Neutral Citation Number: [2019] EWHC 190 (Admin)

CO/3140/2018

IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
PLANNING COURT

IN THE MATTER OF A N APPLICATION FOR PLANNING STATUTORY REVIEW UNDER S 113 PLANNING AND COMPULSORY PURCHASE ACT 2004

Date: 8 February 2019

B e f o r e :
MR JUSTICE WAKSMAN

MARK JOPLING

Claimant

- and -

(1) RICHMOND-UPON-THAMES LONDON BOROUGH COUNCIL
(2) SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT

Defendants

-and-

QUANTUM TEDDINGTON LLP

Interested Party

Jenny Wigley (instructed on a direct access basis) for the Claimant
Rupert Warren QC and **Heather Sargent** (instructed by Town Legal LLP, Solicitors) for the Interested Party

Neither Defendant appeared or was represented

APPROVED JUDGMENT

Hearing dates: 16 and 17 January 2019

INTRODUCTION

1. In this case, the Claimant, Mr Mark Jopling has challenged the adoption by the First Defendant, Richmond upon Thames London Borough Council ("the Council") on 3rd July 2018 of a Local Plan ("the Plan") on the principal ground that a procedural requirement was not complied with, pursuant to s 113 (3)(b) of the Planning and Compulsory Purchase Act 2004 ("the Act"). The Council does not defend the claim nor does the Second Defendant the Secretary of State for Housing, Communities and Local Government, whose inspector ("the Inspector") carried out the statutory examination of the Plan prior to adoption. That examination led to his report dated 26 April 2018 ("the Report").

2. The subject-matter of the challenge is a 12.5 acre site ("the Site") in the centre of Teddington, known as Udney Park Playing Fields ("UPPF"). One way or another, recreational and sporting use has taken place at the Site since it was gifted by Lord Beaverbrook to St Mary's Hospital Medical School in 1937. It also served as a war memorial together with its Pavilion, which was opened in 1922 by Viscount Cave. In 2015 it was sold to the Interested Party, Quantum Teddington LLP ("Quantum") which has been the effective defendant in these proceedings. In January 2018, Quantum made an application for planning permission to include the building of 107 apartments, a surgery and associated works at the Site but with a significant part thereof to be reserved for sporting activities. The Council has not determined that application, and in late June 2019, Quantum's appeal against non-determination will be heard. The Council has intimated its opposition to that appeal.

3. The central issue in this case concerns the putative designation by the Council of the Site as Local Green Space ("LGS") at a Cabinet Meeting on 13 December 2016. That followed an application for such a designation made by Mr Jopling on behalf of the Teddington Society and the Friends of UPPF ("FUPP") which latter organisation he represents in these proceedings. That designation was incorporated into the draft local plan to be submitted thereafter for examination by the Inspector.

4. During the examination, the Inspector considered among other things (a) the Council's criteria for the LGS designation and (b) the justification or otherwise for the designation of the Site as LGS, in fact the only area so designated.

5. As is frequently the case in such statutory examinations, following a number of hearings, the Inspector put forward a number of Main Modifications ("MMs") to the Plan which, if maintained by the Inspector in its final form, meant that the Council would have to include them in the Plan as adopted. If not, the Plan could not be adopted at all. It is plain on any view from the Report that the Inspector rejected the designation of the Site as LGS. The Council, while disagreeing with the Inspector on that point, considered itself bound by his Report and so gave effect to it in the adopted Plan, as we shall see.

6. However, according to Mr Jopling,

   (1) The MMs, as proposed by the Inspector and later circulated for the usual consultation by the Council, did not make clear that they included the de-designation of the Site as LGS;

(2) For that reason, those in favour of retaining the designation, including Mr Jopling, were not given a proper or real opportunity to make representations on the point at this stage of the examination; they say that they should have been because in truth, the de-designation was part of the MMs proposed;

(3) As a result, they were substantially prejudiced; had they been made aware that this was a matter to be addressed in the consultation, they could and would have submitted further evidence and arguments on the point;

(4) Had they done so, it is at least conceivable that the outcome in terms of the Inspector's Report would have been different i.e. he would have retained the designation;

(5) Accordingly, that part of the Plan as adopted, which de-designated the Site should be quashed and remitted for fresh consideration by the Inspector or a different inspector.

7. All of the above constitutes Ground 1 of the claim.

8. Quantum resists Ground 1 for essentially the following reasons:

(1) The de-designation of the Site as LGS was not and could not have been the subject-matter of MMs; accordingly, the Council, in undertaking the related consultation, was not obliged to refer to it;

(2) There was therefore no procedural error in the MMs consultation process which is the only challenge made here against the Council;

(3) Alternatively, it was in fact clear from the MM documents that de-designation was up for debate and so Mr Jopling in fact had a fair opportunity to deal with it;

(4) Alternatively, if there was a procedural breach, Mr Jopling (and those he represents) have suffered no substantial prejudice; and

(5) In any event even absent the procedural defect and with an opportunity to put in further evidence and make further arguments, the outcome would inevitably have been the same.

