

CO/2003/2001, Neutral Citation Number: [2001] EWHC Admin 1116

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

Royal Courts of Justice  
Strand,  
London, WC2A 2LL

Friday 21st December, 2001

B e f o r e:

THE HONOURABLE MR. JUSTICE OUSELEY

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THE QUEEN  
ON THE APPLICATION OF  
LAURA C AND OTHERS

Claimants

- v -

LONDON BOROUGH OF CAMDEN THE SECRETARY OF STATE FOR THE  
ENVIRONMENT TRANSPORT AND THE REGIONS

Defendants

AND

BARRATT HOMES LIMITED DDSF LIMITED

Interested Parties

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(Transcript of the Handed Down Judgment of  
Smith Bernal Reporting Limited, 190 Fleet Street  
London EC4A 2AG  
Tel No: 020 7421 4040, Fax No: 020 7831 8838  
Official Shorthand Writers to the Court)

David Wolfe (instructed by Leigh Day & Co, Solicitors for the Claimants)  
Stephen Hockman Q.C. & Mark Beard (instructed by LB Camden Legal Services for the 1st  
Defendant)  
Paul Nicholls (Andrew Blake for Paul Nicholls) (instructed by Treasury Solicitors for 2nd  
Defendant)  
Peter Harrison (instructed by Owen White, Solicitors for the Interested Parties)

J U D G M E N T  
As approved by the Court

## Introduction

1. On 7<sup>th</sup> March 2001, the London Borough of Camden, in full council, resolved to grant three interrelated planning permissions. The first related to an application by Dawnay Day Structured Finance Ltd for the demolition of an existing leisure and community centre, the erection of a new sports and leisure centre, together with other uses, in a new building and a new residential block, sixteen storeys high at its highest, at Swiss Cottage. The second, which for present purposes is uncontroversial, related to the refurbishment and alteration of the existing library adjacent to the existing and proposed sports and leisure facility. The third related to an application for various works of ground remodelling and landscaping to replace the existing sunken ball court or all weather pitch, part of the adventure playground and the market square. These applications were made by the Council's Director of Leisure and Community Services.
2. The land in question in all three applications was owned by the Council and appropriated for the most part to its Leisure and Community Services Committee.
3. On 27<sup>th</sup> April 2001, Leigh Day & Co, Solicitors acting then for the Claimants apart from Ms Cooke, wrote a letter before action to the Council and a letter to the Secretary of State asking him to call the applications in for his own determination for reasons which foreshadow the challenge brought in this case. On 4<sup>th</sup> May 2001, the Secretary of State rejected this request, in line with his normal policy, because no issues of more than local importance were raised. He had already rejected on 12<sup>th</sup> March 2001 an earlier request to call in the applications, made by other persons.
4. On 18<sup>th</sup> May 2001, the Council signed a development agreement with Dawnay Day Structured Finance Ltd (DDSF) and Barratt Homes Ltd. the Interested Parties. Planning permissions were issued on 2<sup>nd</sup> August 2001, shortly after the signing of agreements under section 106 of the Town and Country Planning Act 1990.
5. On 18<sup>th</sup> May 2001, judicial review proceedings challenging the 7<sup>th</sup> March 2001 resolutions were lodged on behalf of the first four Claimants. The fifth Claimant seeks permission to be joined, in so far as such permission is necessary. The fifth Claimant notified the Council of her desire to participate on 21<sup>st</sup> August 2001; it is her grounds alone which now raise a Human Rights Act point, and it is now her challenge alone which attacks the Secretary of State's refusal on 4<sup>th</sup> May 2001 to call in the applications.
6. The grounds upon which the challenge is brought against the Council in summary are: first, that it failed to comply with its duty under section 54A of the 1990 Act to determine the applications in accordance with the development plan because it failed to consider relevant policies and whether they were breached; second, that it unlawfully allowed its interests as landowner, applicant and promoter of the development to influence what should have been its independent consideration of the planning merits so that its decision was biased and predetermined; this also meant that material considerations were ignored and immaterial considerations taken into account; and third, that for the Council to determine its own planning applications where it was involved as landowner was in breach of the fifth Claimant's rights under Article 6(1) of the European Convention on Human Rights to a fair and public hearing by an independent and impartial tribunal in the determination of her civil rights, because of factual disputes which, it was contended on her behalf, arose in the course of the determination.
7. The Council and its development partners, the Interested Parties, reject these arguments and in addition say that permission or relief should be refused because of delay and prejudice.

8. As against the Secretary of State, the fifth Claimant says that his refusal to call in the applications was unlawful because first, it was only by calling them in for factual disputes to be resolved by an Inspector that the right to the determination of her civil rights by an independent tribunal could be secured, and because second, his policy unlawfully prevented him calling in applications in circumstances such as these. In so far as primary legislation prevented the call-in, it was incompatible with the Human Rights Act.
9. The Secretary of State opposes those contentions, together with the Council and the Interested Parties.
10. The Claimants are three local children of varying ages who use the sports and other facilities presently on site, and the Treasurer of a sports club for disabled children which also uses those facilities. The fifth Claimant lives in a local flat and claims that her view from it will be affected by the new residential development, which will also overlook and block direct sunlight to the playground by the flats where her children play.
11. This is an application for permission to apply for judicial review, ordered to be heard at the same time as the substantive application so that the issue of delay can be considered at the same time as the merits and prejudice.

#### Facts

12. The Claimants' case in relation to the blurring by the Council of its development control function and its leisure services and land-owning functions involved a detailed analysis of the way in which the proposals for the sports and leisure centre and related developments had been promoted and considered within the Council over a number of years.
  13. I shall not set out all the detail upon which Mr Wolfe for the Claimants relied, but rather enough to give the essence of the material.
- A. The site
14. The Swiss Cottage development site occupies a large part of the street block on the east side of Avenue Road, close to the well known "Ye Olde Swiss Cottage" public house. The block includes a three storey public library listed Grade 2 and built in the early 1960s, an unlisted sports centre by the same architect, Sir Basil Spence, and of the same era, which provides a swimming pool, sports hall and fitness facilities, also the existing Hampstead Theatre soon to move to a new building being constructed in a different location on the site, but which has already taken up some of the open space on site, together with a sunken all-weather pitch, and an adventure playground operated by the Winch, which is a project for young persons more formally called the "Winchester Project", a hard surfaced square sometimes used for markets, and other buildings and spaces.
  15. The specific sporting facilities on site are a 5 badminton court sports hall converted from a swimming pool, 2 indoor swimming pools each of 33.3 metres length, 4 squash courts, a large indoor fitness area, an all weather pitch of the size of 3 tennis courts and a few lesser facilities.
  16. The site has suffered from many problems over a number of years. In 1997 the Council, conscious of its problems and the advantages of improving the facilities, embarked upon an extensive public consultation process to obtain views about possible ways of regenerating the site.

17. In March 1997, a "Jury" of 16 citizens, a representative cross section from the surrounding area, set up by the Council as part of a public consultation exercise over the future of the Swiss Cottage site, reported that the worst aspects of the site were that it was ugly, dirty, concrete built, of poor layout and failed design, broken up by the all-weather pitch, and lacking in safety and signage. The Jury wanted the overall site radically improved and to see the "preservation of current services within a quality environment."
18. The state of the buildings and land was described in the Planning Brief adopted in February 1999 in damning terms. I shall have to return to the background to that document in view of submissions made by Mr Wolfe but it was not contentious as a description of the existing problems, which lay behind the Council's actions from 1997 onwards.
19. The site was "split in such a way that none of the pieces relate to the other". The entrances to the Sports Hall and library were poorly located, uninviting and of poor quality; the former provided inadequate disabled access and parking; the physical fabric of the library and sports hall had deteriorated with cracking, pigeon fouling and graffiti. There was a lack of defensible space. The square was surrounded by walls, was cold and harsh in appearance, daubed in graffiti and contributed to a feeling of insecurity. The all-weather pitch broke up the site and was one of the main reasons for the site's lack of integration. Its illicit use caused a nuisance to nearby residents. The adventure playground, unused and physically deteriorating, added to the air of dereliction. The grassed areas were small and of poor quality, as was the whole central area. The theatre needed immediate replacement. The interior of the sports centre contained much wasted space including extensive poolside seating; its plant and infrastructure needed replacing.
20. The general continuing accuracy of that description of the state of affairs was attested to by the Council's witnesses, Mr Jordan, Development Control Manager and Mr McNicol, Director of Leisure and Community Services. There had been some changes in that the replacement theatre had been permitted in October 1998 which involved the use of some designated open space on site; for that reason it had been referred to the Secretary of State as a departure application, but had not been called in by him. Mr McNicol also points out that the derelict adventure playground was used for the first time in many years in the summer of 2000, with some refurbishment of climbing equipment then and again in summer 2001. Still only half is in use with play equipment. There was no dispute about the accuracy of what he said.

## B. The Project Group

21. Following the fairly general aspirational recommendations of the Citizens' Jury as to what should be done on the site, a Project Group was set up by the Council in September 1998 to bring about the Swiss Cottage development. The Project Group was an advisory body, and not a formal decision making body, comprised of Council Officers and external consultants. Until January 2001, the Group was led by Mr McNicol and Mr Gilks, Director of Environment. It met fortnightly. After January 2001, Mr McNicol alone led the Project Group. The Leisure and Community Services Committee and the Finance and Resources Management Committee took the strategic decisions; at officer level decisions were taken by Mr McNicol. The Minutes of the Project Group meeting of 4<sup>th</sup> September 1998 state: "Project Management to be joint, between Directors of Leisure and Community Services and Environment." A project manager, John Wolfenden, was appointed to co-ordinate the project, and implement decisions.
22. Mr McNicol spoke of his role as being that of the officer landowner/developer, and in effect the Leisure and Community Services Committee was the promoting committee for whom he acted. He contrasted his role with that of the Council as planning authority, saying that "Throughout the life of the Project, I and other officers have been mindful of the need to

maintain a separation between" the two roles. Mr Jordan made the same point, saying for example "Neither I, nor any of my staff played any part in the project group set up by the client department, leisure and community services." Those staff working to him were deliberately separated from the Council staff engaged in promoting the development of the Swiss Cottage site, who were answerable to Mr McNicol. The development control planners offered in effect advice and assessments such as would be offered pre-application to any developer, and occasionally attended Project Group meetings for that purpose. A planner from the Forward Planning and Projects Section acted as planning consultant to the development but had no development control responsibility.

### C. The Initiation of the Client and Planning Briefs

23. At member level, an all party group of six Councillors was kept informed of progress through informal briefings from Mr McNicol; the members included the Chairman of the Leisure and Community Services Committee and local Ward Members.
24. Mr McNicol initiated the preparation of a "Client Brief" for the development of the site, which was to be the subject of public consultation. This drew upon the Citizens' Jury's general recommendation of March 1997, the November 1998 recommendations of external leisure consultants, Strategic Leisure, and data supplied by Sport England as to the needs of the catchment area.
25. Mr McNicol's witness statement described how the existing facilities had particular drawbacks: the space for health and fitness was too small for the demand; the 33.3 metre long main pool was not of a length used for competitive swimming so the 940 person banked poolside seating was hardly used.
26. The all weather pitch was not of a standard size, and provided 3 substandard size tennis courts or one adult 7 a-side football pitch. It was overwhelmingly used for football and largely by males, over 25.
27. Strategic Leisure carried out a detailed examination of existing facilities in the Swiss Cottage area, and consulted the various user groups and other relevant bodies. It identified a need for a 25 metre, 6-lane pool and a 6-court size sports hall. Strategic Leisure recommended a 25 metre 6 or 7 lane pool, a teaching pool, and a 5 or 8 court sports hall with fitness and other studios. It recommended that an all-weather pitch should continue to be provided. Sport England found no need in the area for a 50 metre pool. The standard sizes for all weather pitches are reckoned by tennis court sizes (1 to 3), and full hockey pitches or their fractions. A one court pitch can cater for 7 a-side junior and 5 a-side adult football and at 40 metres by 18 metres would be about 40% of the size of the existing pitch at Swiss Cottage.
28. The preparation of the Client Brief also involved the assessment by Mr McNicol of capital cost, running cost, the optimum use of the available space and the prospects of such a development obtaining planning permission.
29. In parallel with the preparation of a draft Client Brief by Mr McNicol, the Development Control Sub-Committee in October 1998 requested that a Planning Brief for the whole area should be prepared, including proposals for the replacement of the open space lost to the new theatre. It was the grant of planning permission by that sub-committee for that proposal, which made it realise that a comprehensive view needed to be taken of the whole area. The Project Group Minutes of 18<sup>th</sup> September 1998 record that Mr Burley, the forward planner working with the Project Group was "to prepare planning brief in parallel

with Client Brief to a November DC Sub-Committee". He did not prepare the Client Brief. Mr Jordan's witness statement says that the Planning Brief was not prepared by officers answerable to the Leisure and Community Services Department. On 30<sup>th</sup> October 1998, the draft Planning Brief was discussed at the Project Group meeting: Mr Burley reported on a meeting with English Heritage which would affect the Brief and Mr Gilks stated that "flexibility was the key note of the brief and that an early meeting should be held with [senior members] of the [Development Control Sub-Committee]". Mr Wolfe instanced this as development control not being maintained as an independent function.

30. An aspect of the Planning Brief was discussed at the 11<sup>th</sup> December 1998 Project Group meeting where "the importance of openness and consistency in the presenting officers' position was underlined". These were provided to the Claimants although they are not public documents. In November 1998, a draft Planning Brief was agreed by the Development Control Sub-Committee for the purposes of public consultation. Mr Burley was the contact officer and, I infer, prepared the Committee Report on behalf of Mr Gilks the Environment Director. His report stated that there would be a joint consultation exercise on both Client and Planning Briefs. Their respective functions were described:

"Consultation

This will involve a joint exercise between Leisure and Environment to consult on the Planning and Client Briefs. Whereas the Planning Brief will specify guidance on built form and preferred uses. The Client brief will articulate Leisure Service's and the various site users' service aspirations in the form of a detailed service specification"

31. The draft Planning Brief referred to the importance of finding a suitable place for the relocation of the all-weather pitch, and every attempt being made to increase the amount of public open space. Mr Burley and Mr Gilks answered questions from councillors on the draft Planning Brief, the role of the Citizens' Jury and Mr Gilks said that approval of the Planning Brief would "enable the Leisure Committee to formulate distinct proposals for the site".
32. There were public exhibitions in December 1998 in a variety of locations on the possible content of the Client Brief, seeking views in particular on what facilities should be included; specific consultation also took place with a range of users and groups including the Winch, sports clubs, the Community Centre on site and the local Sports Council.
33. The consultation on the Planning Brief lasted about two months, again including a travelling exhibition, a static exhibition at the Swiss Cottage library and extensive notification of local residents and groups. The letter notifying residents of this consultation, which was from Mr Burley who was the designated contact officer, said this of the role of the Planning Brief:
- "A Planning Brief sets out the ground rules within which any future redevelopment can take place either by the Council or by anyone else. The planning brief is not the Council's development proposals but guidance about the site and the important elements which any developer must address."
34. The draft Planning Brief was amended in response to this consultation and was approved by the Development Control Sub-Committee of the Environment Committee on 11<sup>th</sup> February 1999. Mr Burley again prepared the report to Committee. No complaint is made of the report.
35. There were concerns raised by members:

"Members raised concerns about the risk of the planning brief being frustrated, should a satisfactory site not be identified for the relocation of the all weather sports pitch in order to reinstate the green open space lost as a result of the development.

On the question of the possibility of including a condition to secure the removal of the all weather pitch, officers stated that it was not possible to insist that the sports pitch be relocated, however, they agreed to amend the planning brief to reflect the importance of achieving a satisfactory alternative site.

Officers confirmed that the planning brief would be amended to include the reinstatement of the public open space lost as a result of the development as agreed by the Development control Sub-Committee on 5th November 1998".

36. This shows that the suitable relocation of the pitch was important, as too was having a Planning Brief which would not be frustrated for want of a suitable relocation site for the pitch. Mr Wolfe said that this showed the sub-committee had never countenanced a dramatic reduction in size in the all-weather pitch.

#### D. The Planning Brief

37. The Planning Brief as adopted sets out its purpose:

"To clarify the position of the Council as the Local Planning Authority.

To describe the current state of the site, its activities, constraints, opportunities and weaknesses.

To identify and publicise the Statutory Planning framework established by the Draft Unitary Development Plan and the Proposed Modifications (UDP) and any relevant national or strategic guidance.

To provide design and development guidance for any future proposals to improve the Civic Centre site.

To provide guidance on current site uses and the acceptability of alternative uses by reference to the Statutory Planning framework."

38. It would be a material consideration in dealing with planning applications. It referred to a large number of policies in the soon to be adopted Unitary Development Plan as "the most relevant" policies. It then set out the planning history of the site and the existing condition of the site which I have already summarised. It provided design and development guidance within the UDP framework, looking at planning opportunities and constraints.

