policy which articulates a requirement for a sufficient amount of private amenity space to meet residents' needs, where determination of whether that is met by a particular scheme depends upon the exercise of planning judgment. Similarly, there is nothing inherently problematic in a policy articulating what will normally be expected in this regard, but consequently allowing for the potential for exceptions which may, as a matter of planning judgment, still be considered to be policy-compliant.
>
> (4) Fourth, the main part of the Claimant's argument depends upon interpreting Policy DMP19 as prescriptively dictating

> how any shortfall can be made up; but in order to do so the Claimant does not rely upon any words within the policy text itself. There is nothing in the policy text itself which imposes such prescription. Had the intention been to impose prescription of this kind, creating a rigidity of approach not otherwise reflected in the language of the policy itself, one might reasonably expect it to be articulated in the policy text (as it could have readily been done).
>
> (5) Fifth, the Claimant's reliance on paragraph 10.39 runs counter to the approach expressed in *Cherkley*. Paragraph 10.39 is relevant to the interpretation of the policy, but it does not form part of it. It cannot import a criterion or requirement which is not found within the policy itself. Here the policy itself does not import a rigid requirement. It permits of exception to what is normally expected. In this situation, it is inappropriate to treat what is identified in paragraph 10.39 as representing the only potential exception to the policy. This approach would have the effect of reading paragraph 10.39 as imposing a criterion forming part of the policy text itself, but where the policy text itself does not impose that restriction. If it had been the intention to do, it would have been easy to have included the prescriptive requirement in the policy text itself.

34. In the event, that particular dispute over the interpretation of Policy DMP19 is academic on the facts of this case for the reasons I have identified. I am satisfied that Ground 1 should be dismissed.

Ground 3 – Misinterpretation of Policy DMP19 – family housing above ground floor

35. Under this ground, the Claimant argues the OR also significantly misled members by misinterpreting Policy DMP19 as setting out a normal expectation of 20sqm of private amenity space for family housing above ground level, whereas properly interpreted the expectation is for 50sqm. In the alternative, the Claimant submits the Defendant failed to apply Policy DMP19 consistently with other planning decisions it has made. I was referred to a number of other decisions made by the Defendant on other cases which the Claimant argued demonstrated the correct approach of expecting 50sqm for any family housing proposed.

36. Mr Parkinson submits that the correct interpretation of Policy DMP19 on this point is a matter of law for the Court. I agree.

37. The dispute turns on the application of the bracketed phrase "(including ground floor flats)" in the second sentence of Policy DMP19 that deals with the normal expectation as to the private amenity space for new dwellings:

> "*This will normally be expected to be 20sqm per flat and 50sqm for family housing (including ground floor flats)*"

38. The term "family housing" is not defined in the DMP DPD itself in which Policy DMP19 is located. That DPD was adopted in November 2016. By contrast, there is a definition in the Defendant's Core Strategy. That was adopted in July 2010. It is part of the Defendant's overall adopted development plan, along with the DPD. In the Core Strategy, family housing is defined as "a self-contained dwelling that is capable of providing 3 or more bedrooms." The term "dwelling" is also defined in the same document. It means "a building or any part of a building that forms a separate self-contained set of premises designed to be occupied by a single family or household, (definition derived from "The Census 1981 Definitions Great Britain" – Office of Population Censuses and Surveys, 1981). That is a definition which therefore inevitably encompasses both a house and a flat.

39. The Claimant submits the bracketed words "including ground floor flats" simply makes clear that the expectation of 50sqm of private amenity space will apply to all family housing, including family housing provided in the form of a ground floor flat. It therefore applies to a three bedroom flat provided above ground floor. Mr Parkinson submits clarification is given in the brackets to make it clear that even where communal space is provided at ground floor level (as is often the case), there is still an expectation that a ground floor flat providing family housing should provide 50sqm of private amenity space; however this clarification does not have the effect of limiting the normal expectation to ground floor flats only.