9. Ground 2 is a related point. It alleges that the Sustainability Appraisal Consultation, required in tandem with, and as a result of the proposed MMs, was inadequate, essentially for the same reasons as the principal consultation, and it is resisted on the same basis.

10. Ground 3 relies upon the same matters as Ground 1 but here the procedural defect is said to be constituted by a breach of Article 6 (2) of Directive 2001/42/EEC - the Environmental Assessment of Planning and Policies Directive ("the EAP Directive") and the related Regulation 13 (2) (d) and (3) of the Environmental Assessment of Plans and Policies Regulation 2004 ("the EAP Regulations"). This ground is wholly parasitic on Ground 1.

THE PLAN

11. It is common ground that a local plan such as that proposed by the Council here is a "development plan document" ("DPD") for the purposes of s20 of the Act. This requires the local planning authority ("LPA") to submit it to the Secretary of State for independent examination. By s20(4), the person appointed by the Secretary of State to carry out the examination (i.e. the Inspector) must determine whether it satisfies various legal requirements and whether it is "sound". By s20 (7) (c) and if asked to do so by the local planning authority, the Inspector must recommend modifications of the document that would make it legally compliant and sound if it would not otherwise be so (ie the MMs). By s23 (3) the LPA can only adopt the local plan if recommended by the Inspector with modifications on the basis of incorporating them and (if applicable) with additional modifications which do not materially affect the policies in the plan. The only other alternative is not to adopt the plan at all.

12. By Regulations 2 (1) and (5) of the Town and Country Planning (Local Planning) (England) Regulations 2012 ("the 2012 Regulations") the expression "local plan" includes any document of the description referred to in regulation 5 (1) (a) (i) (ii) or (iv) or 5 (2) (a) or (b).

13. Regulation 5 (1) (b) refers to maps which accompany a document containing policies applying to particular sites and which shows how the adopted policies map would be amended by the document if it were adopted.

14. By Regulation 2 (1) and (9) of the 2012 Regulations, an "adopted policies map" is a map which, among other things, illustrates geographically the application of the policies in the adopted development plan. It follows that the adopted policies map itself is not a DPD.

15. The reason for this is clear, in my view. The map is simply a geographical illustration or representation of policies themselves contained in the local plan upon which it is parasitic. Any allocation or designation of a particular area of land will therefore be found in the local plan itself. It follows that if changes to the map are entailed by a change to the published local plan as contained in the final version recommended by the Inspector, if the LPA adopt the plan it must make any changes to the map which are necessary to render it consistent with it.

16. The above is reflected in paragraph 5.24 of the Planning Inspectorate Guidance ("PINS**"**) which provides, among other things as follows in connection with the Inspectors examination:

> "it should be noted that the Policies Map is not a development plan document and therefore it is not appropriate for Inspectors to recommend MMs to it. Rather the role of the Policies Map is to illustrate geographically the application of policies in the plan and will be for the LPAs to update this to ensure consistency with the adopted plan."

17. At the hearing before me, Quantum took as its primary point, a submission that it was not for the Inspector to recommend, for the purposes of the examination, the de-designation of the Site even though he had representations on it and had clearly stated that it was not justified in the Report. As a consequence, it was (and had to be) submitted that any adverse

view of the designation by the LPA of the Site as LGS was not actually binding upon the Council for the purpose of adopting the plan.

18. The basis for that contention was that it was only in the Council's Proposed Policies Map here that the designation of the Site as LGS appeared; so it was not for the Inspector to propose any modifications to it, since this forms no part of the DPD. However, I disagree with that interpretation of the relevant provisions for the reasons set out below.

19. First, if an area is to be the subject of a particular designation or allocation relevant for planning purposes (as LGS obviously is) it would have to be stated somewhere in the local plan, otherwise that local plan would not include it at all which would make no sense from a planning point of view.

20. The fact that the Inspector should not propose modifications to the map (for example to alter boundaries or demarcations or make other such changes to the details) is because there is no need; his job is to deal with the primary question of the relevant policies contained in the local plan, but those policies will include any particular designation of an area along with the criteria for achieving such a designation; that is consistent with the reference in Regulation 5 (1) (a) (ii) and (iv) to include site allocations.

21. The proof of the pudding is in the eating here: it is clear that the Inspector saw the whole question of the designation or otherwise of the Site as LGS as a matter for him to recommend or reject; he did the latter at paragraphs 68 and 69 of the Report. It is also clear (now) that the Inspector's MMs were intended to capture the de-designation of the Site even though this was not done explicitly. Any such de-designation would have been a departure from the Published Plan and was obviously an MM in substance.

22. It cannot be correct, as Mr Warren QC suggested, that the Inspector's role in relation to de-designation was somehow advisory only, in the sense that it was open to the Council to decide whether or not to adopt that part of his Report when adopting the Plan-indeed, as we shall see, the Council clearly regarded itself as bound to do so.