39. My attention was drawn by Mr Wolfe to a number of passages in it in relation to various of his arguments. Although he made one or two criticisms of it, he did not suggest that it contained guidance as to irrelevant considerations. Nor did he suggest that it failed to comply with the UDP. It appears to me to be a perfectly normal Planning Brief. Mr Jordan in his witness statement draws attention to the design guidance, uses and objectives which it contains. These support that judgment:

"The existing theatre and Citizen's Advice buildings should be removed (LBC10p15 para. 7.4). The retention of the existing sports centre is to be encouraged but, should this not be economically feasible, replacement should be explored (LBC10 p16 para. 7.11-13). A new pedestrian link between the Library and

Sports Centre should be considered (LBC10 p15 para. 7.7). Demolition of the Community Centre would be beneficial (LBC10 PAGE 17 para. 7.14). Consideration should be given to incorporating a part of the present adventure playground into a larger and better quality open space at the centre of the site (LBC10p18 para. 7.19).

"One of the critical factors to successfully improving the whole site is the suitable relocation of the all weather pitch" (LBC10P20 para. 7.20).

All of these recommendations have been taken up in the development scheme.

40. The approved planning brief also sets out the preferred uses and objectives which are (LBC10 p22 para. 8.3):

"To improve and enhance the quality of the public open space at the heart of the site."

"To retain the listed library."

"To retain and enhance the range of social, community, leisure and theatre uses on the site."

"To allow an acceptable level of commercial development (in accordance with UDP Policies and identified design constraints) such as retail, office or private housing (including car-free housing) as part of a mixed use scheme to enable the achievement of the above uses."

41. Paragraph 7.20 dealt with the all-weather pitch:

7.20 "One of the critical factors to successfully improving the whole site is the suitable relocation of the All Weather Pitch. The Council considers that every opportunity should be explored to meet this objective. If the facility cannot be provided on site as part of a new leisure building or on top of the existing Sports Centre then a site within the immediate area should be considered. The pitch's location breaks the existing site into two and inhibits movement through the site. It also reinforces the separation of activities working against the integration of the site."

42. Paragraph 7.21 dwelt on the advantages which the relocation of the all-weather pitch would bring: creation of an area of green public space, opening up the centre of the site for use by all, drawing the buildings and site together through a high quality landscaping strategy and removing a source of stress and nuisance to local residents from illicit late night use and from floodlights.

The conclusion of the Brief in paragraph 7.26 was:

"Overall the quality of the whole site needs improving in particular the central space. Every attempt should be taken to increase the amount of public open space. This could be achieved by the removal of the existing theatre and CAB offices, the relocation of the All Weather Pitch, the re-use of part of the adventure playground, or freeing up space if the sports centre site and the community centre are re-provided as part of a wider redevelopment. The resulting central space together with The Square should be improved as a safe, green space for all to use and which serves to unite the disparate buildings on the site. It should attract more life into the central area as a way of supporting the existing site uses."

43. The Planning Brief also regarded it as acceptable for there to be a level of non-leisure "commercial" development, retail, offices or housing, as part of a mixed use scheme to enable the leisure uses to be provided within the design constraints of the site.
44. Mr Wolfe said that this Brief had not been amended to take account of the requirement of the 11<sup>th</sup> February 1999 meeting expressed in its resolution that the Brief "be approved subject to the inclusion of additional comments from members". There do not appear to be



any changes of note in relation to the all-weather pitch. I do not know whether additional comments were to be formulated outside the meeting or whether they were to be inserted by officers gathering the sense of points raised or whether they were matters which members felt were adequately covered after explanation. Either way, it is too late now to start examining the precise relation of the Brief to the resolution and I decline to find something suspicious in that aspect. The matters complained about, i.e. reinstatement of lost public open space and a satisfactory relocation of the all weather pitch, are covered.

45. Mr Wolfe also drew attention to the officers listed as contacts which included Ms Silcock of Development Control on the proposals and Mr MacDonald of Forward Planning on policies and proposals.

#### E. The Client Brief

46. On 24<sup>th</sup> February 1999, the Leisure and Community Services Committee considered the Client Brief. Mr Burley had no involvement in this Brief. The draft Client Brief described its purpose as being:

"The aim of the Client Brief is to clearly articulate the range, level and type of leisure and community facilities the Leisure and Community Services Committee wants to see provided for Camden residents on the site.

The Brief will identify the minimum requirements, which will need to be included in all proposals. It will further identify desirable requirements. The desired elements included in the final Scheme will be dependent on the overall scheme being viable in terms of availability of space, capital finance and ongoing revenue implications."

47. It said in paragraph 10.2:

"Based on the catchment and the findings of the facility audit it would appear that a minimum 25 metre 6-lane Pool, a Teaching Pool, a 4-court Sports Hall, Squash Courts and an All-Weather Pitch are needed. In addition there is a lack of modern play facilities for the growing number of 0-14 year olds in the area. Other than the existing Swiss Cottage Sports Centre there are also few Gyms or Health and Fitness Centres offering community access."

48. This was criticised by Mr Wolfe as inaccurately recording Strategic Leisure's recommendation that a minimum of a 6 court sports hall was needed. The report in that part adopts the language of the consultants, and save for the reference to 4 as opposed to 6 courts is the same. In its list of sports provision to be made in the sports building, it refers to the 4 court sports hall as "essential" but said that if space and funding permitted, spectator seating would be "desirable as would be a 6-Court Sports Hall." Mr McNicol in his witness statement explained that Strategic Leisure had not taken account of proposals for sports halls planned to be built by the Council within a mile or so of Swiss Cottage and within its catchment area. The report does not give the impression that it is departing from the consultants' views or doing so for the reason given, or even according with their views but meeting the needs in a different way. But I do not consider that this advances any aspect of Mr Wolfe's case. This is the assessment within the Client Brief as to what was needed. The attack is not on the judgment of that Committee.

49. The Brief also referred to the all-weather pitch: it recognised that Camden lacked outdoor playing surfaces and so "needs to jealously protect all existing provision":

"To achieve the open space requirements for the site there is a need to either relocate the pitch elsewhere on the site or to identify another replacement site in close proximity.

The All Weather Court should have an artificial grass surface and be suitable for use for the following sports: tennis, 5 a side football, basketball, volley ball and hockey practise. The minimum requirements for a replacement is a two tennis court size pitch. A 3-court pitch would be welcomed if the space can be identified."

The draft Client Brief presents a clear overall picture of what the various leisure requirements are and why.

50. Mr. Wolfe also drew my attention to the heading "Legal Comments" in the draft Client Brief under which the comments of the then acting Borough Solicitor, Ms Lowton, have been incorporated into the report. It continues:

"She would also add that the Swiss Cottage Site Development project remains in its formative phase. There will be numerous legal issues that will arise during the development process which Legal Services will be instructed to advise upon at the appropriate time".

Mr Wolfe said that this showed her giving active advice on the "Client" side.

51. She described her role in her witness statement. She had never been a member of the Project Group; her role had largely been confined to legal comments on reports from the Project Group to the Leisure and Community Services Committee, the meetings of which she sometimes attended to give advice. She had overall responsibility for all legal officers' advice.

52. Mr Wolfe also pointed out that among the Committee members at that meeting was Councillor Woodrow, Chairman of the Development Control Sub-Committee.

53. The Project Group met on 5<sup>th</sup> March 1999. Mr Wolfe pointed to what the Manager, Mr Wolfenden had said about the all-weather pitch:

"The issue of finding an alternative site for the All Weather Pitch that was the same size as the existing site had still not been resolved. The [Project] Group might have to consider whether a 1 court pitch on site combined with a 2 court pitch off site would be acceptable."

54. Mr Gilks said that:

"Off site alternatives for the All Weather Pitch would have to be considered if Swiss Cottage School did not want the facility on their site"; "the relocation of the pitch was running to a very tight timescale in terms of arranging the management of the site, purchasing land and seeking planning permission".

55. This, Mr. Wolfe said, exemplified the way in which what was a planning or development control matter was being taken over by the "client" developer side. I simply disagree. The developer, private or Council, would be expected to look at that difficult issue in a variety of ways.

56. The Project Group briefed the Corporate Management Team on 31<sup>st</sup> March 1999 as it did on a number of occasions. It was to receive monthly reports. It comprised most Senior Council Officers including the Chief Executive. On 31<sup>st</sup> March 1999, it "identified the relocation of the all weather pitch as a critical public relations issue for the project". Mr Wolfe submitted that this, in view of the way in which the matter evolved, showed that the Council was treating itself differently from the way in which it would treat an external leisure developer: the need for the retention or suitable alternative replacement for the pitch would have been clearer in the Planning Brief, the members' comments would have been taken on board, and the mechanism for giving effect to that need would have been identified. It would then have been for the developer to explain and the Council as planning authority to consider why permission should be granted in the absence of satisfactory alternative provision being made. The all-weather pitch continued to be of interest to the Corporate Management Team.

57. The Council's majority Labour group also met to consider the project on a number of occasions. This Group received a report from the Project Group in March 1999 before the Leisure and Community Services Committee meeting. On 29<sup>th</sup> April 1999, Mr Gilks and Mr McNicol attended a Labour Group meeting with his assistant director Ms Mangan; these meetings and others were said by Mr Wolfe to exemplify a level of political access which simply would not have been available to an external developer.
58. On 5<sup>th</sup> May 1999, the Leisure and Community Services Committee met to consider the Client Brief. The Camden Federation of Sports Association, now the Camden Sports Council, an informal association of local voluntary sports organisations is an advisory, non-voting member of that committee and attended a number of meetings in 1999 when the Client Brief was discussed. Councillor Woodrow, Chairman of the Development Control Sub-Committee, was present as a member of the Leisure and Community Services Committee, until the Swiss Cottage development came up when he deliberately left so as to avoid any suspicion of influence because of his development control position. Councillor Mennear declared his non-pecuniary interest as a member of the Camden Federation of Sports Associations, and stayed, perfectly legitimately.
59. The Committee agreed the Client Brief so far as it then went, agreed to seek developer submissions for the redevelopment of the Leisure Centre, and to continue the dialogue with user groups on the proposed redevelopment. It also recognised that there was a funding gap of £2.47m, subject to variation following developer bids, which the Council would have to find ways of financing; the Finance and Resource Management Committee would be involved in that. There was all party support for the proposals.
60. The report to Committee had dealt with a range of options including doing nothing; it concluded that the redevelopment option, with various amounts of residential development to provide funding, was the best option. Schemes would have to be worked up and tested for viability and for content. The scheme would evolve with further public consultation, agreed as lasting till the end of February 2000, and would have to pass through the planning process. It was in fact still a long way from a crystallised scheme fit for a planning application. There was a significant legal input as the next stages in implementation were being examined, which involved seeking bids and compliance with EC Public Procurement Directives.
61. The report dealt with the all-weather pitch:  
 "In order to secure the open space objective, the divisive location of the all-weather pitch has to be addressed. To achieve this, it must be either be redesigned or preferably relocated off site. . . . However, the local community as well as the Winchester Project have a need for an outdoor play/sports activity area and it is considered that a smaller "one court" facility suitable for tennis and 5-a-side football could be accommodated on site."
62. On 28<sup>th</sup> May 1999 the Project Group minutes recorded that the leader of the Council was to be invited to give the keynote address to prospective developers, indicative said Mr Wolfe of a high level of political commitment, although correspondence suggests that he did not in fact attend. Mr McNicol referred to the criticism which a 4 court sports hall would engender, with a clear explanation being required as to why a 6 court hall was not an option. Mr Wolfe submitted that this showed a different approach to its provision from that which would have been adopted had it been a private development proposal.
63. On 11<sup>th</sup> June 1999, Ms Mangan reported that it did not appear possible to include a 3 court all weather pitch on site and that she had been unable to locate a suitable site for a 2 court pitch off site. Later on in June, possible alternative sites were referred to in the Project Group but they still had to be assessed.
64. Consultation on the Client Brief continued and those consultation responses were considered at Committee meetings in June and July 1999. In the report for the 29<sup>th</sup> June 1999 meeting, Mr McNicol made specific reference to the proposed Talacre Sports Centre, which is within the Swiss Cottage catchment area, in the context of the Client Brief's minimum requirement for a 4-Court Sports Hall, compared to the existing 4/5 Court size. If a 6-court hall were structurally and financially viable it should be pursued and developers would be asked to put forward bids for both sizes. The report referred to the need for a one court size all-weather pitch on site, and to investigations for alternative locations, because the Camden Federation and the Winch wanted to retain the same size pitch on site. The report said:

"Members will recall one of the key objectives for the site is to improve the public open space this is encapsulated in the planning brief for the site and was a strong recommendation from the Citizen's jury. This objective will be compromised if an All Weather Court of a similar size has to be located on the site."

A briefing meeting for members was held on 21<sup>st</sup> July. The purpose of this briefing, according to Project Group minutes was:

"to provide clarification to members about how the funding of the scheme related to the provision of facilities on the site. It would be made clear to members that the implementation of the project would be at risk if changes were made at this stage."

65. Members were to be briefed on the option for the swimming pools, courts/sports hall and the all-weather pitch. The aim, as I read it, was to get members on side, but to do so without reopening issues about facilities and finance in such a way that the prospective developers and leisure operators, who were already being approached, lost confidence in Camden's desire to proceed with the development. Mr Wolfe highlighted a reference to the undesirability of suggestions from the sports lobby threatening the project's implementation and to concern over creating uncertainty about the project "at a point where certainty about its future should have been reached", as showing that there was a lack of open-mindedness on at least the part of some officers. Subsequently Mr Gilks told the Project Group that the briefing had provided clarity for members. Mr Wolfe said that an outside developer would not have had such access. Mr McNicol also again referred to the minimum need for a 4-court sports hall in view of the proposals at the Talacre Sports Centre and at Haverstock School.
66. At the 26<sup>th</sup> July 1999 meeting the Client Brief was finally agreed, for issue to developers. The report for the 26<sup>th</sup> July 1999 meeting of the Leisure and Community Services Committee, prepared by Ms Mangan, referred to Strategic Leisure's recommendation for a 6 or 8 court sports hall. It referred to the need for private sector development, of some form or other, to cover the funding gap of £2.47m as had been discussed in the Planning Brief. The mix of uses and the extent of the funding gap meant that the demand analysis provided by Strategic Leisure could not be met in that respect. A larger sports hall would create design problems because of its bulk, intruding into sight lines to the listed library; if located elsewhere, a loss of open space could result; these outcomes would be problematical in the light of the Planning Brief. A larger hall would reduce the scope for enabling residential development, whilst increasing the gap to be funded.
67. The report stated that no alternative site had yet been found for the all-weather pitch; the search would go on but the officer's view was that the best solution was a one court pitch on site and a larger pitch elsewhere. If no such site had been found by February 2000, the landscape designers could still be asked to incorporate a larger one on site.
68. The Client Brief as eventually approved is a very substantial document, just over 100 pages long. The facilities required are described in very considerable detail. The swimming pool was to be an 8 lane 25 metre pool, with seating for up to 200; there was to be a teaching pool. A four-court sports hall with a clear 9.1 metre height was required, along with other courts, fitness centre and children's play area.
69. A rather shorter Client Open Space Brief was also approved; it dealt with the size of the all weather pitch (40 metres by 18.5 metres), pedestrian linkages, informal open spaces, other play facilities including one for 5-13 year olds. The site of the disused adventure playground could be incorporated. Mr Wolfe highlighted that the decision that there should be a one court pitch on site was a decision made by the Client or Leisure function of the Council. The Project Group had recognised that the all-weather pitch was an issue which needed resolving "in order to defuse detractors and those who were not in favour of the scheme." The Leisure and Community Services Committee " would have to take a positive approach to finding a solution". Solutions were considered at length in October 1999, on a number of occasions.

#### F. The involvement of external developer

70. The Planning Brief, the relevant Client Brief, and general supplementary design guidance were sent to the four competing landscape designers and the four competing leisure centre developers, together for the latter with a description of the way in which financial bids were to be structured.
71. There was then another period of public consultation on the competing proposals from November 1999 for 3 months. Mr McNicol described how widely the proposals were publicised: 25,000 flyers for a public exhibition, 150 posters, meetings, advertisements; it was, he said, the most extensive consultation which the Council had ever undertaken on its own development proposals. Nearly 3,000 people attended the exhibition; there were questionnaires and interviews. A specialist consultancy organised and reported on this exercise.
72. In December 1999, the Council Leader visited the site and was fully briefed during his visit. The Project Group minutes of 11<sup>th</sup> February 2000 reported that there had been regular member level briefings and "there was a commitment from the Chief Executive to see the project completed". Member level briefings continued.
73. On 8<sup>th</sup> March 2000, full Council rejected a motion from Councillor Mennear expressing regret at the proposed reduction in the size of the Swiss Cottage all weather pitch.