40. By contrast, the Defendant argues the wording in the brackets is clearly intended to exclude flats above ground floor from the normal expectation of 50sqm for family housing. Mr Bird submitted that the definition of family housing in the Core Strategy did not apply to Policy DMP19, as its context called for a different approach. He submits family housing used in Policy DMP19 excludes flats, subject to the express inclusion of ground floor flats. He contended this interpretation reflected the difficulty of providing private amenity space above ground floor level in flatted developments in a Borough substantially reliant on brownfield redevelopment sites to meet its housing need. Mr Bird also sought to rely upon evidence from Mr Glover to the effect that if such a requirement did exist, it would very rarely be capable of being met.

41. Although conceding that it is "not strictly relevant" to the interpretation of Policy DMP19, Mr Bird also sought to rely upon the supporting text to Principle 5.2 of its SPD which states:

> "*Brent's policy DMP19 states that the standard sizes of external amenity space to satisfy residents needs are:*
>
> *- 50m2 for family housing (3 bedrooms or more) including ground floor flats*
>
> *- 20m2 for other flats.*
>
> …"

42. Mr Bird submitted that if it had been intended that Policy DMP19's 50sqm expectation applied to all flats providing family accommodation, the policy would simply have said:

"*50sqm for family housing (including flats)*"

43. Mr Bird also argued that the Defendant's interpretation accords with the wording of the policy and with common sense having regard to the impracticality of applying the standard argued for by the Claimant.

Analysis

44. Mr Bird's invocation of principles of impracticality and common sense have to be treated with some considerable caution in light of the other evidence before the Court. It is clear from other reports that the Defendant's own officers have, on a number of occasions, interpreted Policy DMP19 in exactly the way the Claimant contends is correct. Be that as it may, I approach the construction of the words used in accordance with the well-established principles, as reflected in the summary contained in paragraph 41 of *Mansell* drawing on other authorities.

45. Having done so, I am satisfied that the Claimant's interpretation is the correct one for the following reasons:

> (1) First, I have no hesitation in concluding that the term "family housing" used in Policy DMP19 is intended to have the same meaning as that contained in the Defendant's Core Strategy. Although the definition is not expressly included in the DPD document itself, the DPD is intended to form part of a suite of documents comprising the Defendant's statutory development plan of which the Core Strategy is an important part. It is a reasonable starting point that definitions of terms used in the Core Strategy are intended to be consistently used and applied in subsequent development plan documents giving effect to that strategy, such as the DPD. That does not preclude the possibility of terms used in later documents having different meanings (depending on their context), but it is less likely to the case in the absence of some explanation or the context requiring that result.
>
> (2) Second, as a matter of ordinary language, the term housing can naturally cover either flats or houses, particularly when used in planning for an urban area such as a London borough. Absent a contrary definition, or clear indication to the contrary, one would naturally expect it to apply to both. The definition in the Core Strategy provides further clarity that it may consist of both, but also identifies that it is dwellings with 3 bedrooms or more that falls into the category.
>
> (3) Third, to interpret the term "family housing" used in DMP19 differently sits uncomfortably with the wording in Policy DMP19 itself. The word "including" in used in the bracketed phrase makes it clear that the expected standards also apply to ground floor flats. This means flats are considered to be included as a relevant type of housing. That is consistent with the way the term has been defined in the Core Strategy.

If a three bedroom flat falls within the definition of "family housing", it is difficult to see why that position is altered depending on whether the flat is provided at ground floor level, or at a higher level. It is a description which is concerned with provision of housing for families. But for the bracketed phrase (to which I turn shortly), it seems there would be no real basis for contending that the term only applied to a ground floor flat and not a flat at an upper level.

(4) Fourth, there is no obvious reason why a family's need for private amenity space would be diminished simply because the accommodation is to be provided in a house rather than a flat, or at ground floor, rather than an upper floor. I will return to the issue of practicality (in so far as that is relevant to the issue of interpretation shortly).

(5) Fifth, having set an expectation of 50sqm for all family housing, if one then turns to the natural and ordinary meaning of the words used in the bracketed phrase, and in particular the word "including", it tends to support the Claimant's interpretation. The It is the language of clarification as to what is included, rather language consistent with exclusion. The word "including" ordinarily means that what follows is included in what is covered, but it does not necessarily mean, let alone suggest, that other things are necessarily excluded.