23. Read in this context, paragraph 5.2.4 of PINS makes complete sense and does not mean that the Inspector is not to be concerned with particular designation contained in the local plan just because (as they would have to be) they have their geographical representation on the map.

24. It follows that there is no major legal flaw in the challenge brought by Mr Jopling, as alleged by Quantum. The de-designation of the Site was and had to be, the subject of a Main Modification. Accordingly, and as Mr Jopling submits, the issue is then whether there was a procedurally adequate MMs consultation.

SUSTAINABILITY APPRAISALS

25. Section 19(5) of the Act provides that the LPA must also carry out a sustainability appraisal for the proposed local plan and to provide a Report of its findings in this regard. By Article 5 of the EAP Directive, the relevant environmental report (for these purposes the Sustainable Appraisal) must consider the likely significant effects on the environment entailed by the local plan and any reasonable alternative. By Article 6 (1) of the Directive,

such a report should be made available to the public among others. By Article 6 (2) the public must be given an "early and effective opportunity within an appropriate time frame" to express their opinion on the draft plan and the environmental Report before adoption. Then, by regulation 13 of the EAP Regulations, every draft plan for which an environmental Report has been prepared must be made available for the purposes of consultation. The LPA must invite the consultation bodies and the public to consultations to express their opinion on the relevant documents specifying the address to which and the period within which opinions must be sent. The relevant period must be one of such length as will ensure that the public is given an effective opportunity to express their opinion on the relevant documents.

26. It follows (and it is not disputed) that if MMs are proposed, the LPA will have to undertake a further sustainability appraisal which itself will be the subject of consultation along with the main consultation on the MMs.

THE EXAMINATION PROCESS

27. As already noted, and by s20 (5) of the Act, the purpose of the examination is to determine whether the relevant DPD satisfies certain legal requirements and is sound. By s20 (6), any person who makes representations seeking to change a DPD must (if he so requests) be given the opportunity to appear before and be heard by, the person carrying out the examination. Paragraph 5.27 of PINS states that the precise arrangements for public consultation on any proposed MMs may vary from case to case but the principles include that it should be made clear that the consultation is only about proposed MMs and not other aspects of the plan and that the Inspector will not contemplate recommending a Main Modification to remedy the unsound or legally non-compliant elements unless any party whose interests might be prejudiced has had a fair opportunity to comment on it.

28. It is also common ground that the examination itself does not conclude until the publication of the Inspector's Report.

THE PUBLICATION VERSION OF THE PLAN

29. This included the following:

> "5.2.8 Local Green Space, as identified on the Proposals Map, is green or open space which has been demonstrated to have special qualities and hold particular significance and value to the local community which it serves.
>
> 5.2.9 In line with the NPPF, managing development within a Local Green Space should be consistent with policy for Green Belt. Development, which would cause harm to the qualities of the Local Green Space, will be considered inappropriate and will only be acceptable in very special circumstances where benefits can be demonstrated to significantly outweigh the harm.
>
> 5.2.10 The following criteria are taken into account when defining Local Green Space:
>
> - [a] The site is submitted by the local community;
> - [b] There is no current planning permission which once implemented would undermine the merit of a Local Green Space designation;
> - [c] The site is not land allocated for development within the Local Plan;
> - [d] The site is local in character and is not an extensive tract of land;

- [e] Where the site is publicly accessible, it is within walking distance of the community; OR where the site is not publicly accessible, it is within reasonably close proximity to the community it serves;
- [f] The Local Green Space is demonstrably special to a local community and holds a particular local significance, for example, because of its beauty, historic significance, recreational value (including as a playing field), tranquillity or richness of its wildlife;
- [g] The Local Green Space designation would provide protection additional to any existing protective policies, and its special characteristics could not be protected through any other reasonable and more adequate means."

30. I interpose to add that sub-paragraphs [d], [e] and [f] track paragraph 77 of the NPPF; the other requirements are additional and were put forward by the Council.

31. The publication version of the Proposals Map Changes stated at paragraph 2.2.1 that the Site is to be designated as LGS as shown in the map below. In paragraph 2.2.2 it was said that a reason for this was that the Site was already designated as Other Open Land of Townscape Importance ("OOLTI") and was designated as an Asset of Community Value. At paragraph 2.2.3, it was stated that Policy LP 13, which dealt among other things with LGS, set out the policy guidance including criteria for designation. The Council assessed the Site against the criteria as well as national guidance and considered that it met all of the criteria.

32. Although the Plan itself does not mention the Site by name, it is in my view identified by paragraph 5.2.8 referred to above. True it is that one needs to look at the Proposals Map to see what it is, but that does not mean that the designation by the Council as LGS did not form part of the Plan and was therefore not open to recommendations for modification by the Inspector if he thought fit.