74. On 7<sup>th</sup> April 2000, the Project Group agreed that Mr Gilks should brief all political parties following the briefings of the Member and Labour Groups. These briefings took place on 12<sup>th</sup> April, and Mr McNicol reported to the Project Group that the majority group had given strong support to all the recommendations. The Project Group meeting of 7<sup>th</sup> April 2000 also referred to the consultation process:

"There would be a twin track of consultation, including the statutory requirements and the Council promoting its own application. As the project progressed more thought would be given to whether the applications would be considered at full Council."

75. This was, said Mr Wolfe, the "developers' committee" discussing how the application should be discussed by development control.
76. The external consultants' report on public consultation was one of the documents used in the evaluation of the prospective developers' proposals. The evaluation was presented to the Leisure and Services Committee on 12<sup>th</sup> April 2000. The report recognised that there were matters relating to the preferred leisure scheme which would have to be resolved in the course of the planning process through which the eventual applications for planning permission would have to pass. Dawnay Day Structured Finance Ltd was recommended as the leisure centre developer; it proposed to create a special purpose vehicle with Barratt Homes Ltd to deliver the total built project. Gustafson Porter were recommended as the landscape designers.
77. The report also recommended that a planning application be made to Westminster City Council for the replacement of the part of the all-weather pitch which would be lost on site, at Quintin Kynaston school, some ten minutes walk from the site but outside Camden's area. Discussions with the School Governors had proved fruitful. This idea had first been discussed by the Project Group in January 2000 when the Project Manager, reporting on the Landscape Design Selection Process had said:

"Any increase in the size of the pitch would have to be looked at in relation to the planning brief. If an alternative for the pitch was not found then the decision about the open space should be delayed."

Progress had been discussed at each subsequent meeting.

78. The summary of the report was enthusiastic about the prospects of development. The report also set out the next steps, which included continued management by the Project Group, co-ordination between the component parts, planning and related applications to be submitted at about the same time, and implementation of works at Quintin Kynaston school. The Committee was also asked to confirm that a four court sports hall and a one court all weather pitch were required.
79. At the actual meeting, on 12<sup>th</sup> April 2000 two members of the Committee who were also members of the Development Control Sub-Committee declared a non-pecuniary interest for that reason: they might be considering future planning applications. The Borough Solicitor, Ms Lowton stated:
- "each individual member should make a judgment on this at the time any such applications were considered. However, the proposals currently before the Committee would be likely to be considerably amended before becoming formal applications. This being the case, members may well be able to take the view that it was appropriate for them to participate in the Development Control Sub Committees determination of any such applications, notwithstanding their consideration of the proposals tonight."
80. Deputations were received at the meeting from young people opposing the proposed reduction in the size, of the sports pitch, from a local school, Holy Trinity, likewise concerned at the reduction in pitch size and swimming pool size and from the Swiss Cottage Community Association in broad support of the proposal.
81. There were discussions about the extent of school use and the scale of facilities needed; if the Quinton Kynaston pitch proposal were refused planning permission "then the matter would be reported back to the Committee", said Mr McNicol. Councillor Mennear specifically argued that a 6 court sports hall, two 25 metre 8 lane pools and an all weather pitch of the same size as currently exists should be provided. Mr McNicol referred to the cost of a 6 court sports hall; Mr McNicol and Mr Gilks as Director of Environment referred to the planning and design problems of such a building and to the risk to viability. Mr Mennear's proposed amendments were defeated on a vote, and the report recommendations were accepted.
82. Before the selection of a developer had been made, Mr Jordan's staff, according to his witness statement, restricted themselves to providing planning comments on various outline schemes from prospective developers

and on their relationship to the UDP or Planning Brief. He said this was like any other pre-application advisory service. The same discussions continued with DDFS after its selection.

83. Mr Wolfe's case is that this highlights the confusion in the Council's mind: DDFS were undoubtedly developers but so too was the Council through its Leisure and Community Services Committee in substance, and indeed in form as the applicant in relation to the Library and open space proposals; part of the Council's functions should have been recognised by the planning function as being on the other side of the fence, as a developer-applicant.

#### G. The planning applications

84. The planning and listed building applications for the three components were submitted by their various applicants on 19<sup>th</sup> and 20<sup>th</sup> June 2000; subsequent revisions were made. They went through the statutory public consultation process and also additional public consultation including an exhibition in the Library; there were press and site notices, some 500 written notifications to interested persons and the applications were referred to on the Council's planning website.
85. They were not advertised as applications which departed from the Development Plan because the planning officers considered the issue and did not consider that there was any departure from the UDP. This does not appear in any witness statement from the Council because of the way in which the question of whether they ought to have been treated as departures arose. However, this is what Mr Hockman QC for the Council told me; it was not disputed by Mr Wolfe and I accept it. The listed building and conservation area consents had to be referred to the Secretary of State because the Council cannot grant itself such consents; those were granted on 10<sup>th</sup> July 2001. They are relevant to the overall project but particularly to the Library refurbishment application which is not controversial before me.
86. On 28<sup>th</sup> July 2000, the Project Group discussed under the heading "Project Programme" :  
  
"whether the applications should be submitted to full Council, and this was felt to be advisable in both political terms, and in terms of procedure whereby the site was being appropriated for planning purposes involving a mixed development. JW felt this would be a useful device to ensure that covenants were removed, and said he would discuss this further with Ted Totman."
87. Mr Totman was the Project Group's external legal adviser, a specialist in development agreements. Mr Wolfe said this was an odd matter for the developer to be discussing.
88. Mr Wolfe referred to the role of Ms Silcock a principal development control planner. She was asked to attend and did attend a half day meeting on 28<sup>th</sup> April 2000 with DDSF and Barratts and other members of the Project Group; this followed an earlier meeting between her, the Project Manager and the Project Planner. In correspondence, Camden explained that this was really an informal meeting between all parties in various capacities to meet face to face. Ms Silcock met the people with whom she would be negotiating. On 14<sup>th</sup> July 2000 the Project Group thanked her for registering the applications "swiftly". Unlike Mr Wolfe, I saw nothing at all untoward in that.
89. Mr Jordan and the development control team examined the applications, the public consultation responses and concluded that revisions and improvements had to be made. These were negotiated over the summer and autumn. Ms Silcock joined two meetings of the Project Group to comment on the scheme and to discuss alterations to the applications. In particular on 6<sup>th</sup> October 2000, she explained various design problems such as bulk, overlooking and daylighting which the residential towers would create.
90. Mr Wolfe placed reliance on the passage in the Minutes of that meeting under the heading "Client Report" and sub-heading "The Winchester Project", stating "A firm line needed to be taken with the Winch to ensure success". On 20<sup>th</sup> October 2000, the Project Group minutes referred to a meeting between Gustafson Porter and the Winch's architects - the latter had its own proposal - which Ms Silcock attended to express planning views. There is no evidence that Ms Silcock put any pressure on the Winch which, whilst not pursuing any proposal of its own, maintained its opposition to the Council's scheme. On 3<sup>rd</sup> November 2000, Ms Silcock was invited to attend the start of the Project Group meeting so as to be informed of the latest news from the developer's architects.
91. The Project Group, in September 2000, had talked of a sustained public relations effort being "needed to get the Council's message across." On 3<sup>rd</sup> November 2000, the Project Group minutes record:

"The three applications would be registered next week. This will generate press interest and need consultation. A day to day programme was needed until Council in January that would detail every stage in the process. Every Councillor would need to be given a briefing note informing them of the project. AB expressed concern over the legality of this and advised that a precedent should not be set that allowed planners to 'court' Councillors' views before the planning had been granted permission. MG stressed that informing Councillors was in line with being open about the project and informing them of the process."

This was the Senior Planner's report.

92. A range of revisions were made in December 2000 to the main leisure centre and residential development applications in consequence of these discussions: the number of residential units was reduced, the leisure centre design particularly at roof level was altered, together with other design and layout changes. Further revisions were made in February 2001 to the number and mix of residential units, increasing them to 169 of which 41 would be "affordable housing."
93. In December 2000 and February 2001 further changes were made to the open space application and in December 2000 to the Library proposals.
94. Each of these changes was the subject of extensive public consultation. The public consultation leaflets both in September 2000 and Spring 2001 referred to the making of a planning application for additional facilities at Quintin Kynaston School, but did not suggest any risk of failure or fall back in that event.
95. In January 2001 the Project Group agreed that Mr Gilks would raise with Mr Jordan "resourcing problems" in the context of dealing with the applications. Why, said Mr Wolfe, would the developer discuss resources with development control? In fact, Ms Silcock was leaving the Council in January 2001, and hence was not involved in the report writing for development control.

#### H. Advice on members' position

96. On 10<sup>th</sup> January 2001, Ms Lowton wrote to all members advising them that there would be member briefings in relation to the scheme and how they should approach the scheme. Its terms are important:

"Members will be aware that revised drawings for the above planning applications are now being consulted on, in accordance with statutory requirements under the Town and Country Planning Act 1990.

As the local planning authority, the Council will have to determine these applications. This will take place at the full Council Meeting on 22<sup>nd</sup> January. Prior to that Meeting the DC Sub Committee and the main Environment Committee will also consider the applications (but not determine them).

Because the development site is owned by the Council there will be a number of Information Briefings in respect of the scheme. The purpose of these Briefings is to keep members informed about the general progress of the scheme. They are not intended to influence Members to vote in a particular way when the planning applications are considered.

It is imperative that when Members consider the Planning Applications they do so with an open mind and only take into account relevant planning considerations. They must disregard any irrelevant consideration, particularly anything relating to the fact that the Council is the landowner of the site. Given that members must be seen to be fair and impartial in determining the applications, they should if possible refrain from making comments to the press. Particularly given that members can sometimes be quoted out of context in articles. In particular no member should make any statement in the Press or in a public meeting about how they intend to vote in determining the planning applications.

When they come to consider the Applications, Member should not have regard to what they've been told in Information Briefings or what they know about the scheme from other sources (e.g. the press or from attending other meetings of the Council). They must firmly base their decision on planning considerations having regard to the matters set out in the officer's report on the planning Applications, to the officer's presentation on the application at the meeting and any representations made to the meeting.

If any Councillor feels that they could not consider the application with an open mind or believes that a member of the public knowing all the facts would think the Councillor was not considering the application with an open mind, then that Councillor should not participate in the determination of the application."

97. On 19<sup>th</sup> January 2001, at the Project Group, Mr Gilks asked Mr Brookes, a Council lawyer:

"MG asked AB to advise Members on procedures for voting on the planning applications if they, for instance, sat on the Board of Hampstead Theatre, or had some other kind of interest in sport, leisure or Swiss Cottage generally.

ACTION BY: AB

AB asked if a site visit was appropriate for all Members to get an idea of what the project entailed. RM agreed to arrange if necessary.

ACTION BY: RM

MG stressed that the whole planning process and informing Members needed to be conducted in an open manner. There would be a report and a presentation at Development Control Sub-Committee and at Council, it being especially important for Council members who may be inexperienced in dealing with planning applications. Mike Jordan would present the report at both meetings.

98. On 24<sup>th</sup> January 2001, Ms Lowton wrote specifically to Councillor Mennear who was opposed to the scheme. Mr Wolfe said the object of the letter was to "lean" on him not to participate. In her letter, Ms Lowton referred to her earlier letter to members; she then referred to a letter from Councillor Mennear, critical of the scheme which had been published in a local newspaper:

"Although you stop short of stating which way you intend to vote on the Applications your letter implicitly suggests that you have made up your mind to oppose them. This means that you might appear to have made up your mind on the planning issue before all the relevant information has been given to you. In turn, that suggests that you may not be coming to the relevant meetings with an open mind."

99. After referring to the Local Government Ombudsman's advice on participation, she concluded by saying:

"In the light of your letter of 5<sup>th</sup> January, you need to consider whether you can demonstrate that you are approaching this matter with an open mind. There is no reason, of course, why you could not have made your mind up already. However, if that were the case, I would advise you to consider very carefully whether you should take part in the Council meeting discussion."

100. Mr Wolfe suggested such an approach should have been adopted in relation to other Councillors, including scheme proponents on the Leisure and Community Services Committee. Councillor Mennear did in fact participate at the Council meeting, declaring that he approached matters with an open mind. Councillor Turner, Chairman of the Leisure and Community Services Committee was advised by Ms Lowton that it would be preferable for him to be absent from that meeting because of his identification with the project. He did not attend.

101. On 2<sup>nd</sup> February 2001, Ms Lowton again wrote to all members giving advice on participation in the decision-making process on the applications. Its terms again are important; in part it repeated what was said about relevant and irrelevant considerations, but it enlarged considerably on the circumstances in which members should not participate. She advised:

"No Councillor should participate in consideration of the Applications (whether at Full Council or elsewhere) if they have or feel they have a "clear and substantial interest" in the Applications. In this context a Councillor would have a clear and substantial interest if he or she believes that they cannot consider the Application with an open mind or believes that a member of the public knowing all the facts would think the Councillor was not considering the Application with an open mind.



Any councillor who feels that they have a clear and substantial interest in any of the Applications should declare that interest as early as possible in the meeting and withdraw for the whole time the item is under consideration. The Local Government Ombudsman has advised that Members with a clear and substantial interest should not try to lobby or influence their fellow members in any way. This applies at all stages from Development Control, through Environment Committee and includes full Council.

What is a "clear and substantial interest" / membership of other Committees

Whether a member has a clear and substantial interest is matter for that member to decide.

However one factor that is relevant to this issue is membership of Committees that have previously considered reports on the Swiss Cottage Site from a land ownership perspective. This principally relates to Leisure and Community Services Committee which actually holds the land and has approved various Reports relating to the Development which is the subject of the Applications. It also relates to Finance and Resource Management Committee, which has approved financial arrangements for the Development.

Membership of another Committee with an involvement in a matter does not necessarily disqualify a member from considering a Planning Application. There is case law which indicates that it is not necessarily procedurally unfair for councillors who sit on one committee to also sit on the Planning sub committee which is determining a planning application related to the work of the first committee. All planning applications had to be considered on their merits and there was no evidence in the case before the Court that any of the councillors had closed their minds and thus failed to consider the application on its merits.

However it needs to be borne in mind that this case reflects the position in case law and the Local Government Ombudsman may take a much narrower view of what is permissible when considering issues of maladministration. Furthermore, the case should not be interpreted as automatically permitting all members of Committees who have previously considered the Swiss Cottage Development to participate in considering the planning applications.

Each Councillor must decide whether they feel they can consider the application with an open mind or believe that a member of the public knowing all the facts would think the Councillor was considering the application with an open mind. If a member feels that they cannot consider the issues with an open mind, then they must declare a "clear and substantial interest" and not participate in the item at the meeting. In my view members who have been particularly closely involved with the Development (e.g. the Chair of the Leisure and Community Services Committee) or who have gone on record as unequivocally supporting or opposing the Development would find it harder to demonstrate that they were approaching the Application with an open mind. Most "ordinary" members of the Leisure Committee would find it easier to demonstrate their impartiality in approaching the Applications. However in each case, it is a matter for the individual Member concerned having regard to the extent of their involvement.

Membership of other Organisations.

Some Members of the Council may be members of local organisations in the Swiss Cottage area such as community forums or other community groups. However unless these groups were directly affected by the Development e.g. the group would have to give up premises or significant facilities as a result of the Development, then such an interest is unlikely to amount to a clear and substantial interest. Even if the group is affected by the Development to a significant degree, then the relevant member may still not have a "clear and substantial interest" unless they were particularly involved with that organisation e.g. were on its management committee. However for reasons of transparency, members should declare membership of such organisations as a non-pecuniary interest. Declaration of a non-pecuniary interest which is not clear and substantial does not prevent a member speaking or voting on the relevant item members should read the relevant paragraphs of the Code of Governance on this issue (paragraphs A4h-j).

Speaking to the Press

Finally I would reiterate previous advice that members should be very cautious about talking to the Press on the applications or on Swiss Cottage generally and in particular should not make any

statement in the press or in public about how they intend to vote (unless they intend not to participate in the Meeting.)

I hope this of assistance. If you are unsure of any aspect of the advice, I would urge you to contact me to discuss further."

102. On 2<sup>nd</sup> February 2001, the Project Group referred to the need for the section 106 agreement to reflect the development agreement, both of which were in the drafting stage. Mr Wolfe said that this was an odd way round to put matters. It was odd also that Mr Totman, the Project Group's external solicitor should draft the section 106 agreement, with some assistance by way of precedents from Mr Brookes who also attended Project Group meetings.

#### I. The planning reports to Committee and Council

103. On 19<sup>th</sup> February 2001, the Chairman of the Development Control Sub-Committee, Councillor Woodrow, was briefed by Mr Jordan and Mr Brookes, by the former as head of Development Control and by the latter as legal adviser and clerk to the Sub-Committee. This issue was raised by Mr. Wolfe because Mr McNicol at the Project Group had thanked everyone for their hours of hard work in finalising the report to Development Control Sub-Committee. Applicants or their representatives, said Mr Wolfe, would not be present at this commonplace pre-meeting briefing. However, the Project Group were not involved in writing any of the Committee Reports; Mr Brooke's role was to provide legal clearance.. This is set out in correspondence answering the Claimants' solicitor's request for certain information.