(6) Sixth, if the Defendant's meaning had been intended it would have been more logical, simpler and far clearer to have used the language of exclusion, rather than inclusion. The policy begins by using a broad term "family housing". That is a term the Defendant would know is used in the Core Strategy to cover any three bedroom flat (whether at ground floor or above). If the intention had been to limit the ordinary application of that term so as to exclude flats above ground floor, one would have expected language of exclusion, not inclusion, to be used, e.g. "except family flats provided above ground floor".

(7) Seventh, the written evidence as to potential difficulties of providing 50sqm of amenity space for family housing in flats at above ground floor levels does not affect this analysis, nor is persuasive anyway. The natural and ordinary meaning of the words cannot readily be displaced by claiming difficulty with meeting the target in practice. The Defendant does not argue the result is never achieved (indeed one of the three bedroom flats is said by the Defendant to have more than 50sqm of amenity space). Such arguments also do not sit well with paragraphs 10.37-10.38 of the explanatory text. This sought to express the virtue of the Defendant adopting a "locally distinctive target". This was on the basis that the Defendant had historically been able to achieve higher levels of amenity

> space within higher density schemes within its Borough. If the target is ultimately now considered to be too ambitious by the Defendant, that is a matter for the Defendant to take up in any review of its development plan. It is not a good reason of itself for reading down the words that have been used. Moreover, the argument has to be seen in light of the wording of the policy as a whole. Where 50sqm cannot be achieved, the shortfall may be addressed by the provision of communal open space. If provision of 50sqm private amenity space for three bedroom flats at upper levels proves difficult in a particular scheme, this does not prevent policy compliance. None of this supports an interpretation which requires dilution of the normal starting point expressed in the policy that 50sqm of private amenity space is expected for all family housing.

46. Finally, although not altering any of the analysis above, I simply record that I am not necessarily persuaded by the assumption made by both parties that the bracketed phrase, read naturally, only applies to the 50sqm of family housing. In principle it could be read as a clarification that applies to both parts of the preceding sentence. The policy sets a normal expectation of 20sqm per flat and 50sqm for family housing. The bracketed phrase could simply be making it clear that these respective expectations for <u>private</u> amenity space apply to ground floor flats as well, notwithstanding the potential closer proximity of ground floor residents in a flatted scheme to ground floor communal open space.

47. For all the reasons identified above, I accept the Claimant's interpretation of the expectation in Policy DMP19 and reject that of the Defendant. In light of this conclusion, it is unnecessary to analyse the other reports in which Policy DMP19 has been considered by the Defendant. It is evident that there has been an unfortunate degree of inconsistency in the way the policy has been interpreted in the past.

48. It is also unnecessary to deal the Claimant's alternative argument that even if the Defendant's interpretation of the policy were correct, the decision in this case could be impugned because of a failure to apply the policy consistently. I would have had difficulty in accepting the logic of that argument. I do not read any of the authorities the Claimant relied on for the "consistency principle" as supporting a submission that a local planning authority could either: (a) be required to continue to apply the incorrect interpretation of policy it has previously used; or (b) be required to take into account a previous incorrect interpretation of policy as a "material consideration" in a decision applying the correct interpretation of the policy.

49. I therefore turn to address the consequences of the correct interpretation in this particular case. Logically it follows that the OR was wrong in advising members that the normal expectation for private amenity space for any of the three bedroom flats in this development was 20sqm, rather than 50 sqm. This incorrect advice was given in respect of three flats in the scheme, one on each of the three floors above ground level, as set out in the Table in paragraph 58 of the OR. The correct 50sqm expectation was set out for the three bedroom flat at ground floor. Had the overall advice and reasoning of officers in the OR been as stark as that, there is a significant risk members would been materially misled in a significant way affecting their decision overall. But the analysis was more nuanced.