33. The sustainability appraisal equally appraised LP 13 and the designation of the site as LGS.

34. The publication version of the Plan, the map and the sustainability appraisal were then all submitted to the Inspector on 19 May 2017. He then directed that there be a series of hearings on different aspects of the Plan. In his Guidance Notes for those participating in the examination he repeated the statutory provision that only people seeking specific changes to the Plan were entitled to participate in the hearing sessions of the examination and that he might invite additional participants to attend if necessary. He added "There is no need for those supporting or merely making comments on the Plan to attend. Anyone can observe any hearing session."

35. 9 October 2017 was fixed as hearing day 5 ("H5") and the questions to be considered then included the following:

> "8. Is the evidence base supporting Policies LP 12, LP 13 and Local Green Space robust? Are Policies LP 12 and 13 clearing their intention/wording and means of delivery? How is the approach to LGS designed to work in practice? What evidence underpins the policy formulation in this regard?…
>
> 9. Is the Local Plans approach to Green Belt justified, consistent with national policy and in conformity with the London Plan? Are alterations to the Policies Map necessary?"

36. In my judgment the reference to alterations to the Policy Map suggests that the Inspector considered that his remit included the possible removal of designations.

37. The following documents, among others were submitted for H5:

(1) A very substantial written submission from Quantum to include its earlier representations against the designation of LGS for the Site which had been submitted to the Council in August 2016, in February 2017. This foreshadowed its intention to apply for planning permission in respect of the Site; what this document did not include was the original application for the designation made by Mr Jopling in September 2016;

(2) A short paper from Mr Jopling in response to Question 9 which he saw as dealing with the LGS designation of the Site. This document purported to add 4 extra points which had arisen since the Plan had been published. But it did not include his original submission;

(3) The Council's own representations which contained at Appendix 1 specific points relating to the LGS designation. It set out each of its criteria for the designation and justified it by reference to them. This is a significant document but, as will be seen, it does not present the whole picture in respect of the Site - in particular the details of its use since inception.

38. What then happened at the hearing was this: the Inspector heard a representative from Quantum's planning consultants, Barton Willmore to speak on the issue of the designation of LGS for about an hour and he heard also from Quantum's development partner, Teddington Community Sports Group CIC ("Teddington"). These were both invitees. Mr Jopling was not present but after hearing those submissions, the Inspector invited a representative of FUPP who was there, to make what Mr Jopling called an "impromptu" response. It obviously was, since FUPP was not invited to H5. The representative did speak, for about 2 minutes.

39. There is no challenge as such to the hearing conducted by the Inspector. But the fact is that in reality FUPP had little or no real opportunity to contest orally the suggestion by Quantum that designation should be removed. Therefore, it follows that if (as they did in my view) the Inspector's MMs included removal of that designation so that FUPP would now not be supporters of the local plan but objectors as regards this putative modification, it was vital to ensure that they had a fair and effective opportunity to make representations in the MMs consultation which followed.

THE PROPOSED MMS

40. As regards LP 13 these were somewhat oblique. They were set out in the Councils "Local Plan Consultation on Proposed MMs" within the section on "MM 7 Green Infrastructure" as follows:

> "p56
>
> Para. 5.2.8 Amend para to read: 5.2.8 Local Green Space, ~~as~~ to be identified on the Proposals Map… New areas of Local Green Space designation can only be identified when a plan is being prepared or reviewed..

5.2.10 Delete last 3 bullet points of para 5.2.10"

41. The stated reason for this change was "To ensure clarity and effectiveness consistent with national policy."

42. At first blush it appears as if all that was being done was to adjust the underlying LGS criteria by removing the last 3 bullet points. The reference to "new areas" could be read as "further" areas to be designated i.e. other than the Site which had already been designated. And the change of the words from "as" to "to be" might be regarded as a minor alteration. However, as subsequently became clear in the Report which followed the end of the consultation period, he was in fact recommending removal of the LGS designation of the Site. On that footing, one can see that the change of words was significant because it was removing any suggestion of a current designation as there had previously been. Objectively speaking, however, that was not clear at all at the time. And the stated reasons for this part of MM 7 did not suggest de-designation either.

43. The consultation period ran from 22 December 2017 to 2 February 2018. There was no response to it from FUPP; this was because, according to Mr Jopling, they did not understand the Inspector to be recommending the removal of the designation. The representations which were made and then put into the comprehensive responses document made by the Council were from Barton Wilmore on behalf of Quantum and from Teddington.