##### i) The Overview Report

104. Mr Jordan states in his witness statement that the four reports for the Development Control Sub-Committee, Environment Committee and ultimately for the full Council were prepared under his supervision. One report was an overview report; the other three each dealt in detail with a specific component of the scheme: leisure centre and residential development, library and open space.

105. The overview report described briefly the background to the proposals: the consultations carried out by the Council as landowner with the Citizens' Jury, the origin of the Client Brief, the involvement and selection of the Council's development partner, the planning consultations. It described the proposals and summarised the main planning issues. Paragraph 4.1 referred to the need for decisions to accord with the UDP by virtue of section 54A unless material considerations indicate otherwise.

106. The Planning Brief was described as particularly material; the various aspects of the development were assessed against the requirements of that Brief and, except for the affordable housing as to which the Brief was silent but which was in welcome accord with the UDP, were found to comply with it. The Brief was annexed.

107. The advantages of redeveloping the sports facilities over refurbishing them was referred to; although this was the conclusion of the Leisure and Community Services Committee, the matter had also been assessed on the same information by planning officers, who concurred with the Committee's assessment. In paragraph 4.9, the report commented, in a passage which Mr Wolfe criticised as showing that the planning function was fettering itself, that

"The nature of the sports and leisure facilities required as part of the development proposals are essentially matters for the consideration of the Leisure and Community Services Committee and its judgements informed the Client Brief".

108. The need for the all-weather pitch to be removed from its present location was discussed, and the potential provision of an additional all weather facility on the nearby school site was referred to. The officers commented that these facilities "would be very welcome, but if this was unachievable for any reason, this would not amount to a justifiable reason for refusing the current proposals".

109. Environmental impacts were discussed. I set out the daylight, sunlight and overlooking impacts because of the human rights issues raised by the fifth Claimant:

"Daylight and sunlight assessments of the proposed residential scheme have indicated the likelihood of some infringements in daylight provision to adjoining residents in Winchester Road. However, it is the case that to maintain existing daylight levels would require a significant reduction in the size of the residential building to

a degree which would make the overall scheme unviable. Refusal of the development on the grounds of loss of daylight could not be justified."

110. The brief conclusion of this overview report included the statement that "the development has paid due regard to the Council's planning policies as set out in the UDP and to the specific planning brief × the overall conclusion is that the development in its present form will offer major community benefits and is to be welcomed". In general terms there was not, and could not be, complaint made of this report.

111. The Borough Solicitor added comments about material and immaterial considerations, highlighting the relevance of the UDP and Planning Brief. She made the same comments as in her letters to members about participation. She referred to the Note from Legal Division at the start of the Agenda. It was also available for the full Council meeting. I set out part of it:

"This note reflects the conventions adopted by the Development Control Sub Committee in determining Planning matters. It is anticipated that the Full Council Meeting of 7<sup>th</sup> March 2001 will adopt the conventions of the Development Control Sub Committee in considering various planning proposals for the Swiss Cottage Site. Consequently this Guidance is equally applicable to meetings of any other forum considering planning matters. Its main purpose is to ensure that the Council acts reasonably and openly in dealing with planning matters and to protect the Council and individual Members from allegations of unfairness, findings of maladministration and legal challenge."

112. The advice reiterated that members had been advised to minimise their involvement in the planning issues so far as possible before the meeting so that they could be, and could be seen to be, approached with an open mind. Reference was made to the need to ascertain and declare pecuniary interests, and clear and substantial private or personal non-pecuniary interests, and to leave the meeting. The relationship of councillors to members of the public in the time leading up to a meeting had to be such that councillors could, and could be seen, to act fairly at the meeting. Political group meetings should not be used to decide how councillors should vote.

ii) The Leisure Centre Report

113. The Leisure Centre Report covered not just the new building complex for sports and leisure but also the market and affordable housing units, a doctor's surgery, a new community centre and ancillary matters.

114. In the conventional way, it dealt with the site and its surroundings in some detail and then described the proposal including revisions which had been made to it. The relevant planning history was set out including the approval of the draft planning brief in February 1999. The response to public consultation was set out so that the various objections could be seen. They included objections to the reduction in general sports facilities on the site, to the loss of the Winch's adventure playground and to the reduction in the size of the pool. There was an objection that the block of flats would cause overshadowing of the rest of the site. Petitions from objectors were referred to: these petitions covered the reduction in size of the sports hall and of the all weather pitch.

115. There was then a long list of policy numbers from the UDP set out under the general introduction "Relevant policies include the following: × Policy EN 68/70 "No loss of public or private open space and Other Green Open Land", (I add that this summarises the policy not the effect of the proposal), Policy EN 71 "Playing fields and open sports and recreational facilities". Policy LC 1 "Safeguarding existing leisure provision" is also referred to. The flavour of the range of policies referred to can be sensed from such policies as Policy RE 1 "Improving environmental quality and promoting regeneration", Policy EN 4 "Providing safe and attractive public spaces" Policy TR 4 "Traffic Impact Statements", Policy HG 15 "Visual privacy and overlooking", and Policy SC 5 "Expansion of health care provision".

116. The main section of the report is headed "Assessment." Paragraph 6.1 states: "The following assessment relates the proposals to the key elements of the approved Planning Brief and UDP policies and standards which underlie it. The main issues are:

Land use considerations ×

Impact of developments on neighbour amenity ×."

117. In the section headed "Land use considerations," the report compared the proposals to the Planning Brief and made specific reference to two UDP policies. The requirements for the provision of facilities within the new leisure building was stated to be based on the Client Brief drawn up by the Leisure and Community Services Committee; these were then set out. The report referred to the fact that a number of objections had been raised to the nature of the sports provision in the new centre and to the "perceived reduction in sporting facilities, particularly the reduced size of the swimming pools." The analysis of these objections by the Director of Leisure and Community Services indicated the response to those objections and concluded with his view that the provision would enhance the range of facilities and provide a first class wet and dry leisure centre; a particular feature of his analysis was the greater flexibility provided by the proposed design which compensated for the overall smaller pool area. (One of the problems at present was the unused but substantial quantity of spectator seating at the pool).

118. In paragraph 6.6 the report stated:

"Whilst overall before and after floor space figures listed at the front of the report suggest that the new leisure building would be smaller than existing, in terms of the actual areas of activity spaces (i.e. pool size, sports hall area, health and fitness space, etc.) there would be an increase in floor space from 2440m to 2934m

6.7 in the light of the above it is considered that the proposals would comply with UDP's policy LC 1 which seeks to safeguard existing leisure provision."

figures referred to at the front of the report showed that the existing sports centre at 9200m<sup>2</sup> was 2,200m<sup>2</sup> larger than the proposed sports centre, although the community centre as proposed would be 150m<sup>2</sup> larger at 472m<sup>2</sup> square metres than the existing community centre.

121. The report referred to the potential for retaining the sports building and stated that the Brief had sought the retention of the sports building "unless its refurbishment is not economically feasible. Refurbishment has been considered by the Director of Leisure, but was discounted for reasons which included the out of date building frame which did not lend itself to refurbishment, the large areas of poorly utilised space, the greater costs of refurbishment whilst providing inferior facilities, which also meant additional capital costs and poorer revenue return compared to a rebuild. " Planning Officers concur with the Director of Leisure that the option to rebuild is the best one in the circumstances and this would accord with the Planning Brief." On this aspect the report concluded that the new leisure centre building would be: "Pivotal to the transformation of the site and to ××. the key objectives of the Brief addressing the weaknesses of the existing building. The siting, scale and footprint respect the context and would enhance the setting of the listed Library Building. In addition, the scheme enables the provision of an attractive and useable public space forming a green edge to the southern boundary of the site. The contemporary innovative design would be of exceptional quality producing a legible, robust user-friendly public building acceptable to all."

122.A range of other planning matters are considered, including urban design, the residential and community centre buildings, compliance with residential policies and standards, amenity space, transport issues including car parking access and cycle parking. The report then turns to the impact of developments on neighbour amenity. In view of Mr Wolfe's submissions in relation to the fifth Claimant's human rights it is necessary to refer to these issues. Policy EN 27 in the UDP was relevant to this issue:

"as it deals with the impact of development in daylight/sunlight, outlook and overlooking. The proposed residential development in the south-eastern corner of the site raises issues regarding impact on amenity of occupiers on the east side of Winchester Road notably lower level flats in Taplow Tower × The Planning Brief raised the issue of maintaining the amenities × of this terrace as a potential constraint on the height of building development on the site."

123.Ms Cooke, the fifth Claimant, lives in a fifth floor flat in Taplow Tower. The report referred to other reports submitted by the applicants, prepared by independent consultants from the BRE and from Gordon Ingram Associates, which used different methods for assessing the effect of development on daylight. In the case of Taplow Tower windows to flats facing onto Winchester Road on the ground and first to fifth floors were assessed in terms of daylight and sunlight. A figure of 27% vertical sky component ("VSC") is considered to provide a reasonable standard of natural daylighting. The report concludes that: "In the case of Taplow, flats VSC levels would similarly be reduced to levels significantly below the 27% standard." This is a reference to reductions in VSC to between about 15% to about 21 to 23% in the lower flats. The report identifies the intricate debate which daylight analysis can give rise to, between the vertical sky component and the average daylight factor methods. The report concludes on this issue:

"Notwithstanding the views of the consultants, officers consider that the proposals would have a negative impact on adjoining residents in the above properties in terms of a noticeable reduction in daylight and inevitable reduction in outlook caused by the size of the new development. However, it is appropriate to note that the impact of a new development in this location on the Swiss Cottage site is not likely to be significantly improved through a lowering of the height by cutting out a few floors. The extent of the change necessary to achieve the 27% standard will necessitate a radically different approach to the distribution of building bulk on the site and may therefore significantly impair the benefits which would accrue in the current proposals."

124.So far as sunlight is concerned an analysis had been carried out in relation to the Winchester Road properties and it was concluded that the occupiers would still enjoy reasonable sunlight, officers did not dissent from that conclusion. In terms of overlooking the report concluded that so far as Winchester Road properties were concerned "It is not considered that overlooking and loss of privacy would arise."

125.The report recommended that the sub-committee recommend that planning permission be granted subject to legal agreement and that the Environment Committee and do likewise.

126.The report on the refurbishment of the library is not controversial.

### iii) The Open Space Report

127.The third report related to the open space and in particular to the removal of the sunken ball court and the development of a new landscape park, a new floodlit ball court and various other aspects of open space provision. The report followed the same pattern as the first report and there is a good deal of overlap between the background and consultation responses referred to. A shorter list of policies is identified without any introductory words. Policies LC 1 and EN 71 are not referred to in the list. The report stated that although the site had to be considered and designed as a whole,

the scheme "nevertheless raises important issues concerning the displacement of existing structures and uses on the site which have raised many objections from consultees. These issues are:

"(b) the demolition and replacement on site of the all weather pitch

The demolition of part of the Winch's adventure playground and its incorporation into the open space scheme."

128. The report identified the problems which the current layout of the site suffered from as a result of the location and size of the all weather pitch, and the nuisance which its use created for nearby residents. It referred to the proposed one court size pitch and the games which could be played upon it. It stated:

"Overall the pitch would be well integrated, making good use of ground levels and being well overlooked from the leisure centre and surrounding areas. Because of its design and location it would not disrupt the open space, and nuisance (noise and glare) to residents of Winchester Road should be much reduced if not eliminated."

The report referred to the progress then being made on proposals for additional all weather sports pitch provision at a nearby school. No reference was made as to what was to happen in the event that the planning application in relation to that provision was unsuccessful. Mr Wolfe submitted that this showed a different approach being adopted towards the Council's proposal from that which would have been adopted had this been a private development.

129. The advantages of the removal of some of the land currently used as an adventure playground were also referred to: the playground was disused and unsightly and the incorporation of part of it into the new public open space would produce a more coherent area. The Officers reported that a realignment of a path would provide a greater area to the rear of the Winch which would be suitable for a multi-level external play area for the age groups for which the Winch sought to cater. The other aspects of the open space were then referred to and the conclusion reached that the Development Control Sub-Committee, the Environment Committee and the full Council should be recommended to approve the application.

## J. The Committee debates

130. Discussion of these reports at the Development Control Sub-Committee took place over the course of two evenings in February 2001 because of the time required to deal with the issues; in fact they occupied a total of 5 hours. The Sub-Committee had copies of all further public correspondence, and of a range of other appendices. It received 9 deputations of which 7 were opposed to the proposals. Mr Jordan also made an oral presentation covering the proposals themselves, consultation responses, relevant planning policies and the issues involved.

131. The meeting of the Sub-Committee began with Councillor Woodrow, its Chairman, drawing members' attention to the Sub-Committee's usual conventions which I have already set out. Members were asked to declare any interest before consideration of the Swiss Cottage applications began, even if they had done so at the start of the meeting. Councillor Woodrow stated that although he was a member of the Leisure and Community Services Committee, he had not taken part in any of their discussions of the scheme; three other Councillors made the point that although also members of that Committee, they did not feel compromised by their discussions. Of two Councillors involved in other bodies, the Winch and the Conservation Area Advisory Committee, the former left, the latter merely observed proceedings from the gallery. Two Councillors involved in the Hampstead Theatre declared a non-pecuniary interest. All this was repeated by those present at the reconvened meeting. A Councillor specifically asked for advice at the meeting as to the position of members of the Leisure and Community Services Committee who were also on the Sub-Committee; the oral advice given was essentially that previously provided in writing: individuals could decide for themselves bearing in mind their degree of participation and the need to keep an open mind.

132. Mr Wolfe drew attention to what he submitted was an important illustration of the planning function deferring to the development function, as well as a failure to have regard to material considerations. The Minutes recorded that the Chairman:

"underlined that the Sub-Committee had to concern itself with planning matters such as the appearance and use of the proposed buildings and spaces, and their effect on amenity and transport; but should not deal with matters which the Council had delegated to the Leisure and Community Services Committee, which included the formulation and co-ordination of leisure services policies and their implementation; the planning and provision of leisure services; and responsibility for the financial resources allocated to the Committee."

133. Mr Jordan himself is recorded as reiterating:

"that the Sub-Committee and the Environment Committee should appreciate that there were aspects of the scheme which were not planning matters, such as the ideal length of the swimming pool or the future allocation of different sports facilities, which were policy considerations for the Leisure and Community Services Committee, and not for the Council *as local planning authority*. He believed that the Secretary of State would also take this view if the applications were called in. It was important to view such a major scheme in the round and to judge it against the Unitary Development Plan (UDP) and the planning brief."

134. An officer said:

"Once the planning authority had approved leisure use, it was up to the service providers to decide how that use was apportioned for different sports and leisure activities."

135. This approach was based on legal advice from Mr Brookes. Councillor Mennear, not a member of the Sub-Committee, was told that objections to leisure policy were not for the Sub-Committee or the Environment Committee. He complained that the Leisure and Community Services Committee had been told that certain matters were for development control, now being redefined as leisure matters. He sought to raise a series of questions about the size of the hall, the pitch size and other matters, of which some were ruled out of order as being leisure not planning matters. The Chairman said that the Planning Brief had to be the starting point. Mr Jordan added that the planners had to make a professional assessment which did not "imply a slavish adherence either to the brief or to the precise findings of consultation". Councillor Mennear said that the choice was between accepting the scheme, losing the larger pitch and playground, or rejecting the scheme.

136. One Councillor, commenting on the bulk of the residential component, said that if it had been a private development, more would have been heard about light being cut off from the Taplow block. Mr Wolfe saw that as a comment supportive of his analysis.

137. The question was raised as to what would happen if the proposal for an additional all-weather pitch at Quintin Kynaston School were refused. Mr Jordan replied that the Planning Brief still stood and the smaller on-site pitch would still meet the Leisure and Community Services Committee's requirement. He said that the Sub-Committee "had to rely on the judgment" of that Committee and that the Council "as planning authority had to determine the application as it stood." This all, said Mr Wolfe, showed a fettering of discretion and an approach particularly in relation to changes and the replacement all weather pitch which would not have been accorded to a private developer; the developer had privileged influence; the size compromises were project finance driven by the Council as promoter of a mixed use scheme.

138. In effect the Sub-Committee held a joint meeting with the Environment Committee because it was only the latter which could pass the necessary recommendation, as a matter of Standing Orders, to the full Council. Indeed other members present and there were a number were permitted to speak. This Committee formally convened immediately after the passing of the Sub-Committee resolution and adopted its recommendation that planning permissions be granted, so that the full Council was properly seized of the matter. Ms Lowton makes the point in her witness statement that it was not certain that the limited involvement of the Environment Committee in the management of the site meant that, under the 1992 General Regulations, the Sub-Committee could not determine the applications. However, determination by full Council added to the scope for debate in public and transparency.