50. Paragraph 57 of the OR referred to an overall deficit of 39sqm below DMP19 levels, reflecting the incorrect expectation for 3 bedroom flats above ground floor. But the Table at paragraph 58 provided members with a break down of the actual amount of amenity space provided for each flat, along with the actual amount of communal open space provided. Whilst this Table also reflected the wrong expectation for the three flats above ground floor, it did at least ensure members were aware of the actual private amenity space available for each unit (subject to Ground 2 which I deal with below). Thus members knew that:

> (1) The ground floor three bedroom flat had 105 sqm of private amenity space.
>
> (2) The first floor three bedroom flat had 10sqm of private amenity space.
>
> (3) The second floor three bedroom flat had 10sqm of private amenity space.
>
> (4) The third floor three bedroom flat had 58sqm of private amenity space.

51. Both the ground and third floor flats exceeded what I have found to be the correct expected standard of 50sqm. Identification of the correct expectation would not have altered the position that these flats were meeting that expectation. For the first and second floor flats, both were in fact already failing the lower 20sqm expectation for non-family housing. Identification of the correct expectation would have increased the extent of that failure and consequently the extent of the overall shortfall against which to measure the communal space provided. But for both flats members were at least aware that the actual provision of amenity space for each was 10sqm.

52. Significantly in my judgment, the OR went on to provide members with some explanation of the interpretative approach adopted by officers and the potential for a different interpretation to apply. At paragraph 59 officers explained that the overall shortfall (39sqm) had been calculated by officers on the basis that the standard of 50sqm applied to three bedroom ground floor flats only. Members therefore knew that calculation was therefore dependent on an interpretation that the other three bedroom flats at upper levels needed only 20sqm. Officers then alerted members to the consequence of the alternative interpretation as follows:

> "… However, should one interpret this policy to include all provision of family homes, the shortfall would increase to 99sqm."

53. Members were therefore aware of the potential alternative interpretation. They would have been able to see what other three bedroom flats existed above ground floor level to which the 50sqm expectation would apply on that alternative interpretation. They were also advised that the consequential shortfall in private amenity space would rise from 39sqm to 99sqm. The point is briefly stated, but officers were acknowledging the contrary interpretation and dealing with its consequences in a way which enabled members to appraise the resulting shortfall. It is clear that this was dealing with a

point of objection, as the next paragraph of the OR begins: "Objectors also question the quality of amenity space for the ground floor flat …".

54. Having expressed views regarding the ground floor flat, officers then set out overall views at paragraph 61 of the OR. Although recognising a shortfall of amenity space below the level set out in the policy, they noted that all units had private external amenity space of at least 5sqm (this being a reference to the Mayoral standard in the London Plan) and all had access to the communal roof terrace that was being provided. Pausing here for one moment, whilst the level of shortfall is greater (99sqm rather than 39sqm) on the correct interpretation of Policy DMP19, the officers had alerted members to that greater shortfall on the alternative interpretation in paragraph 59 of the OR. That alternative interpretation does not affect either of the points that officers made that all flats had access to at least 5sqm and access to the communal roof terrace.

55. Officers then identified the relative proximity of the development to Preston Park approximately 430m away. They considered this proximity would supplement the on-site amenity space. I do not agree with the Claimant that officers were here erroneously relying upon off-site amenity space to satisfy themselves that Policy DMP19 was met. The proximity of the park was treated as a relevant consideration affecting the weight to be attached to the conflict with the Policy DMP19 expectation (as can be seen from reading the paragraphs as a whole, including paragraph 106). The point about proximity to the park would also not have changed in consequence of the alternative interpretation which officers had informed members about in paragraph 59 of the OR. In light of these consideration officers took the view that the quality of accommodation was good, and the shortfall below Policy DMP levels was acceptable. This was a matter for their planning judgment.

56. I do not accept that the judgment made by officers would have been any different based on the greater shortfall they had identified under the alternative interpretation. Read fairly and as a whole, in line with the principles in *Mansell*, in the OR officers had expressly acknowledged that the shortfall would increase from 39sqm to 99sqm in that scenario. Officers were not suggesting and it cannot reasonably be inferred, that this would have altered their overall view as expressed in paragraph 61. The reasonable inference is the opposite – the increase in shortfall would make no difference to their overall opinion. There would have been certainty about this if officers had stated as much in terms; but I consider that this is the natural and fair reading of these paragraphs taken as a whole.