44. However, following the expiry of the consultation period Mr Jopling saw these comments which, in part, appeared to be maintaining the position that the designation should be removed. As a result he wrote to the Council on 18 March stating amongst other things that FUPP's understanding of the procedure was that only comments relating to the MMs were to be forwarded. It had regarded the reason for removal of the three bullet points in 5.2.10 as being because they were already in paragraph 77 of the NPPF and so unnecessary and did not read the change as a criticism by the Inspector of the designation of the Site. Therefore, the responses from Barton Willmore and Teddington were illegitimate. He then made certain other comments concerning the Site taking issue with some of the factual points made by Quantum. The Council's response was that as the responses from Barton Wilmore and Teddington were directed to the proposed MMs they had to be incorporated and it would be for the Inspector to consider their relevance. In the Report the Inspector made the following points in paragraphs 68 and 69:

> "68. Part D of the policy provides protection to identified LGS. National policy makes provision for the development plan process to designate LGS where three criteria are satisfied albeit also states that the designation will not be appropriate for most green areas or open space. The Council has, at para 5.2.10, created a number of additional criteria to be considered for the designation of LGS. The rationale for these is not clearly explained in the pre-submission evidence. Critically however and as accepted by the Council during the Examination Hearings process, there is no clear methodology which explains how the criteria have been applied and what means of value analysis has been applied to the sites identified to be designated as LGS. Thus the justification for any decision to designate land is more one of assertive opinion rather than evidential analysis and consequently is insufficiently robust. In the absence of such analytical process the inclusion of land as LGS cannot be supported at this time. Nonetheless, the LGS references within the Plan can be retained subject to modification to ensure clarity and consistency with national policy (MM 7).
>
> 69. I have noted the volume of representation received in relation to the Udney Park Playing Fields. It is clear that a large section of the community supports the designation of the land as LGS, albeit

> this is not universal and I note the submissions to the contrary. Regardless of the particular development aspirations that may apply to the site, my focus is upon whether designation of the land as LGS can be justified. In light of the absence of robust analysis as to its value against the criteria of the Framework and how any judgements have been objectively assessed in relation to, for example, its beauty, historic significance, recreational value etc, the designation is not justified adequately. The land is close to the community but it is unclear how it 'serves' that community and submissions have been received which argue that the land is both special or, in the contrary, not special and the rationale for both is not well developed beyond assertion I am unable to conclude that the designation is justified at this time. The site will retain its existing designation as Other Open Land of Townscape Importance (OOLTI). As a simple point of fact, the absence of a LGS designation of itself does not mean the site is, or is not, suitable for development."

45. Once he had read the Report, Mr Jopling wrote to the Council. He complained that it was unfair that as no concern had been raised about the validity of the designation of the Site during the Main Modification consultation, there was no opportunity to supply supplementary independent evidence to the Council or the Inspector, while on the other hand Quantum misused that consultation to successfully challenge the status of the Site. He then provided a detailed response to the Report. He made the point that while the Inspector had said that the argument that the Site was special had not been developed beyond assertion, in paragraph 77 of NPPF there was a reference to the relevant area having to be "demonstrably special, for example recreational value including as a playing field." Thus, according to Mr Jopling, it had been established in policy terms that a playing field was "special". He then wanted the opportunity to show beyond any doubt that the "special" criteria could be met due to the historic current and future function as a playing field. And then wanted to make representations to show that on an "objective assessment" it could be shown that the designation was justified. He then over about a page made a number of other detailed criticisms of the conclusions which had been reached by the Inspector. He attached to his letter references to the various activities which had previously been carried on at the Site which were not merely football and cricket but netball, rugby sevens and other activities. He then attached a detailed two-page submission from the England and Wales Cricket Board. This was a document which was submitted in opposition to Quantum's application for planning permission but was attached here to illustrate the kind of further evidence and arguments that could have been submitted during the consultation period. He also attached a document from Teddington which was in fact submitted in January 2017, against the LGS designation, but which nonetheless illustrated the recreational value and history of the Site.

46. The Council's letter of reply dated 22 May 2018 was sympathetic to the designation of the Site as LGS and referred to what was described as its "robust case" to justify it, as submitted to the Inspector. However, the Council went on to say that the deletion of LGS here was not put forward as an MM during the consultation. It then quoted paragraph 5.24 of PINS saying that the LGS designation was in the policies map and so the Inspector did not recommend the Main Modification to it, instead informing the Council of his assessment and conclusion via the Report. It went on to say that "ultimately the inspector's report is binding on the council if it wishes to adopt the plan. Failure to remove the LGS designation from the policies map would be contrary to the inspector's Report and would likely result in a judicial review or other legal challenge by the land owner or developer."

47. However, for the reasons given above, I consider that this reading of paragraph 5.2.4 and what the Inspector was doing, was misconceived. In truth the de-designation was an MM but expressed very obliquely.

48. Accordingly, the Council did not permit this matter to be reopened in any way and instead adopted the Plan with the MMs. In the adopted version, the Council added within paragraph 5.2.8 that "there are no areas designated yet within the borough." This was additional material which the Council said it was entitled to add. That may be. But it certainly makes clear that the modifications as they stood did lack clarity.

THE PARTIES UNDERSTANDING AT THE TIME

49. Given the words used, it would be surprising if they did not cause some confusion and indeed they did.

50. Firstly, and as already noted, Mr Jopling and others at FUPP did not appreciate that the MMs included de-designation.