139. The recommendations of the Sub-Committee and of the Environment Committee that the permissions be granted, subject to various matters, were reported to the full Council, together with the officers' reports. The vote on the conventions governing participation was provided to the full Council together with a Note from Legal Division briefly summarising the role of the UDP and other relevant considerations. The reason for full Council deciding these issues was set out, as being that the Regulations prevented the Sub-Committee deciding the issues in the circumstances which were identified. The advantage of the Council being seen to act "appropriately" was also referred to. Mr Wolfe contended that the views of Committees debarred from decision-making should not have been referred to; they were immaterial considerations.

## K. The Council debate

140. Before the full Council meeting on 7<sup>th</sup> March 2001, Ms Lowton wrote to all members of the Council, to clarify the role of the full Council. She said:

"It is important for members to remember that the Full Council is determining the applications solely in its capacity as local planning authority.

A planning authority can only consider the proposals before it and has now power to require the variation of any application. This is the case whether the applicant is a private individual or (as at Swiss Cottage) effectively another Committee of the Council. Debate at the Council Meeting should concentrate solely on planning issues. Members should not revisit decisions already taken by Leisure and Community Services Committee that led to the applications being made.

A local planning authority should only refuse an application where there are sound planning based reasons for doing so.

The most important planning consideration is the Council's Unitary Development Plan. The Council should determine applications in accordance with the Plan unless material considerations indicate otherwise. Other material planning considerations include other adopted planning policies of the Council e.g. Planning Briefs. In the context of the Swiss Cottage Application the Planning Brief or the site is a particularly important consideration and members should make sure that they are familiar with this.

Members should also ensure they take into account any written or verbal representations on the applications, insofar as they relate to planning issues."

141. Contained on the Agenda for the Council meeting is a Note from the Legal Division which sets out legal advice on dealing with planning matters. Members should familiarise themselves with this note before the Meeting.

"Where any member feels that there may be a planning reason that would justify refusal of any application, he or she is advised to seek the guidance of officers on the sustainability of that reason before voting.

In making their decision Members should also have regard to the minutes of the meetings of the Development Control Sub Committee and the Environment Committee which considered the applications in a consultative capacity. An extract of the minutes relating to Swiss Cottage is attached.

In considering each of the applications, members should ask themselves "is there a planning reason that would justify refusal?" Basically, if there is no such reason, members should follow the officer Recommendations."

142. On 4<sup>th</sup> March 2001, objectors, but not these Claimants, asked the Secretary of State to call in the applications; he refused to do so on 12<sup>th</sup> March 2001.

143. The Council meeting was chaired by the Mayor who was a member of the Development Control Sub-Committee. She opened the meeting with guidance which repeated what Ms Lowton had written in her letter. The oral deputations heard by the Sub-Committee were heard again before the full Council. The discussion lasted two hours; although the discussion at the Sub-Committee was referred to, Ms Lowton said that the Council's consideration was very different from a merely formal consideration given to a matter referred up to the Council by a Committee.

144. Mr Jordan gave a 30 minute presentation describing the proposals and their background; he repeated his assessment of the relevant planning policies and issues; he reviewed the consultation responses. He was questioned at this meeting, as indeed had happened at the Sub-Committee about the meaning and effect of various UDP policies. It was his impression that Councillors had studied the UDP and other relevant material closely.

145. He was asked to comment on various objections and deputations. He explained that a number of those concerns were not planning considerations. It was not the planning authority's task to "second guess" "the judgments about leisure provisions which had been made by the Leisure and Community Services Committee, nor to ask themselves whether the development proposals represented the best possible leisure scheme which could ever have been produced × they had to judge whether it complied with the adopted UDP and with × the planning brief".

146. Mr Wolfe relied on these matters as showing various errors of law.



147. He also referred to Mr Jordan's speaking notes; these of course are no more than that and were considerably enlarged upon during the meeting. Mr Wolfe criticised them in a number of respects. The notes refer to what are not planning issues: I set them out because of the criticism which Mr Wolfe made of the approach adopted.

"What are not issues for this Committee

Great deal of comment re type of leisure provision, adequacy of spaces provided, balance, who will be most suited .....

Leisure and CS Cttee charged with planning and providing On advice of Director and leisure consultants Planning Officers cannot second guess here -

Not the expertise

Not capable of being handled as a planning matter

No correct planning answer to how long a pool should be, what's more important fitness v games

Nothing in UDP to give answer to this

For Members to set priorities in provision

Particularly, a judgements for L+CS Cttee

On appeal/call in SoS would not rule on this

Possible to have a view that more of x preferable

Not possible to refuse on grounds hall not big enough

148. Mr Wolfe also drew attention to the language in the notes which speaks of "Due regard to UDP, brief." This, he said, was not the approach to the UDP required by section 54A of the 1990 Act. However, the Notes at their start refer to "Planning Merits - comply UDP, planning brief. If so, what are effects, harmful? sufficient to refuse? Appear to be 4/5 key issues for this committee."

149. The Notes then go through those issues: "(1) Redevelopment / refurbishment - has the right balance been struck" and say that in relation to the only contentious area, the Pool and Leisure Building, there could be "no sustainable objection" and the proposal met UDP and Brief policies; "(2) Open Space". They do contain references, as was indeed the case, to the proposals themselves involving a substantial increase in open space compared to the position currently with the new Theatre being built, and returning the amount of public open space nearly to what it had been before the Theatre was moved. This was to be seen in the context of the UDP policy presumption against the loss of open space. They refer to the UDP being of no help in relation to the allocation of land, I infer for particular types of use, in the open space context. The requirements of the Brief are said to have been fulfilled; I draw that inference because the notes say:

"Allocation not really for planners to decide on – would have to show creation of shortfall (LC1) – we have a situation here where there is a current shortage of both green open space and playground facilities.

CONCLUSION: Acceptable and accords with brief."

150. Mr Wolfe said that that was inconsistent with the officer's report to Council, which recognised a shortfall in relation to all weather pitches, and that there was no need for a shortfall to exist anyway, before the extent of all weather pitch provision could become a planning issue. The notes then deal with other key issues. "Market" "No UDP policy requiring market"; "Enabling Development": "UDP strongly supports"; "Environmental Impacts": "Visual": objections are referred to; "details to resolve × devil is in detail", "Environmental"

"can legitimately be criticised for daylight effect, put repeatedly to applicant, would require substantial revision. Not accepted by applicant Departs from established Camden policy to avoid such loss, but not below an absolute stat minimum. Have to view in the round."

"Traffic."

"second area for legitimate criticism – car free potential, missed chance to set an exemplar.

TR16 encourage not require

Parking standard met so no basis for refusal."

"Sustainability," "Conclusions."

Conclusions

Due regard to UDP, brief

Reservations expressed (esp daylight effect), but not sustainable refusal

Substantial benefits too new facilities, library, affordable housing

Recommend pp,lbc, cac

151. Full Council approved the proposals. All the recommendations were accepted though there were more votes cast against the open space proposals than were cast against the buildings development.

L. The next steps

152. On 2<sup>nd</sup> August 2001 the planning permissions were issued and thereabouts the section 106 agreement was signed. The development agreement between the Council, DDSF and Barratts had been signed on 18<sup>th</sup> May 2001, the same day as the Claim Form was lodged. This agreement is expressly stated not to affect the Council's functions as planning authority and the obligation which the agreement contains to enter into a section 106 agreement is binding on the Council only as landowner. Mr Wolfe particularly draws attention to the sequence of provisions whereby the agreement remains conditional upon the issue of a satisfactory planning permission and the conclusion of any judicial review proceedings; the "long-stop" date is 18<sup>th</sup> May 2002, but that is extended to a period no later than three years' after the commencement of any judicial review proceedings or their earlier conclusion. The provisions are, of course, more complex, but that summary suffices.

153. The proposals for a replacement pitch at Quintin Kynaston school have come to nothing; the school governors became unreceptive.

The issues

154. I shall deal with the substance of the Claimants' various points, not just because I have heard full argument on them but also because all parties wish to avoid the unhappy prospect that, if permission were refused because of delay, the matter might have to be returned to the High Court for consideration on its merits were the Court of Appeal to grant permission to apply for judicial review.

155. However, in order to deal fully with Mr Wolfe's submissions on bias and pre-determination it is necessary to deal first with three subsidiary issues which, whilst a basis for challenge in their own right as the case was eventually formulated, were also part of the basis for Mr Wolfe's larger submission.

Section 54A

Section 54A of the 1990 Act provides:

"54A. Where, in making any determination under the planning Acts, regard is to be had to the development plan, the determination shall be made in accordance with the plan unless material considerations indicate otherwise."

156. This section applies because, by virtue of section 70(2), the Council in dealing with the applications has to have regard "to the provisions of the development plan, so far as material to the application."

157. It is necessary first to establish what the UDP policies were at the time of the 7<sup>th</sup> March 2001 meeting and whether they would have been available to members. This not wholly uncommon problem arose because although the UDP had been adopted on 2<sup>nd</sup> March 2000, the final version had not been published in March 2001 because of delays caused by unsuccessful legal challenges to its adoption. In the now published version the policy numbering, though not the text, has been changed from that which was available to members on 7<sup>th</sup> March 2001.

158. The version of the UDP set out in vol.2 Tab 5 is the one which existed in March 2001, is consistent with the reports and is, Mr Hockman tells me and I accept, the one which members would then have had available to them if they had wished to examine the UDP. I regard this as laying to rest the suggestion that members would have read the wrong and on the face of them irrelevant policies.

160. It is next necessary to consider the meaning of the phrase within section 54A "the determination shall be in accordance with the plan."

161. Mr Wolfe submitted that in order for a Council to comply with the duty in section 54A, it is necessary for it to identify correctly the relevant development plan policies, to consider what "determination × in accordance with the plan" requires by examining the way in which each relevant policy impacts on the proposal, and then to look at other material considerations to see if a discordant determination is justified. He emphasised the importance of this being spelt out in reports particularly where, as here, the determining body, the full Council, lacked the training and day to day experience and expertise of the Development Control Sub-Committee, which would have made a less rigorous approach in the Report more acceptable for Sub-Committee decisions. The Council's land ownership and involvement as developer or development partner underlined the significance of his point, and the need for rigorous analysis.

162. There is, in my judgment, a single determination involved in the grant of planning permission subject to conditions; the imposition of particular conditions may itself be a determination in a given case, and certainly conditions and section 106 agreements can affect the "accordance" of the determination with the development plan. The "accordance" of this determination has to be "with the plan"; it is not an accordance with each relevant policy of the plan. The language of section 54A can be contrasted in this respect with the language of the Town and Country Planning (Development Plans and Consultation) (Departures) Directions 1999 which defines a "departure application" as one "which does not accord with one or more provisions" of the development plan. The word "relevant" is obviously implicit.

163. I agree with what Sullivan J said in *R v Rochdale MBC ex parte Milne*, unreported 31<sup>st</sup> July 2000, at paragraphs 48 to 49, subject to that caveat about the terms of the Departure Directions. He said:

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

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

In the light of that decision I regard as untenable the proposition that if there is a breach of any one policy in a development plan a proposed development cannot be said to be 'in accordance with the plan'. Given the numerous conflicting interests that development plans seek to reconcile: the needs for more housing, more employment, more leisure and recreational facilities, for improved transport facilities, the protection of listed buildings and attractive land escapes et cetera, it would be difficult to find any project of any significance that was wholly in accord with every relevant policy in the development plan. Numerous applications would have to be referred to the Secretary of State as departures from the development plan because one or a few minor policies were infringed, even though the proposal was in accordance with the overall thrust of development plan policies.

For the purposes of section 54A it is enough that the proposal accords with the development plan considered as a whole. It does not have to accord with each and every policy therein."

164. It may be necessary for a Council in a case where policies pull in different directions to decide which is the dominant policy: whether one policy compared to another is directly as opposed to tangentially relevant, or should be seen as the one to which the greater weight is required to be given.

165. The formulation of certain policies requires a purposive approach to their accordance with a proposal. Where an exception to a policy is expressly permitted in certain circumstances, reliance on those exceptional circumstances may be seen as not according with the plan. A different view may be taken where the exceptions are specified and have their own clear planning objective. Where a policy "welcomes" one type of development, one which elicits a more frosty greeting may be seen as not according with the plan, even though no express breach is involved. There is a real risk that Mr Wolfe's suggestion that each individual relevant policy had to be examined against the proposal, and the

implication that a breach of one necessarily shows a proposal out of accord with the development plan, would impose a legalistic straitjacket upon an appraisal which cannot sensibly be made in such a manner.

166. I now turn to the evidence as to the approach to section 54A which Councillors were advised to adopt. Mr. Wolfe submitted that instead of adopting the necessary approach of asking whether a proposal accorded with the development plan, the Council erroneously had only had due regard to the plan. The Councillors all had a Note from Legal Division attached to the reports which correctly spelt out, for those less experienced, the effect of section 54A. This advice was also set out in the letter from Ms Lowton to all members, shortly before 7<sup>th</sup> March 2001. It was also set out in the "Summary of Main Planning Issues in the Overview Report." The Planning Brief, as annexed referred to the preferred uses and objectives as according with the UDP.

167. The witness statements of Ms Lowton and Mr Jordan in particular, refer to the soundness of members' understanding and the advice which the latter gave that Councillors had to judge whether the schemes complied with the UDP and the Planning Brief. It was not said by Mr Wolfe that the latter was out of accord with the UDP.

168. The speaking notes back up what Mr Jordan said, rather than the reverse. They set out the correct approach at the start, and he knew what section 54A meant. They indicate a view on compliance with the UDP being expressed in relation to the key considerations identified, at least so far as material here. These aspects were elaborated on in Mr Jordan's presentation and answers. In that context, I do not consider that the reference to "Due regard to the UDP" in the conclusion to the notes, as indeed in the report, can be regarded as a weighty pointer to a general misunderstanding as to the role of the UDP. I consider that the Council understood the effect of section 54A, and did not err in that respect. Of course, it is unwise to depart from the statutory language, but the undoubted lapses of language must be set in the overall context of what was said about section 54A and do not persuade that the Council actually erred in its approach. Nor indeed do I see anything sinister, in terms of bias or predetermination, in that occasional lack of rigour.

169. Mr Wolfe next submitted that nonetheless the Council did not reach a conclusion as to whether or not the proposals accorded with the development plan. I set out the four policy provisions which Mr Wolfe contended called for particular examination in this context, taken from the "Composite Draft June 1998 (Non-Deposit Material)":

1. "EN68 Public and Private Open Space

The Council will not permit development of public or private open space identified in the Schedules of Open Land Proposals and on the Proposals Map, unless:

the proposal is for development ancillary to the use of the land as public or private open space, or on private open space, it is for development ancillary to a use taking place on land of which the open space concerned forms part, and for which there is a demonstrable need that cannot reasonably be satisfied elsewhere.

In either case, the development must be sufficiently small in scale to enable the open character of the land to be retained."

"Other Green Open Land

EN70 The Council will oppose development on Other Green Open Land (OGOL), such as allotments, grounds of housing estates and institutions, large gardens, backlands, rail embankments, verges and vacant land not otherwise categorised."

3. "EN71 Playing fields and open sports and recreational facilities.

The Council will resist proposals for the development of existing playing fields and open sports and recreational facilities attached to schools and other large institutions such as colleges, hospitals and estates and sports clubs, or of the grounds of such establishments where they are suitable for continued use as playing fields or open sports and recreational facilities. Development will not be permitted unless it is ancillary to, and necessary for such use and does not detract from the open character of the land."

The reasoned justification adds nothing significant.

"Leisure

The following policies complement those in Chapter 2 : Environment which seek to protect the amenity value of open space and the opportunities presented for informal recreational use.

### "Safeguarding Existing Provision

LC1 Where development proposals include sites and buildings currently used for leisure or culture facilities, the Council will welcome schemes that enable the retention of such uses, or which make suitable alternative provision. The Council will resist proposals which would create, or add to, any identified shortfall in provision of buildings for leisure and culture uses.

#### Justification

Leisure and culture facilities are an important resource which contribute to London's world city role, help to sustain and support residential communities, and also make a significant contribution to the Borough's social, economic, and physical fabric. Land and buildings suitable for such uses should therefore be retained, and improved, wherever possible. Given the extent to which leisure and culture uses are under threat from more profitable commercial development, the Council will give strong protection to land and buildings used for these purposes where there is an identified shortfall in terms of type, scale, or distribution. If replacement provision is proposed, the Council will expect this to be of a similar or improved standard capable of continuing to serve the same, or a wider, catchment area, with no diminution in accessibility."