57. This analysis also needs to be read with the officers' overall conclusions in paragraph 106 of OR. Officers took the view that the conflict with Policy DMP19 due to the shortfall in amenity space did not result in the proposal being in breach of the development plan as a whole. Again, although not expressly stated, I consider it is inherent that the judgment was intended to be the same even if the alternative interpretation, and consequential increase in shortfall calculated for members in paragraph 59 of the OR, were to apply.

58. For this reason, I am not satisfied that the error of interpretation materially misled members in this particular case. When the advice is read fairly and as a whole, officers were advising members that on either interpretation, and either shortfall (39 or 99 sqm) the quality of the accommodation was good and the shortfall was

acceptable. In paragraph 106 officers correctly turned their mind to the question of compliance with the development plan as a whole. They were entitled to conclude that the breach of Policy DMP19 identified did not lead to the proposal being in breach of the development plan as a whole. The development satisfied a significant number of other policies, drew policy support from other policies which officers were entitled to take into account and did not conflict with any other policy.

59. Even if I am wrong in this analysis and members were materially misled, I am satisfied on the facts of this case that it is highly likely that the outcome would not have been substantially different if the error had not occurred. Consequently it is a case the Court would be required to refuse to grant any relief under section 31(2A) of the Senior Courts Act 1981.

60. Officers were satisfied, and members accepted, that the provision of 10sqm of private amenity space for the two three bedroom floor flats at 1st and 2nd floor level was ultimately acceptable in light of (a) access to at least 5sqm of external private amenity space; (b) access to the communal open space; and (c) the relative proximity of the development to Preston Park. Having reached those conclusions on what was physically provided for those flats, I find it highly likely that both officers and members would have come to exactly the same view even if the correct normal expectation for the above ground floor three bedroom flats had been articulated in the report. There was no misunderstanding as to what was physically being provided for those flats, nor indeed as to the fact that it was below normal expectations. The error only related to the expected standard and consequently the extent to which the amount fell below that expected standard. Given that officers and members considered that the provision of 10sqm for two of those flats was acceptable in principle (given the other factors officers relied upon which would not change), I consider it is highly likely that the same outcome would occur had the error of interpretation not occurred.

61. For these reasons, I dismiss the Claimant's challenge under Ground 3.

Ground 2 – Failure to assess amenity space in accordance with SPD

62. Under this ground, the Claimant submits that the OR also failed to assess the amenity space available for each flat in a manner consistent with its own policy as set out in its SPD, without giving any explanation for taking a different approach. Principle 5.2 of the Defendant's SPD states:

> "Principle 5.2 "New development should provide good levels of private outdoor space and well-designed communal space for new residents".

63. The supporting text to principle 5.2 in the SPD states (amongst other things):

> "Private amenity space should be provided in accordance with the Mayor's latest guidance and other Brent adopted guidance. Brent's policy DMP19 states that the standard sizes of external amenity space to satisfy residents needs are:
>
> 50 sqm for family housing (3 bedrooms or more) including ground floor flats

> 20 sqm for other flats
>
> …
>
> Minimum width and depth for balconies and private external spaces is 1.5m."

64. Mr Parkinson submits that the Defendant's calculations of the amenity space for the two third-floor flats in the development included balconies below this minimum/width and depth figure. He refers to calculations provided in the 2nd witness statement of Mr. Rushe at paragraphs 17-19. Mr Rushe calculates reductions of 9.5sqm and 18sqm respectively, representing a 27.5 sqm reduction in total from what the Defendant had calculated. There is a minor disagreement between Mr Rushe and Mr Glover as to the extent of the reductions that would result, but I agree with the parties that is not necessary for me to resolve that dispute to assess the point of principle that is raised. Mr Parkinson submits the OR did not explain the issue to members and the areas ought to have been excluded and no reason is given for departing from the SPD approach. In consequence, he submits, the planning committee members were materially misled. He points out that if there has been an error of this kind, then the shortfall 99sqm identified in the OR (on the correct interpretation of Policy DMP19) would have been greater than members were informed.