51. Secondly, neither did Quantum. I say that because its response to the consultation as recorded by the Council in its summary of responses clearly proceeds on the basis that there was still an argument to be had, not about the content of the LGS policy, but about the designation of the Site as if this was still an issue for the inspector to consider - see 2/511-512. This point was made expressly in Mr Jopling's Statement of Fact and Grounds in these proceedings and it was not rebutted by Quantum.

52. Thirdly, neither did the Council, in my view. That is plain from its letter of 22 May 2018 when it said that the Inspector did not include removal of the designation in his MMs. That view is reflected in paragraphs 12 and 23 of the first witness statement (dated 14 December 2018) of Joanne Capper, the Council's Principal Planner in its Environmental and Community Services Directorate. It is also implicit in paragraph 17 thereof. This statement was submitted by the Council to assist the parties before me even though the Council did not defend the claim. Furthermore, according to Mr Jopling, he had a telephone conversation with Andrea Kitzberger-Smith at the Council's Local Plan Office (he had earlier said, wrongly, that it was Ms Capper). The effect of that conversation, as he said in paragraph 9 of his second witness statement, was that the Council's expectation was that the forthcoming MMs would not mention the Site and there would be no change to the designation in the Inspectors final report. And in his email to Ms Kitzberger-Smith dated 20 November 2017, having received the MMs, he said that as he saw no reference to the Site in the MMs, he assumed that the status of the Site will proceed into the final version of the Plan. She replied shortly after stating that "yes, that's the Council's intention".

53. Moreover, as already noted, in the Plan as adopted, the Council felt it necessary to make clear the fact of the de-designation by adding some words to 5.2.8.

54. Equally, the responses of Teddington clearly suggest that the designation had not yet been removed or recommended to be removed in the MMs.

ANALYSIS - GROUND 1

The Law

55. There is no real dispute that a consultation of the kind in issue here on the MMs must, as a matter of law, be fair and effective. See, for example, the dicta of Lord Woolf MR in *R v NE Devon Health Authority Ex p Coughlan* [2001] QB 213 at para. 108. This includes

giving adequate reasons for the modifications proposed. This is reinforced by 5.27 of PINS which, among other things, states that within the consultation, "any party whose interests might be prejudiced has had a fair opportunity to comment on it [ie the MMs]."

Inadequacy of the Consultation

56. In my judgment, the consultation was plainly inadequate, principally because it was not clear what was actually to be consulted upon, for the reasons already given. And since the MMs did in reality include the designation (on which FUPP had a very limited opportunity to comment on at H5) it was particularly important that they had a proper opportunity now to make full representations.

57. Quantum really only had two answers to this. The first was that the Inspector had no power to make an MM concerning the Site anyway and therefore did not do so. But I have rejected the former proposition above. Without it, the latter proposition goes nowhere. Alternatively, and to some extent inconsistently, Quantum then say that on a close reading of the MMs it was or should have been apparent that a consequence thereof might be the removal of the designation of the Site, for the following reasons:

    (1) The words "to be"; I disagree. These words are oblique at best on a fair reading; although in hindsight and with the benefit of the Report it is possible to see what they were intended to denote;

    (2) The deletion of the last three bullet points on the LGS policy, and since the Council had used them to designate LGS without them, the position might be different; I do not consider that this deletion presages realistically any likely change at all;

    (3) The only reasons given for this MM- consistency with national policy-which therefore suggests that the existing designation might not survive; again I fail to see how the possible removal of the designation is flagged up by this;

    (4) The Sustainability Appraisal Addendum-this also went out for consultation. On LP13, it stated that no further appraisal of paragraph 5.2.8 as amended, and 5.2.10 was needed and the MMs with accompanying reasons were then set out. It is correct that in respect of a different section of the LP13 policy, there was a further sustainability appraisal although with no difference on outcome. The original sustainability appraisal did make a specific reference to the Site - see p101-102. And it is correct that in the revised wording those references are removed- see pp98 and 99. But read objectively, that is not sufficient to make clear (especially in an Appendix) that the designation had now been removed as a result of the MMs - indeed it would be odd if that had been the Council's intention since its own evidence was that the designation had <u>not</u> been removed at that stage.

58. Accordingly this is no answer either.

59. It follows that the consultation process was manifestly unfair in my judgment and in particular towards those interested in supporting the designation. Therefore, for the purposes of s113 (3) (b) of the Act, a procedural requirement in connection with the adoption of the local plan was not complied with.

The Beechcroft Case

60. Subsequent to the hearing, Mr Jopling forwarded to me certain materials he had recently obtained, in relation to a different challenge to the Council's adoption of this same Plan brought by a developer ("the Beechcroft Case"). This culminated in a Consent Order dated 20 December 2018 entered into by Beechcroft with the Council and the Secretary of State. Its effect was to quash the challenge to part of the Plan, which related to a change to the designation of the relevant site as OOLTI. This had been intended by the Inspector and featured in his report but not as a prior MM and was therefore not consulted upon. The parties agreed that the matter should be remitted for a public consultation, followed by consideration by an independent examiner as to whether or not it should be an MM. Thus far, one can see parallels with the case before me.