170. In the original and amended Claim Form, the way in which the UDP policies had been considered was the subject of detailed analysis, with some additional planning commentary about what was argued to be a clear breach of planning policy. Various criticisms of the physical availability to the Council at 7th March 2001 of the up to date UDP policies were also made. This area indeed appeared to be the main focus of complaint. Mr Wolfe sought to exploit what he said were inconsistencies between the way in which the reports dealt with the relevant policies, the way in which the Council answered the original claim in its Grounds of Resistance and the way in which Mr Jordan analysed those policies after the event in his witness statement. Mr Wolfe also said that that analysis was an invitation to me impermissibly to embark upon an examination of the planning merits.
171. Mr Wolfe submitted that the reports did no more than list the relevant policies and provided no analysis of the sort required and that it would not have been realistic to expect Councillors independently to carry out the necessary research and analysis. Of course, this ground of challenge would be of theoretical interest only, in the absence of some arguable basis that a reasonable Council could conclude that the proposals did not comply with the UDP. It is necessary for that purpose to examine the policies. But Mr Wolfe is right to say that it is not for me to examine the planning merits of the policy arguments, or to judge whether a proposal accords with a policy or plan, unless of course there is really only one reasonable answer.
172. Mr Wolfe attached great weight to the reports to the Development Control Sub-Committee. They are indeed important but they have to be seen, in this instance, as the starting point for a presentation, questions and a debate which included two vigorously contested arguments, with some Councillors supporting one component and opposing another. It is against the Council's approach on 7<sup>th</sup> March 2001 that this issue is to be judged.
173. The very long list of "relevant" policies, itself said not to be comprehensive, in the Leisure Building Report, shows, in my view, that the Report is looking not just at the directly relevant policies but at all those which might be relevant and therefore might need some sort of consideration. It cannot be said that the inclusion of policies in the list represented a concluded view that they all applied, especially as some e.g. EN68 only apply if in fact they are breached. Mr Wolfe sought to argue that that must be the conclusion; I consider that that is an unreal approach to the interpretation of the Report.
174. Mr Wolfe is right to point out that very few listed policies are thereafter specifically referred to in the Report, and that when they are referred to, the analysis is short, as for example with LCI. It is also right that, whilst compliance with some UDP policies is referred to, there is no overall view expressed in relation to compliance with the UDP.
175. Policy LCI was considered in the Report; the building development was concluded to comply with it. That is plainly the key policy of the four raised by Mr Wolfe in relation to his section 54A argument. I accept Mr Jordan's factual evidence in his witness statement that none of the scheduled open space on site would be built on under these proposals; policy EN68 therefore does not apply because it is not breached, though it is easy to see why it might be described as relevant or applicable in advance of analysis of its application. I accept Mr Jordan's factual evidence that an area which "could" be regarded as Other Green Open Land within EN70 is developed for part of the housing block; it is, so far as I understood the various monochrome stipplings and bandings, a small area, offset by new open space on site. This was covered in the report, in paragraphs 6.57 to 6.62 but not in the context of policy EN70. I consider it a matter of planning judgment whether that policy was or was not strictly complied with or was instead met in spirit, assuming of course that the land was "OGOL". However on no view could it be a large point. Policy EN71 is another

of those which, whilst relevant in the sense of something to be listed for consideration, is not applicable in the end because as a matter of fact, no land to which it applies, is to be developed for building purposes; I accept Mr Jordan's factual evidence on that.

176. Mr Wolfe's primary argument in relation to section 54A and the building proposal fails, not just because of the overall consideration of matters on 7<sup>th</sup> March 2001, but also because the key UDP policy complained of, LCI, was concluded to be met by the building proposal. EN70 gave rise at worst to a small and very debatable omission. Policy EN71 does not apply. In my judgment the Council did conclude that the proposal complied with the UDP, applying the balanced approach to the application of section 54A which I have set out earlier.

177. Mr Wolfe however argued that the conclusion on this proposal in relation to policy LCI itself ignored various relevant considerations.

178. He submitted that it was necessary for the Council, in order to reach a conclusion on compliance, to examine whether any shortfall existed or would be created in relation to buildings for cultural and leisure uses, and that had to be done by reference to various types of provision. The Council, he said, had acknowledged a shortfall in leisure provision in its evidence to the UDP Inquiry and in Mr Jordan's speaking notes.

179. The latter refers to open space and playground shortages, and is not relevant to the building. The Council's evidence to the UDP was very generally expressed, was not endorsed by the Inspector and in my view could not sensibly be regarded as the sort of identification of a shortfall which the policy contemplates. I accept Mr Wolfe's point that the Council in its correspondence and Grounds of Resistance erred in saying that the shortfall had to be identified in a Council document, but its underlying point is right: the shortfall must be one identified by the Council, or proven to it, not a shortfall asserted by say a sports body, or by an individual Councillor.

180. In this case the sports building would be smaller than the one it replaced, but the useable activity space would increase by some 500m<sup>2</sup>; the mix of sports and activities would vary; the swimming pool area was seen as more flexible in use; the hall size and components were considered in some detail. I do not consider that such an approach to the application of policy LCI can be considered illegitimate or that any loss of actual space for any sport constitutes a breach of policy LCI, no matter what the replacement might be; nor do I consider that each component reduced in size requires a local needs survey in order for a conclusion on compliance with LCI to be reached. I emphasise, in the light of the representations actually made by the Claimants at the planning and other decision stages, that the swimming pools were considered in the planning context against this policy.

181. I now turn to the conclusions on section 54A in relation to the open space Report, which is also to be set in the context of the debate as a whole.

182. A shorter list of UDP policies was referred to. It did not include policy LCI or policy EN71; policy EN68 was listed. It is fair to comment, though it cuts both ways, that this Report needs to be read in the light of the earlier Reports; various points are not repeated. The Council looked at the design of the site as a whole.

183. It is right that there is no explicit analysis of the proposals against the potentially relevant policies; the UDP leisure policies are only explicitly referred to in relation to the pitch proposed in Westminster City Council's area. No overall view is expressed in relation to the compliance of the proposal with the UDP.

184. It is the first part of Policy EN68 which is relevant. The Report, as indeed did the Leisure Building Report, makes perfectly clear what is happening on the existing open space, and that there will be more open space than now, though not quite as much as there was before the new Theatre was built. It is not in dispute as a matter of fact, on Mr Jordan's evidence, that the currently scheduled open space remains open space though its configuration, modelling or function may change. That is not what Policy EN68 can be thought rationally to be trying to stop.

185. On the assumption that the all weather pitch is attached to a "sports club" or the like, because it is physically close to the current sports centre and is run by the same operator, policy EN71 is arguably in play. The second part of policy EN71 arguably does not apply so as to sanction non-compliance with the first part. The areas in question will continue to be used as open space but for less formal and active recreations and the pitch is reduced in size in its new location. There is scope for saying that this policy was arguably relevant and arguably breached; I say "arguably," because I consider that whether that was so or not was an issue about which planners could reasonably differ. There is no one clear answer.

186. Mr Wolfe also points out that Policy LCI applies to sites; the all-weather pitch is a site used for leisure. The proposals for replacement of it, and Mr Jordan's acknowledgement in his speaking notes of the shortage of playground facilities, shows an identified shortfall in such provision. Although the Reports did not consider either policy to be relevant to the reduction in the size of the all-weather pitch, it is clear from Mr Jordan's speaking notes that he did

consider LCI to be potentially relevant. He dealt with it by pointing out, not just the shortage of playground facilities, in which context the prospective replacement facility had relevance, but also the shortage of green open space, the more informal use which would be better provided for with the new proposals.

187. It would have been more satisfactory had the Report specifically addressed these policies; however the full Council did have policy LCI before it in the context of the conflict between formal and informal open space needs. It appears to me probable that Mr Jordan's overall approach at the Council meeting was, as the speaking notes, suggest: "UDP can give no assistance here." That is at least a view that policy LCI was not breached; that is supported by Mr Jordan's conclusion that the proposal in this respect and overall complied with a Planning Brief which itself complied with the UDP. It is probably a view, which I consider to be a view reasonably open to the Council that the policy did not apply. I do not consider that both policy LCI and policy EN71 can apply, but if so, the same conclusion in relation to each policy would be arrived at by whoever decided their application. I consider therefore that the correct analysis of the Council's approach overall to the all-weather pitch shows no legally erroneous conclusion as to the application of UDP policies and section 54A. Again, I bear in mind that the accordence of a proposal with the UDP requires a purposive judgment looking at the UDP as a whole.

188. I do not consider therefore that Mr Wolfe has shown that section 54A was not complied with. The Council did consider the relevant policies in that context, as evidenced by the reports, the advice, presentation and speaking notes, and the whole debate. The conclusion as to accordence with the plan is necessarily an overall conclusion on policies some of only arguable and uncertain application. It is very much a matter for planning judgment. The relevant policies were considered and a reasonable view was reached on the accordence of the proposals, separately and as a whole with the UDP. One might have wished for a more explicit analysis of certain aspects in the reports, but that does not amount to a legal flaw. This was not a proposal which was in clear breach of a directly relevant policy, let alone of one determinative of the proposal in the absence of other considerations. A range of policies generally encouraging the provision and retention of leisure and recreational facilities and of open space, and generally resistant to their loss had to be considered in relation to proposals which, as so often, the policies were not explicitly tailored to meet. In those circumstances, section 54A does not permit of complaint, by Mr Wolfe, where a purposive view is taken by the Council of the group of policies overall. In fact the Council in my judgment considered those policies which were directly relevant and considered adequately the thrust of the rest, at least sufficiently to meet its duties under section 54A.

#### Immaterial considerations

189. Mr Wolfe submitted that the conclusions of the Development Control Sub-Committee and of the Environment Committee were legally irrelevant and that if the Council had regard to them, as undoubtedly it did because they were reported to the Council to assist it, it had erred. Any other approach would undermine the statutory regime which prevented those committees making the decision.

190. The statutory regime is as follows. Where, as here, a Council has an interest in the land proposed for development or is proposing to develop land on its own or with a developer, section 316(1) provides for Regulations to regulate the Council's arrangements for the discharge of its functions, notwithstanding the powers of delegation in section 101 of the Local Government Act 1972.

191. The Town and Country Planning General Regulations 1992 s.i. 1492 provide in Regulation 3:

"3. Subject to regulation 4, an application for planning permission by an interested planning authority to develop any land of that authority, or for development of any land by an interested planning authority or by an interested planning authority jointly with any other person, shall be determined by the authority concerned, unless the application is referred to the Secretary of State under section 77 of the 1990 Act for determination by him."

192. Regulation 10 provides:

"10. Notwithstanding anything in section 101 of the Local Government Act 1972 (arrangements for the discharge of functions by local authorities) no application for planning permission for development to which regulation 3 applies may be determined -

by a committee or sub-committee of the interested planning authority concerned if that committee or sub-committee is responsible (wholly or partly) for the management of any land or buildings to which the application relates; or

by an officer of the interested planning authority concerned if his responsibilities include any aspect of the management of any land or buildings to which the application relates."

193. Although the land in question was appropriated to leisure uses, the Environment Committee was involved in its management in a number of ways which were set out in its Report to the full Council for the 7<sup>th</sup> March 2001 meeting, by way of explaining why the Environment Committee could not determine the planning applications: some of its non-development control officers were involved in the project, it "owned" part of the overall site albeit not a part which was included in the planning applications, and it might be an eventual recipient of an appropriation of the land from the Leisure and Community Services Committee.

194. The consequence therefore was that the decisions on the three applications had to be made by the full Council, and not by the Environment Committee or its usual sub-delegate in these matters, the Development Control Sub-Committee, unless the applications were called in by the Secretary of State. Section 58(1)(b) requires these decisions to be made by the local planning authority for the area, in the absence of an appeal to or call-in by the Secretary of State.

195. The effect of the fifth Claimant's Human Rights Act argument on the operation of this statutory framework is dealt with later.

196. I do not accept Mr Wolfe's submission. I do not see the purpose of the General Regulations as being to prevent member participation in the decision-making. If Parliament had intended the consequence of the requirement that the decision-maker be the Council, to be that an unknown number of Councillors were automatically debarred from considering the matter in full Council, it would have stated so expressly. The purpose of the provision is to establish a decision-maker distanced from the interested committee, to dilute but not expunge its influence.

197. The rationale for Mr Wolfe's submission was the lead which, he said, the views of the experienced Sub-Committee would give to the less experienced Councillors. However, if those Councillors can participate in the full Council meeting, I can see no reason why those Councillors should not consider and make recommendations which the Council can consider. There is no sound rationale for such a distinction. The debate and voting here also showed that full Council members did not simply defer to the views of the Development Control Sub-Committee, but reached their own views.

198. I note that this problem was never raised with the Council before the meeting of 7<sup>th</sup> March 2001, although the intended process had been obvious since at least 21<sup>st</sup> February 2001.

#### Ignoring material considerations

199. Mr Wolfe submitted that the Council, in its consideration of the planning applications, had decided that certain matters concerning the type of leisure provision were not planning matters, but were instead matters for the Leisure and Community Services Committee. He submitted that the type of sports facility provided could be a relevant consideration: in particular here, the scale of the swimming facilities, and the size of the sports hall; he also referred to the reduction in the number of squash courts. The commentary to Policy LCI recognised that "types" of provision could be relevant. PPG17 "Sport and Recreation" refers in a number of places to the role of planners in meeting needs. I instance those most helpful to his cause:

#### *"General Policy*

It is the policy of the Government to × encourage the provision of a wide range of opportunities for recreation, so that people can choose those which suit them best. Such opportunities should, wherever possible, be available for everyone, including the elderly and those with disabilities for whom access to facilities is especially important.

It is part of the function of the planning system to ensure, through the preparation of development plans, that adequate land and water resources are allocated both for organised sport and for informal recreation. It is part of planning authorities' responsibilities to take full account in their development



control decisions of the community's need for recreational space, to have regard to current levels of provision and deficiencies, and to resist pressures for the development of open space which conflict with the wider public interest."

"16. It will therefore be helpful if local planning authorities draw up their own standards of provision for formal and informal sport and recreation, based on their own assessment of need, and include those standards in their local plan."

*"Local plans*

13. Local plans provide the appropriate context in which to assess local needs for recreational facilities; identify deficiencies in the provision of public open space; encourage the development of suitable sites and types of site for additional sport and recreation and open space provision; ensure that provision is properly co-ordinated with other forms of development and other land-use policies; and protect open space and other land with recreational or amenity value."

"15. Policies and proposals in local plans can be locationally specific. They should generally cover:

the specific needs for both mainstream and specialist sports facilities (indoor and outdoor), including, where appropriate, large sites (for example), local motor or air sports sites, football stadium, orienteering courses and boating facilities);

the particular recreational needs of the elderly and disabled people."

"29. The provision of indoor sport and outdoor synthetic or other surfaces capable of intensive use may help meet the demand for sports facilities while reducing pressure on urban open space. As land supply in urban areas is limited, priority will often need to be given to intensive forms of provision –i.e. multi-sports provision with indoor and outdoor facilities. Without sympathetic consideration from local planning authorities to providing such facilities, recreational opportunities for local communities will be restricted. Such facilities are therefore important; they can also benefit visitors and take on a regional or strategic role in certain circumstances."

200. Mr Hockman said that PPG17 did not go so far as Mr Wolfe needed to go in relation to the materiality of type of provision, and was far more general than he appreciated.

201. I consider that the type of sporting provision made, can be a material planning consideration; it depends on the circumstances of the case, and in particular why is it said that a particular feature matters. For example, if the only local swimming pools are of a non standard length and may therefore be ineffective for local school competitions or club galas, there may be a local need which can be relevant to a planning decision; likewise the absence of an Olympic standard facility in a wider area can create a need for the planning system to address. The same may apply to the size of pitches and the number of courts. Such factors are planning considerations generally where there is some public interest involved, related to the use or development of land. The point can readily enough be illustrated by the fact that the Council appears to have regarded the proposals here as beneficial in terms of scale and range of facilities, albeit that the nature of those facilities was seen as "essentially" a matter for the Leisure and Community Services Committee; paragraph 4.9 of the Overview report. The Planning Brief, paragraph 7.12, referred to the opportunity to provide "a range of sports and leisure facilities equal to or greater than those existing."

202. I have already referred to the passages which show the limitations which the Council regarded itself as under, from the report, the Chairman and Mr Jordan's comments at the Sub-Committee meeting, the Borough Solicitor's letter to Councillors before the Council meeting, the opening remarks by the Mayor at the meeting and Mr Jordan's comments. There can be no doubt but that in fact there was a constraint of some extent imposed and that it was intended to, and at least at the Sub-Committee actually did, affect what was debated and taken into account in the decision.

203. This aspect is also related to the point made by the Borough Solicitor that it was not open to the Council to vary the applications, which Mr Wolfe says also shows an approach which would not have been adopted towards an external developer; he said the developer ought to be seen as DDSF/Barratts plus the Leisure and Community Services Committee in respect of the buildings, and the latter alone in respect of the open space.

204. Although it is clear that there were aspects of the proposals which were not regarded as planning matters, it is not entirely clear where that line was drawn.