65. Mr Bird submits this challenge mischaracterises the status and the content of the SPD which is not policy but general design guidance, with no expectation it will be applied in every case and no general requirement to explain a departure from it and the need for any reasons being context specific. In summary, he contends: the SPD leaves the question of what is a "good level" of private outdoor space to a scheme specific contextual assessment (albeit within the normal expectation of Policy DMP19); it does not exclude exceptions being made to any minimum width/depth; it does not lay down prescriptive rules about the measurement of amenity space; the Mayor's guidance to which it refers is in the Mayor's London Plan and is only a minimum of 5sqm of private outdoor space for 1-2 person dwellings, with an extra 1sqm for each additional occupant; the minimum/width depth guidance must always take account of the overall provision of the amenity space available to a flat.

66. He submits that where both third floor flats have balconies which do exceed the minimum width/depth guidance, and are therefore are usable by the flats' future occupants, there is no reason why other areas also adjudged usable, but less flexible, have to be excluded from the calculation of the overall amenity space provision for the relevant flat; such areas remain relevant to Principle 5.2 and the question of "good levels" of outdoor space. He therefore contends there was no "departure" from policy which required explanation.

67. He further submits that the level of detail to be contained in a committee report is a matter of judgment for the officers and there was more than adequate detail in the OR for the planning committee to perform its function without the officers having to descend into the detail of such measurements in this case. He submits that OR paragraph 61 in fact explains why it is concluded that Principle 5.2 is met in this case. He also seeks to rely upon that part of the evidence of Mr Glover dealing with the calculations in the Table in paragraph 58 as being "elucidatory" or "confirmatory" material, rather than reasoning supplementing what is in the OR after the event.

68. Mr Bird also argues that any error would not have made a difference to the overall decision. He submits that flats with the levels of amenity space below that which the Claimant has calculated exists for the two third floor flats were treated as acceptable by the Defendant in this scheme. He contends that the third floor three bedroom flat would still have amenity space in excess of the Mayoral and the Defendant's target (although that assumes that the latter would be a target of 20sqm rather than 50sqm which I have rejected under Ground 3 above), and the third floor two bedroom flat would have 10sqm which was equivalent to the level of provision found acceptable for other two bedroom flats within the scheme as set out in the Table under paragraph 58. He submits that the analysis in paragraph 61 of the OR would have been the same whether one uses the more restrictive calculations of the Claimant or not.

69. In response, Mr Parkinson submits (amongst other things) the reasoning Mr Bird seeks to rely upon is not set out in the OR. In respect of Mr Glover's explanations, he notes that the Court has consistently rejected post-facto explanations and justifications: see *R(Timmins) v Gedling Borough Council* [2014] EWHC 654 (Admin) where it was stated that should be "rare indeed" that a Court would expect such evidence as "subsequent second bites at the reasoning cherry are inherently likely to be viewed as self-serving". He also submits that, in any event, the reasoning now being expressed still represents a departure from the SPD when it is properly interpreted and therefore an error of approach.

Analysis

70. The point that is now made by the Claimant was not specifically made by her, or any other objector, in response to the planning application itself, in the first legal challenge or in the redetermination process. It appears for the first time in the Claimant's pre-action protocol letter in these proceedings. No one had specifically criticised the scheme, or the OR assessment of it, on the basis that the calculations of amenity space included areas of balcony below the minimum 1.5 width/depth referred to in the SPD guidance. It seems to me that this is of some relevance in considering the Claimant's criticisms now made in this Court that the OR did not provide more detailed reasoning about the officers' approach to such calculation.

71. I agree with the general thrust of the submission made by Mr Bird that this ground involves attaching undue status to the SPD document itself, and the way it is expressed, particularly where no objector had placed reliance on this point at any earlier point. The SPD is identified as a material consideration in the OR. It is therefore reasonable to assume that it was taken into account, without needing to rely upon the evidence from Mr Glover that it was. There is no legal obligation, however, for an OR to provide detailed advice on every material consideration.