61. However, in the Beechcroft Case, the designation as originally proposed by the Council had been identified on a plan which was itself "embedded" in the published version of the local plan, while in our case, the Proposed Policies Map was a separate item.

62. Both parties made written submissions on the Beechcroft Case.

63. Quantum submitted that it was of no assistance because while there was an admitted error on the part of the Inspector in not referring his proposed changes as an MM, that was not surprising because he had been dealing with an express provision of the Plan itself, and not merely a separate adopted policies map.

64. I see that but (a) in my view, paragraph 5.2.8 of the Plan did impliedly refer to the LGS designation of the Site as explained above and (b) I do not accept that in a case like this, a proposed change to the designation of an area made by the Inspector cannot be the subject of an MM-it should be, for the reasons also given above. Moreover, the difference between this case and the Beechcroft case as relied upon by Quantum seems to me to be highly artificial, depending only on whether the relevant map was "embedded" or not. That rather suggests that the distinction is not a sound one for the purposes of determining the proper subject-matter of MMs.

65. I also received a letter from the Secretary of State dated 5 February 2019 which sought to draw a distinction between this case and the Beechcroft Case but I did not find it of any real assistance for present purposes. However, that letter did also point out that the Secretary of State had "expressly accepted that "the main modifications consultation undertaken by the Inspector was flawed in relation to the main modification to paragraph 5.2.8 of the Local Plan which removed the Local Green Space designation from Udney Park Playing Fields." After my judgment was sent to the parties in draft, I was provided with another letter dated 5 February, this time from the Council. I did not find it of particular assistance for present purposes.

66. On that basis, the Beechcroft Case materials are of some assistance to Mr Jopling's case but I should make it clear that even without them, my decision would be the same.

Substantial Prejudice

67. It is common ground that in order to obtain relief, the interests of the applicant must have been "substantially prejudiced" by the failure to comply with the procedural requirement – see s113 (6) (b).

68. In one sense, there obviously has been substantial injustice because Mr Jopling was not given a fair opportunity to present the full case to the Inspector (via the MMs Consultation process) as to why the designation should not be removed. But in argument, this was allied to the further point that had such an opportunity been given, there was much information and further argument which Mr Jopling could have presented. I deal with that issue here. I deal separately below, with a further allied point which is whether, even if all that been done, it could not conceivably have made a difference to the outcome i.e. the Inspector's recommendation to de-designate.

69. The further evidence and argument Mr Jopling says would have been put forward must be considered in the light of the Inspector's view that the justification for the designation had been more "assertive opinion" than "evidential analysis", and that it was unclear how the Site could serve the community or was "special"- see paragraphs 68 and 69 of the Report cited above.

70. Mr Jopling points to the following as additional material not before the Inspector:

    (1) The original application for the LGS designation made in September 2016 which contained details of the prior use of the playing fields and noting the fact that the Site had been designated by the Council as strategic for the purposes of its own Playing Pitch Strategy in June 2015; this document also highlights the particular local significance of the Site (see paragraphs 7.1-8.2) and its particular use for playing sport - see paragraph 9.2. It also makes reference to the restrictive covenants which had attached to the Site. While it is not clear whether and to what extent such covenants now bind Quantum, they do make plain the intended limitation on the use of the Site to sporting activities because the limit is to amateur rugby unless some other activity had been approved by the Rugby Football Union. The document also annexes letters from Teddington Cricket club, Heart of Teddlothian FC, London Playing Fields Foundation and London Sport. The fact that (obviously) the Council had seen this document before does not affect the point that the Inspector had not;

    (2) Albeit brief, the 2007 document from Imperial Sport detailing the various sporting facilities then being used at the Site; it is not an answer to say that this document should have been submitted as part of the original application. The question is what could have been submitted to the Inspector;

    (3) A detailed summary of the prior use of the Site, from the England and Wales Cricket Board. This was provided in the context of Sport England objections to Quantum's planning application, but had it been clear what the MMs entailed, there is no reason to suppose that Mr Jopling could not have elicited that information for the purpose of the consultation; I do not accept that because this deals with earlier use, it is irrelevant to the question of the designation;

(4) The latter document itself formed part of the detailed submissions made by Mr Jopling on 17 May 2018 referred to above, following publication of the Report where he tackles directly the points made by the Inspector. He makes particular reference to the use for sporting and athletic activities since 1919 - see pages 678-684; that submission includes the submission made by Teddington because of the reference to the history of activities;

(5) The Council itself might (and probably would, given its present objection to the planning application) have said more on the subject had it been aware that it was up for discussion;

(6) Moreover, it is ironic that under the new criteria for LGS it might be thought to be easier now to show that the Site satisfied them;

(7) A further dimension is ecology. Quantum had in its possession two ecology reports from 2017 although these only became available to Mr Jopling in early 2018 in connection with the planning application. The Phase I Report indicated a high likelihood of bat roosting at the Site and the Phase II Report stated that there was a number of protected species on the site. It is true that the Phase I Report also said that the Site had "low ecological value" but it remains the case that both reports make clear that Quantum was wrong to say, as it did to the Inspector, that there were no protected species at the Site. The importance of the bat population here was emphasised in the Councils Planning Officers Report of 28 September 2018 which recommended that the Site should be assessed as a Site of Metropolitan Importance for Nature Conservation.