205. The size of the all-weather pitch was not a matter excluded from consideration. The overview report in paragraphs 4.13 to 4.16 explicitly considers it; the specific open space report considers it in paragraphs 6.9 to 6.12. None of the advice as to what did not constitute a planning matter was directed to that feature.
206. The restriction did not limit consideration of whether there should be a new building as opposed to refurbishment of the existing; the Planning Brief considers the point without reaching any particular conclusion; the overview Report considers the issue on the basis of the Leisure and Community Services Committee view that refurbishment is a more costly way of providing less satisfactory facilities, but there is no suggestion that considerations relevant to that issue are not planning matters, paragraphs 4.4. to 4.11; the leisure building Report at paragraphs 6.17 to 6.23 considers the advantages and disadvantages of refurbishment and replacement in a way which treats the Leisure and Community Services Committee's assessment as an expert or considered input to an overall judgment. Mr Jordan's speaking notes treat the first key issue as being refurbishment versus redevelopment.
207. Although the planning reports do not explicitly consider the design implications of accommodating more leisure floorspace within the new building e.g. more or larger swimming pools or a larger sports hall, the reports do dwell on the design considerations of the building. These were very important both intrinsically because a local landmark was being replaced, and extrinsically in relation to the adjacent listed library, open space and other buildings. There do not appear to have been any explicit alternatives raised by objectors in which they sought to pursue the acceptability of a larger building against those considerations. The leisure building report, paragraph 4.23 refers to the amenity problems which the residential block creates and of which the fifth Claimant specifically complains. A larger leisure building, increasing the funding gap, perhaps enlarging the residential enabling development needed to bridge it but perhaps also reducing the space in which to provide it and the remaining open space, could have had problems which any proponent would need to address. Although it is very difficult to envisage that a mere suggestion that more space should be provided, made at such an advanced stage in the planning process, could or would have been regarded as of any consequence whatsoever, the material before me does not persuade me that the Council did regard or would have regarded as immaterial an alternative design for the leisure building which provided more space, especially if the alternative also addressed the inevitable problematic consequences.
208. Accordingly I take the view that the point at which the restriction actually bit on the consideration of the applications was in relation to the mix of space for different activities within the leisure building as proposed. The overview report comment certainly appears to deal with the building contents. However, the analysis which I set out below would apply to any restriction on debate over whether the new leisure building should be redesigned and enlarged so as to provide for more facilities within the building.
209. The reason for this restriction is important; it emerges most clearly from Mr Jordan's speaking notes. There was a specialised committee which with consultants, extensive public consultation and developers, had considered the mix of uses which best fitted the varied and competing demands for space and money; inevitably there were compromises: it was not for the planning function, with less knowledge and expertise to try to go all through those matters again. The UDP did not provide a planning basis for making a planning judgment as between those needs; by what measure or planning criteria could they say that one facility should be increased at the expense of something else? They could see the mix which was proposed and could compare it with what had been established for some years.
210. In effect the Council was being told that this was a carefully worked up scheme; if this scheme were preferred to refurbishment, there was no basis in the light of the specialist committee's consideration of the building contents, carried out against the background of the known design constraints, for the planning authority to try to "improve" it. It had to be looked at as a whole to see if it was acceptable and it was not for them to conclude that it was acceptable but should be adjusted. If it were not acceptable it should be refused. But there was no material before it to suggest that a better scheme could in reality be devised. There were plenty of demands for different facilities but that is not the same thing at all.
211. The reality is that any such design or redesign exercise is a complex, iterative process balancing different demands, spaces and costs. The Councillors were well aware that this complex task had been undertaken by the Leisure and Community Services Committee, with the advice of others, and by the developers, not least taking account of the financial implications in capital and revenue terms, and of the extent of enabling development required.
212. If the Councillors had wished to increase one facility at the expense of another, or even to increase the building size to accommodate such a change, it would in reality have been refusing the application and sending it back to the drawing board in the teeth of all the consideration which its specialist committee with its advisers and the developer had given matters.
213. It would have been a plainly legitimate approach for the Council to have been advised, at least in the absence of Mr Wolfe's bias arguments, to give very great weight indeed to the conclusions of the specialist committee, as it could also have been advised in relation to the views of an external developer on this matter.

214. If the advice had been couched in terms that very great weight ought to be given to the views of the Leisure and Community Services Committee on the content of the building because of the way in which this complex proposal had evolved, it would have been unobjectionable for the Council to adopt it. Likewise, if the interaction between design, size of facilities, funding gap and the tension between the size of the enabling development which financial considerations suggested and the amenity problems which its size gave rise to, had been said to mean that there was very little point in the Council just wanting more facilities, it would have been entirely unobjectionable.
215. Mr Wolfe's submission is that the advice went a legally critical step too far. It crossed the threshold between something which the Council properly could have been advised was of no or negligible weight and something which was legally irrelevant.
216. In my judgment, the advice to Council was couched in terms which went too far, effectively precluding consideration of matters where the advice could properly have been, that no or negligible weight should be given to those objections which wanted more facilities or a different balance of facilities. I consider that the arguments in favour of a larger pool or pools, or a larger sports hall can be seen as planning considerations; likewise arguments in favour of a different mix within the same size of building. Specific needs of user groups, a lack of such a facility locally, an inhibition upon a particular activity e.g. diving or a particular level of educational requirement can all be relevant considerations.
217. It would have been better if the precise interaction between planning and leisure functions had been spelt out in terms of the real significance of the latter rather than in terms which meant that theoretically relevant considerations were not examined.
218. However, I find it impossible to see that the correct advice, based on the thinking which I have identified, would have been other than that no or negligible weight should be attached to such considerations..That advice would have been accepted and accordingly the outcome would have been precisely the same. I am quite satisfied that the error in the advice had only a theoretical impact on the substance of the advice and would not have affected the views of anyone on the real merits or disadvantages of the proposal.
219. The acceptance by the Council of advice to disregard certain considerations has to be seen in the context of the way in which the proposal had evolved. This included the extensive public consultation involving user groups and others, and the design and cost considerations which the developer/operator and the Project Group and the Leisure and Services Committee had discussed in order to achieve an appropriate balance between those considerations. An increase in the size of one facility e.g. the sports hall, would affect either the size, design, cost and need for more enabling residential development with a larger leisure building or the space available for another activity e.g. swimming.
220. I do not consider that the Council could or would have regarded the desire by objectors for changes to the mix of uses, some of which were not obviously compatible with each other anyway, as considerations of any significance without the consequences of those changes being at least recognised and to some extent at least being identified by objectors. Those consequences include all the complex interactions between cost, funding gap, design of the leisure and residential development and would have necessitated some sound justification. A mere demand for more could not realistically taken an objector very far. The space within the proposed building would have to be redesigned to accommodate an increase in the size of one facility, but it would be at the expense of another, with a wholly uncertain effect on the useable floorspace. How was the planning authority in reality better equipped to reach a judgment about those competing leisure interests? The Councillors would inevitably ask that question however the advice was framed.
221. At that stage in the process, merely seeking a different mix, without examining the real consequences of giving effect to such a change was in effect saying that this scheme should be refused but without providing any sensible reason. The substance of that point was dealt with in reality in the redevelopment versus refurbishment issue. It also reflects the reality of the arguments: the objectors who were keen on a change in the uses really wanted to see the existing arrangements remain albeit refurbished. Mr Wolfe said for example that the Claimants objected because, in part, of the loss of the use of the facilities while redevelopment took place.
222. It is relevant also to consider what the Claimants had to say on this issue to the Council. There was no witness statement from any Claimant until, during the course of argument, Mr Wolfe was pressed as to what their involvement with the subject matter of the case had been. (Indeed the truth of the factual content of the Claim Form had not been attested to until towards the end of argument; I was told and accept that this was because this Claim Form curiously made no provision for that. There was only a requirement to sign showing that the facts in "Section 9" were true, and Section 9 related to the making of "other applications," none of which were being made. Some Claim Forms do indeed appear to have been printed in such a way that the Statement of Truth refers to Section 9 rather than Section 8; it only needs a manual correction to that obvious printing error for the problem to be solved).

223. Four of the Claimants made some use of the facilities on site; only two referred to using the building. The fifth made no claim to use any of the facilities. None of the first four suggested on the Claim Form that they had participated in the planning process at all, let alone that they had raised the considerations which they were complaining about under this or any head. Indeed, there was no suggestion from those Claimant users that they would be in any way disadvantaged by the proposals; that was merely left as an inference to be drawn from the fact that they had commenced proceedings.
224. Eventually, Mr Grimm, the litigation friend of C V the third Claimant aged 8, and R R the second Claimant aged 17 produced Witness Statements. A letter dated 21<sup>st</sup> February 2001 from the parents of the first Claimant, also aged 8 to Mr Turner, Chairman of the Leisure and Community Services Committee, was produced.
225. The Council and Interested Parties objected to my receiving this material so late in the case. It was produced in response to my questions about the Claimants' relationship to the proposals in a number of respects, to which questions the Council and Interested Parties made no objection. I shall therefore consider it. I recognise that this issue is not addressed in the Council's evidence in the way or extent to which it could have been, had the question of the specific materiality of these considerations been more obviously a point which the Claimants wished to pursue.
226. Mr Grimm states that C signed a petition and got his schoolfriends to sign it. The Camden Sports Council's petition, the one in question, states that that Council is opposed to the plans; it wants to "maintain and improve all existing facilities." It opposes any loss of the all-weather pitch or reduction in the size of the sports hall. C also attended the full Council meeting where his grandfather "read out a deputation" which he says was very much for them both. He produced it. It would be very difficult, said Mr Grimm, for an 8 year old to intervene more actively than did C. I find it difficult to see his "deputation" as containing representations of behalf of C as well. The grandchildren are mentioned in one line as users; the rest is in the first person; the only reference to C is that a short petition from his classmates was annexed. Amongst its many criticisms is a complaint at the reduction in the size of the swimming pool and of the sports centre floorspace; the clear message is that the existing centre could and should have been refurbished.
227. There is nothing in this material which suggests that this Claimant sought to suggest that the new building should be redesigned; his point, if he adopted his grandfather's point, was that, given that this was the proposal, it should be rejected in favour of refurbishment. It was not that the new building should have a deeper, longer pool. That issue, development versus refurbishment, together with the scale of active floorspace, was regarded as a key planning issue by the Council which knew very well what was going to be provided on site.
228. Miss R's witness statement deals only with the all-weather pitch; that was fully considered by the Council. Her statement is something of a muddle as to the occasion when she addressed the Council. However, it appeared from the dates that it was in fact a Leisure and Community Services Committee meeting in April 2000 which she addressed on those points. She did not raise those matters before the Council as planning authority.
229. Mr and Mrs C's letter of 26<sup>th</sup> February 2001 may or may not have been before the Council. However, its gist was that the building and facilities should be refurbished and the pitch left where it was.
230. There is no evidence from the fourth Claimant as to whether he raised the point before the Council as planning authority.
231. I conclude that the Claimants did not raise before the Council as planning authority the points that the new building should be larger or have different contents. Rather like the Council, they treated the proposals fixed and not variable but unlike the Council treated it accordingly as something to be rejected in favour of refurbishment. That issue was fully considered. This is all consistent with Mr Wolfe's argument that they were concerned at the interim loss of facilities during redevelopment.
232. I deal later with discretion, delay and prejudice. However, I consider that it is always appropriate to examine very carefully the justice of granting relief on the grounds of an error of law, constituted by a failure to consider a particular aspect, at the suit of someone who either did not bother to participate at all in the planning process or if participating did not raise that as a consideration, unless of course that consideration is one which any objector could reasonably assume would be considered because of a statutory provision or its centrality to the decision. The presence of sufficient standing to bring proceedings, as is the case here, does not thereafter bring some entitlement to a trawl through the decision-making process on a roving legal inquisition looking for errors which were no part of the Claimants' true concerns, adventitiously to exploit them. If the considerations raised by others were ignored, it is for them to complain of it. The very argument itself emerged during the course of the hearing as the nature of what Mr Wolfe was submitting was being analysed.
233. Accordingly, whilst I consider that there was an error in the Council's approach it was one which, by itself, had no significance for the substance of the Council's approach and certainly it did not ignore a consideration raised by any

Claimant. Nor is it one which was of obvious centrality to the decision. Mr Wolfe however still seeks to exploit the point in relation to his main case on bias and the closed mind.

#### Bias and a closed mind

234. Mr Wolfe submits that there were a range of interactions between members, between officers, between officers and members, and with DDSF which meant that the Council on 7<sup>th</sup> March 2001 reached a decision which was vitiated on account of bias or alternatively because it had been reached with a closed mind.
235. I have set out the essential features of the documents and chronology upon which Mr Wolfe relies. Inevitably, Mr Wolfe has had to be selective and this judgment more so in setting out the passages in those documents upon which he relies. However, I have also read around those references as they were being referred to and I have certainly looked at other passages in varying depths. This assists in putting the passages in context and in obtaining a wider impression of what was really happening. It is also important to recognise that the detail in which the argument was to be developed and the significance which Mr Wolfe sought to attach to various events would not have been apparent from the Claim Form or until the detailed "Chronology" and "Schedule of People" was received; the level of detail in the Council's witness statements which preceded those documents has to be seen in that light.
236. I now draw together the threads of Mr Wolfe's detailed points, which he correctly says need to be examined not just singly but also cumulatively. He submitted that the distinction to be observed was not between DDSF/Barratts on the one hand and the Council on the other but between the Council through its Leisure and Community Services Committee and Project Group, latterly with DDSF/Barratts on the one hand and the Council's planning and, in particular, development control function on the other.
237. Mr Wolfe emphasised that he was not making any suggestion of impropriety against DDSF or Barratts, and indeed although he was critical of the Council in many respects, he did not suggest that any of the Councillors or officers had any personal financial interest.
238. There was a lack of separation between the planning and legal officers who were advising the Project Group and the Leisure and Community Services Committee and those who advised on the development control function. Mr Gilks, Director of Environment was on the Project Group, the officers advisory group promoting the proposal. Mr Burley, a planner, prepared the Planning Brief, whilst working as part of the Project Group promoting the development, and advised the Development Control Sub-Committee on the Brief, which approved it: the "developer's planner" was advising the Council in its planning role; this was something no external developer would be able to do. Ms Silcock, who was responsible for the applications as a development control officer, attended a team meeting with the developers and was at a meeting where a "firm line" was agreed to be taken with the "Winch"; she attended some Project Group meetings, to provide development control input. Mr Brookes, a solicitor, advised the Leisure and Community Services Committee in 2000 and was an active member of the Project Group, but was then the solicitor who advised the Development Control Sub-Committee in February 2001 on what was and was not a material planning consideration. Ms Lowton, the Borough Solicitor gave advice to the Leisure and Community Services Committee on a number of occasions, as well as advising how members should decide on participation in various meetings, including Councillor Mennear, and gave legal advice at the 7<sup>th</sup> March 2001 Council meeting.
239. There was a similar lack of separation at Councillor level. For example, Councillor Woodrow, a member of the Leisure and Community Services Committee, also chaired the Development Control Sub-Committee.
240. This was also related to the corporate commitment to the scheme prior to the 7<sup>th</sup> March 2001 Council meeting. There were various meetings of the majority Labour Group at which strong support for the proposal was expressed; there was an all party Members' Briefing Group in support. The Finance and Resources Management Committee also considered the proposals and expressed its support. A number of leading majority group Councillors were positively active in promoting the proposal. This was paralleled by senior officer support which, at the level of the Corporate Management Team, received briefings from the Project Group and at the level of Chief Executive supported the proposal. It was seen and promoted internally and externally as a flagship proposal of the Council. No external developer would have this level of political access. The process whereby the "developer's" committee discussed which Council body should decide the applications and the "political" considerations behind that, confirmed the point.
241. The participation in the Council meeting of six leading majority members including Councillor Woodrow should not have occurred. Indeed, as Mr Wolfe ultimately developed it, though it was not his initial stance, all members of the Leisure and Community Services Committee and of the Environment Committee should also have a declared a non-pecuniary personal interest within the Local Government Code and should not have participated in the Council meeting. It was only the latter to which his skeleton argument referred; and it was not raised in that way at all in the Claim Form. No Claimant raised any such point.

242. The lack of the necessary separation was evidenced also by the following:

- \* the lack of rigour in the reports dealing with section 54A, and the misinterpretation of the UDP (which I have dealt with);

- \* the weight given to the views of the Development Control Sub-Committee (which I have dealt with);

- \* deferring or delegating to the "developer's" committee the leisure detail (which I have dealt with); the failure to secure a replacement for the lost part of the all-weather pitch, in a way which would not have been permitted to an external developer;

- \* the absence of the Council as planning authority having independent input into the drafting of the section 106 agreement, which was also made to follow and be subservient to the development agreement: it was drafted by the same external solicitor who drafted the development agreement, with some modest help from Mr Brookes and Ms Lowton;

- \* the failure of the Council to refer the applications to the Secretary of State as departure applications, which did not accord with one or more policies of the UDP.