72. The SPD was not part of the adopted development plan itself to which the duty under section 38(6) of the 2004 Act applies. The SPD itself is therefore not subject to the same principles set out in *Cherkley* as to the distinction between policy and explanatory text. As planning guidance, rather than adopted policy, the importance of not treating it as if it were contract or statute, and reading it as a whole, when interpreting it clearly applies with the same if not greater force. Principle 5.2 to which reference has been made identifies that new development should provide "good levels of private outdoor space and well-designed communal space for new residents".

Application of this guidance therefore inevitably requires exercise of planning judgment with which this Court will not readily interfere.

73. The principle itself does not purport to prescribe what level is required. The subsequent text in the guidance makes reference to private amenity space being provided in accordance with the Mayor's latest guidance and other Brent adopted guidance, and then refers to Policy DMP19 which I have already dealt with above. By extension of the basic principle expressed in *Cherkley*, this SPD guidance cannot be treated as part of the adopted policy in DMP19, nor can it impose additional development plan policy criteria. The policy test under Policy DMP19 concerns sufficiency of amenity space for residents' needs, with a normal expectation as to an amount. Principle 5.2 of the SPD itself refers to "good levels". In those circumstances, it seems to me that considerable caution needs to be exercised to avoid treating the further guidance in the SPD as to minimum width and depth for balconies at 1.5m too prescriptively, let alone treating it in the way the Claimant is seeking to do as requiring one to discount any balcony space that does not meet that minimum depth from any overall calculations. That is not what the guidance itself says, nor Policy DMP19.

74. In these circumstances, I do not consider the complaint under this ground can be made out. The complaint is that members were seriously misled by the OR because of a failure to assess amenity space in accordance with the SPD by including areas of balcony which did not meet the minimum depth or width. On the facts of this case, I am not satisfied in principle that members were being materially misled simply because the OR did not descend into the detail of any such calculation under the SPD. No one had suggested that such calculations were necessary. Even if the Claimant could overcome that hurdle, I am not satisfied that the SPD bears the prescriptive interpretation that the Claimant is seeking to place on it. The guidance in the SPD is clearly directing developers to the importance of achieving minimum widths and depths as part of considering the issue of good amenity space for Principle 5.2. In my judgment, however, it goes too far to suggest that balcony areas that do not meet that minimum width or depth have to be discounted for the purposes of calculation of amenity space under Policy DMP19. That is not what it says. It imports too rigid an approach that is inconsistent with the language used both in Policy DMP19 and Principle 5.2.

75. Again, even if I am wrong in that analysis and there was some material error in failing to draw members' attention to the existence of balcony space below the minimum width/depth, with the consequences for the shortfall calculations the Claimant suggests, I am satisfied that it is highly likely that the outcome would not have been any different had that error not occurred.

76. I agree with Mr Bird that the consequences of any such error would be limited. They need to be seen in the context of the Defendant's conclusions as to what was acceptable within other parts of the scheme. Although the third floor three bedroom flat would, on the revised calculations, now have to be treated as having amenity space under what I have concluded is the expected standard of 50sqm, it is clear the officers and the Defendant were satisfied with the provision of three bedroom flats with 10sqm of private amenity space in light of the other factors they had identified. I therefore consider it is highly likely that exclusion of the affected balcony and a reduction in the calculations of the overall amenity space for this flat would not have

affected their conclusion. The flat would still have been provided a balcony which met the minimum depth/width.

77. The same is true of the third floor two bedroom flat - it was providing one balcony which met that minimum depth/width. Revising the calculations for this flat to show a reduced amount of amenity space of 10sqm would have taken it to a level that officers and the Defendant found to be acceptable for flats of similar (indeed greater) size elsewhere in the scheme.

78. I accept that the cumulative shortfall of communal space would have increased on this revised approach by another 27.5sqm; but given the reasoning of the Defendant as to the overall quality of the space provided, the proximity to Preston Park and the other policy support for the scheme, I consider it is highly likely that the decision would have been exactly the same.

79. For these reasons, I also dismiss Ground 3.

Summary

80. In light of these conclusions, notwithstanding the comprehensive nature and persuasive manner of Mr Parkinson's submissions, I dismiss this claim.