71. As against all that, Quantum says that what the Inspector did have before him were the Councils written submissions for H5 and in particular, Appendix 1 which I have referred to above. I see that, but in my view it is no substitute for the variety of information and arguments which Mr Jopling says could have been deployed as well, set out above. It is not an answer here, where the consultation process was so defective, to say that somehow "all the essential points" were before the Inspector one way or the other. I do not think that they were.

72. For all of the above reasons, I consider that Mr Jopling and FUPP have suffered sufficient substantial prejudice as a result of the procedural defects.

What difference would it have made?

73. In the light of all the above, it really follows, in my judgment, that if the burden is on Mr Jopling, it is clearly shown that the outcome may have been different if he had a proper opportunity to take part in the consultation in the way that he should have been. Or to put it another way it is certainly conceivable that there would be a different outcome. Likewise, if the burden was on Quantum, it cannot show that it would be inevitable or even highly likely (if that were enough) that the outcome would be the same. And of course, there is no direct evidence from either the Council or the Inspector that it would have been the same.

74. Indeed, albeit on the issue of a different outcome for the sustainability appraisal, Ms Capper said at paragraph 17 of her first statement that had the MMs clearly included the designation of LGS it would "not necessarily" have led to a different sustainability outcome particularly

as the appraisal is of all the elements and designations of LP 13 and given that the UPPF are also protected by Policy LP 14 and their designation as Other Open Land Of Townscape Importance. That the outcome would not necessarily have been different is clearly insufficient for present purposes.

75. Accordingly, for the above reasons, Ground 1 is clearly made out. That conclusion is sufficient for the purposes of Mr Jopling's claim. However, for the sake of completeness, I deal below briefly with Grounds 2 and 3.

GROUND 2

76. It is common ground that there can be a further sustainability appraisal made in the light of the MMs and that (as here) if so, that should be consulted upon. It is also common ground that it is a matter for the judgment of the Council (subject to usual *Wednesbury* constraints) whether to produce a further appraisal or not. There was here, allied to the main consultation a sustainability consultation as well but, as indicated above it was stated that no further appraisal was required in respect of the amendments to 5.2.8 and 5.2.10 of LP 13 because it was said that this change did not necessitate a further sustainability appraisal.

77. However, Mr Jopling says that this was due to the Council not appreciating that MM 7 in fact included the de-designation and therefore there was an error which vitiated the sustainability consultation which did not include it; had the Council been aware, then it seems likely that there would have been a further sustainability appraisal. It is true that Ms Capper stated there would not necessarily have been a different sustainability outcome but that is not sufficient.

78. The only point of substance raised by Quantum against this ground is that there was no error because the Inspector did not and could not have included the de-designation as a Main Modification. But I have already rejected that argument.

79. I do not consider that the difference in the detail of the further appraisal in relation to a different part of LP 13 (referred to in paragraph 57(4) 57(4)above) is relevant for these purposes.

80. In my view, the Council proceeded on the wrong basis which resulted in a procedural defect in the sustainability consultation and so Ground 2 succeeds also.

GROUND 3

81. This is entirely parasitic on Ground 1. But here, the requirements for the consultation are not derived from common-law but rather A 6 (2) of the SEA Directive and Regulation 13 (2) (d) and (3). The format makes clear that the public must be given an early and effective opportunity to comment on the draft plan and accompanying environmental Report before adoption. The latter make plain the need for consultation and that there should be a sufficient period to afford the public and effective opportunity to express their opinion.

82. It necessarily follows that if Ground 1 succeeds for the reasons given, Ground 3 succeeds also.

RELIEF CLAIMED

83. While I heard some brief submissions on appropriate relief should Mr Jopling succeed, as he has, I intend to leave the precise nature and scope of the relief to be granted at the hearing which will follow the handing down of this judgment. That said, it would seem sensible for the parties, ahead of that hearing, to agree as much as they can about the form of relief and in that regard, they may well consider that the Consent Order in the Beechcroft Case provides a useful precedent.

84. I have noted from the Secretary of State's letter dated 5 February that he would like to be heard on any discussions as to relief. For my part I have no objection to him appearing when this judgment is handed down, and the parties should so inform him. They should also inform the Council, lest it wishes to appear.

85. I am most grateful to all Counsel for the excellence of their oral and written submissions.