243. Mr Wolfe submitted that the authority, because the applications concerned its own land and its own interest as leisure authority with a financial interest in the applications, had to be "particularly scrupulous" in its approach. He referred me to what Sedley J said in *R v Teeside Development Corporation ex p. William Morrison Supermarket Plc* 1998 JPL 23:

"Where the two functions [development and development control] are united in the same body, and even where that body owns the land and can sell it only if it grants planning permission, no objection can be taken on the ground that the body has become judge in its own cause, any more than it can be where a local authority grants planning permission to itself.

There are however two factors of importance which qualify these propositions.

The first is that a planning authority must be particularly scrupulous about evaluating a planning application in the correct policy perspective when it itself has an interest in another capacity, in the success of the applications (see *Steeple v. Derbyshire County Council* [1985] 1 W.L.R. 256 at 288–289 per Webster J.). This applies to all planning authorities, but especially to one which does not distribute its functions among different committees."

244. Sedley J, when considering whether the development corporation had fulfilled its duty as a planning authority in a situation where in its regeneration capacity it was wholly supportive of the proposal, said at p 38:

"The broad issue can meanwhile be posed in this way: has the respondent Corporation in seeking to carry out its functions departed from its duty of objectivity and approached the Asda planning application in an unacceptably partisan way?

at p 42:

"The real problem, to which I shall come, is the evident disposition of the Corporation first to seek and then to adopt advice which itself made every choice and placed every emphasis on the side of a development which under the strategic plan was presumptively objectionable."

at p 44:

"I have been driven to the conclusion that there has been in the present case a pervasive departure from the requirement of the law that a planning authority must evaluate an application objectively and without prejudice of its merits."

245. Sedley J set out the range of factors which led to that conclusion and then said at p 46:

"Thus, in my judgment, the Corporation had allowed its regeneration function to dominate, if not to dictate, the performance of its planning function. Its officers and independent advisers, without in any way forfeiting their professionalism, had lent themselves to this task. The result was that in neither quarter – the Corporation or its adverse – was a balanced appraisal made of the case for not breaching policy. The entire exercise was weighted towards justifying the departure.

Mr. Brodie has accepted that if this were the situation, the decision would be vitiated in law. In *R. v. Secretary of State for the Environment, ex p. Kirkstall Valley Campaign Ltd* [1996] 3 All E.R. 304 at 318 – 323 I had to

consider the law on this question. Since the parties before me do not dissent from my reasoning in that case, it is sufficient to quote my conclusion, drawn from modern English and New Zealand authority, that:

"The decision of a body, albeit composed of disinterested individuals, will be struck down if its outcome has been predetermined whether by the adoption of an inflexible policy or by the effective surrender of the body's independent judgment.

This principle was not, I held, attenuated where Parliament had made the decision-making body to an extent judge in its own cause."

246. Mr Hockman relied upon that last part because he submitted that the question for this Court was whether the decision of the Council had been predetermined, for example by a strong corporate view leading to a closed mind or by the surrender of the Council's planning judgment to the Council's leisure "developer" function. This was not a case in which there was any personal pecuniary interest alleged, and the membership of various Council Committees did not constitute a personal non-pecuniary interest. Accordingly no question of apparent bias arose. In any event, as a matter of fact which showed how transparent and fair the Council had been, members had applied their minds to whether they should or should not declare an interest or participate.

247. Mr Wolfe submitted that the question was whether there was a real danger that members were influenced by a personal non-pecuniary interest in the development, which they had acquired either because of their earlier expressions of support for it or because of their membership in particular of the Leisure and Community Services Committee, the promoting committee, or of the Environment Committee which was prevented by statute from deciding the applications. Mr Wolfe submitted that that approach and its applicability to the present circumstances emerged from the earlier decision of Sedley J in *R v Secretary of State for the Environment ex p Kirkstall Valley Campaign Ltd* 1996 3 All ER 304. He said however that the facts here satisfied the more limited "closed mind" or "abdication of proper responsibility" approach in the *Teeside Development Corporation* case. Mr Hockman agreed with the approach of Sedley J in both cases but submitted that, properly understood, it supported his submissions.

248. The conclusions of Sedley J. in *Kirkstall Valley* need to be seen in the context of the facts and the legal submissions made in that case. The Chairman of the Leeds Urban Development Corporation was held to have a pecuniary interest in a development proposal, because the grant of permission would enable the rugby club to move to a site near to land which he owned, which would in consequence be more likely to be removed from the Green Belt, as he wanted, and very substantially increased in value. Two other Development Corporation Board members and officers held various largely honorific positions in the same rugby club and had political connections with the Chairman which were not disqualifying interests. A fourth, a board member, had a financial interest in the move of the rugby club, through his position as its commercial surveyor; although he declared his interest, he remained at the meetings, creating a real danger that his continued presence would influence the decision-making process.

249. It was submitted on behalf of William Morrisons, whose planning permission was at stake, that the only issue of relevance was whether the Development Corporation as a non-judicial body had gone beyond mere predisposition in favour of a particular course and had predetermined it.

250. Sedley J rejected that submission. He held that there were two legal principles which could be engaged, jurisprudentially distinct albeit that relevant factual aspects might overlap. After an extensive consideration of the cases he concluded at p 321:

"In *R v Gough*, the House of Lords has assimilated the test of appearance of bias to the now unitary test of a real danger of bias, in part by assimilating the hypothetical observer to the court hearing the challenge, and correspondingly by assimilating the maxim that justice must be seen to be done to the court's duty to identify any real danger of unjust bias. It is by these criteria in the context of the respondent's statutory function, and not by a prior characterisation of that function, that the facts in *Lannon* would today fall to be tested.

This being so, there is, in my judgment, nothing in the jurisprudence of *R v Gough* which necessarily limits to judicial or quasi-judicial tribunals the rule against the participation of a person with a personal interest in the outcome. The line of authority relied upon by Mr Ryan represents, in my view, a different although equally important principle: that the decision of a body, albeit composed of disinterested individuals, will be struck down if its outcome has been predetermined whether by the adoption of an inflexible policy or by the effective surrender of the body's independent judgment. The decision of the House of Lords in *Franklin v Minister of Town and Country Planning* [1947] 2 All ER 289, [1948] AC 87 cannot now be regarded as diluting this principle."

251. The test for bias was whether there was a real danger that a person would be influenced by a pecuniary or personal interest in the outcome of a question for decision. Such a test should apply to local authority decisions.

252. Predetermination was different:

"The surrender by a decision-making body of its judgment, which would have been another way of putting the ground of challenge in *Ex p Terry*, while it can legitimately be described as a form of bias, is jurisprudentially a different thing from a disqualifying interest held by a participant in the process. There may well be facets of the statutory set-up which contemplate dealings at less than arm's length between a planning authority and a developer, and these may in turn qualify the questions upon which independent judgment must be brought to bear, and so preserve a decision in which the planning authority has a pecuniary or other interest. But there is a difference of kind and not merely of degree between this situation and the situation of a participant member of a decision-making body who has something personally to gain or lose by the outcome."

253. Sedley J instanced a case in which a Council "had become so closely associated with the company in attempts to secure planning permission for the company's project that it had completely surrendered its powers of independent judgment."

254. A distinction had to be drawn between predisposition and predetermination, and predisposition did not satisfy, by itself, the test for bias in relation to planning decisions:

"In this way the necessary involvement of local elected councillors in matters of public controversy, and the probability that they will have taken a public stand on many of them, limits the range of attack which can properly be made upon any decision in which even a highly opinionated councillor has taken part. This is why in *R v Amber Valley DC, ex p Jackson* [1984] 3 All ER 501, [1985] 1 WLR 298 Woolf J was able to hold that although the principles of natural justice governed applications for planning permission, these principles were not violated by a decision of the majority party that it supported a particular planning application. Woolf J, without drawing any distinction between the judicial and the administrative, held [1984] 3 All ER 501 at 509, [1985] 1 WLR 298 at 307-308):

"The rules of fairness or natural justice cannot be regarded as being rigid. They must later in accordance with the context. Thus in the case of highways, the department can be both the promoting authority and the determining authority. When this happens, of course any reasonable man would regard the department as being predisposed towards the outcome of the inquiry. The department is under an obligation to be fair and to carefully consider the evidence given before the inquiry but the fact that it has a policy in the matter does not entitle a court to intervene. So in this case I do not consider the fact that there is a declaration of policy by the majority group can disqualify a district council from adjudicating on a planning application. It may mean that the outcome of the planning application is likely to be favourable to an applicant and therefore unfavourable to objectors. However, Parliament has seen fit to lay down that it is the local authority which have the power to make the decision ....."

255. The distinction can be illustrated by the decision of Brooke J in *R v Chesterfield BC ex p Darker Enterprises Ltd* 1992 COD 466 in which the participation in the decision, on the renewal of a sex shop licence, of a Councillor and Chairman known to be opposed to sex shops in general and this one in particular, did not vitiate the decision; whereas the participation of a Councillor who was a director of the company which owned adjoining premises and from which it could expand into the sex shop were it forced to close, because of non-renewal of its licence, was objectionable because of his pecuniary interest.

256. I accept Sedley J's analysis of the two distinct principles. The first question is whether there was a real danger that a Councillor's decision would be influenced by a personal interest, or putting it in what may be a slightly different formulation of the test for bias, following *In re Medicaments and Related Classes of Goods (No 2)* 2001 1 WLR 727 CA: would the fair-minded observer, knowing the background, consider that there was a real danger of bias from, in this context, a personal interest held by a Councillor? There is an important distinction between bias from a personal interest and a predisposition, short of predetermination, arising say from prior consideration of the issues or some aspect of a proposal. The decision-making structure, the nature of the functions and the democratic political accountability of Councillors permit, indeed must recognise, the legitimate potential for predisposition towards a particular decision. The source of the potential bias has to be a personal interest for it to be potentially objectionable in law.



257. I accept that in principle a non-pecuniary but personal interest can cause the participation of a Councillor to give rise to the perception of fair-minded observer that there was a real danger that the personal interest has influenced his or her views. It may be in any particular case, that that perception would be removed by the declaration of the interest, or by declaration and non-participation in the debate but that it may also require in other circumstances that the Councillor depart. As I have made clear, this case does not concern any Councillor or officer's pecuniary interest.

258. The National Code of Local Government Conduct, issued "for the guidance of members of local authorities" by the Secretary of State for the Environment under section 31 of the Local Government and Housing Act 1989 was referred to by both parties, in the form in which it appears in the *Kirkstall Valley* case. It supplements the disqualifying provisions in relation to pecuniary interests. Paragraphs 5 and 9-12 provide:

"5. If you have a private or personal interest in a question which councillors have to decide, you should never take any part in the decision, except in the special circumstances described below. Where such circumstances do permit you to participate, you should never let your interest influence the decision.

9. Interests which are not pecuniary can be just as important. You should not allow the impression to be created that you are, or may be, using your position to promote a private or personal interest rather than forwarding the general public interest. Private and personal interests include those of your family and friends, as well as those arising through membership of, or association with, clubs, societies and other organisations such as the Freemasons, trade unions and voluntary bodies.

10. If you have a private or personal, non-pecuniary interest in a matter arising at a local authority meeting, you should always disclose it, unless it is insignificant, or one which you share with other members of the public generally as a ratepayer, a community charge payer or an inhabitant of the area.

11. Where you have declared such a private or personal interest, you should decide whether it is clear and substantial. If it is not, then you may continue to take part in the discussion of the matter and may vote on it. If, however, it is a clear and substantial interest, then (except in the special circumstances described below) you should never take any further part in the proceedings, and should always withdraw from the meeting whilst the matter is being considered. In deciding whether such an interest is clear and substantial, you should ask yourself whether members of the public, knowing the facts of the situation, would reasonably think that you might be influenced by it. If you think so, you should regard the interest as clear and substantial.

12. In the following circumstances, but only in these circumstances, it can still be appropriate to speak, and in some cases to vote, in spite of the fact that you have declared such a clear and substantial private or personal interest: (a) if your interest arises in your capacity as a member of a public body, you may speak and vote on matters concerning that body; for this purpose, a public body is one where, under the law governing declarations of pecuniary interests, membership of the body would not constitute an indirect pecuniary interest; (b) if your interest arises from being appointed by your local authority as their representative on the managing committee, or other governing body, of a charity, voluntary body or other organisation formed for a public purpose (and not for the personal benefit of the members), you may speak and vote on matters concerning that organisation; (c) if your interest arises from being a member of the managing committee, or other governing body of such an organisation, but you were not appointed by your local authority as their representative, then you may speak on matters in which that organisation has an interest; you should not vote on any matter directly affecting the finances or property of that organisation, but you may vote on other matters in which the organisation has an interest; (d) if your interest arises from being an ordinary member or supporter of such an organisation (and you are not a member of its managing committee or other governing body), then you may speak and vote on any matter in which the organisation has an interest ...".

259. Mr Wolfe submits that paragraph 12(b) of the Code illustrates the way in which membership of an outside body, albeit as a Councillor appointed to that position by the Council, constitutes a personal interest. It is closely analogous, he said, to the position of someone in the position of the members of the promoting committee. The Local Government Ombudsman's "Guidance on Good Practice," 1994, in relation to member's interests, refers in paragraph 32 to circumstances where the Council is dealing with "a controversial planning application" made by the outside body of which the Councillor is the appointed member. He is advised not to vote.

260. I do not consider that there is an arguable case in relation to those Councillors who had merely expressed supportive views and had even done so frequently that they had a personal interest disqualifying them from participation because of apparent bias. Their participation is to be judged by whether they had a closed mind or had predetermined views.
261. I do not consider that the Environment Committee members have any personal interest. The fact that the decision is, by statute, taken away from them and given to the full Council, without any provision for their exclusion, does not create a personal interest. I do not consider that membership of the committee which may own or manage the land disqualifies a Councillor from participation under the principles relating to bias. The land ownership and the financial consequences fall upon the Council as a whole in reality. All Councillors are to that extent partial; the change in decision-maker may dilute the strength of the relationship but if those Councillors are disqualified, so too would be the whole Council. As I have said, there is a degree of permissible structural bias built into the statutory framework for local authority decision-making.
262. This to my mind reinforces the point that the personal interest which underlies the role of bias, in its application to a planning authority, cannot be one common to all Councillors arising from membership of a Council or its Committees. It is an extraneous interest which has to be involved for bias to arise. Although membership of an external body, in the capacity of a Councillor appointed to that body by virtue of one's position as a Councillor, can create a personal interest, it is not a parallel to nor a guide to the consequences of membership of a committee with particular but necessarily delegated responsibilities, for participation in decision making by the full Council.
263. The same conclusion applies to membership of the Leisure and Community Services Committee. I accept that this Committee was closely involved in promoting the overall scheme, settling the "client brief," considering the content of the scheme as it evolved into the planning applications and negotiating with developers. It was regarded as the Committee which decided what the building should contain by way of leisure facilities, to whose views the Council deferred.
264. I do not consider that this gives rise to any personal interest. It is not an extraneous interest. The Committee is exercising functions on behalf of the Council. Its members' support for the applications is transparent but not binding on the full Council which, subject to argument on predetermination, reached its own decision.
265. I do not consider that the bias test can be applied, at least in this decision making area, unless the danger of the influence on Councillors derives from an extraneous personal interest. Were the law otherwise, it is difficult to see how a Council could lawfully reach a decision on a planning application, whether made by the Council or an outsider, if the application advantaged the Council financially or in the performance of its functions. The real danger of influence would be ever present.
266. In my judgment, the need for particular scrupulousness applies to the way in which a Council approaches such issues. The need for particular scrupulousness is not as such a legal principle: it does not add anything to the rules which already govern the composition of the decision-maker or to the considerations to be disregarded. It does not represent an objective legal standard or norm for the conduct of certain local authority functions, falling below which vitiates a decision. A moderate degree of scrupulousness but not an especially high one cannot lead to a decision being quashed, unless in certain areas but not others a very much more intensive scrutiny and level of judicial intervention is to be applied than is currently accepted law, even allowing for a narrowing of the *Wednesbury* limits in human rights cases and potentially in others. Rather it is a judicial warning of a willingness to infer, where scrupulous care is missing, that an irrelevant consideration was taken into account, a real danger of bias existed or a predetermined approach had been adopted.
267. In any event, I consider that the advice given by Mr Brookes and Ms Lowton, and the various declarations of interest and subsequent departures from the Council meeting show an intent to be scrupulous and fair rather an inadequate effort to eliminate a taint. I do not consider that the Councillors breached the Local Government Code, which is also a strong pointer as to scrupulousness.
268. I turn now to predetermination. The Claimants' case was not so much that a particular Councillor had a predetermined outlook which in effect meant that he should not have participated and that his participation in consequence tainted and vitiated the Council's decision. Certainly no evidence sufficient to make out such a claim was adduced before me. It was rather that a significant number of Councillors, if not the whole Council, had reached a predetermined view because of the whole course of conduct by officers and members over the last few years, in effect reaching a corporate view that these leisure proposals were beneficial and to be welcomed, disabling themselves from giving objective and independent consideration to the planning aspects.
269. I do not accept Mr Wolfe's arguments. The material provided fell some distance short of showing that the Council had predetermined its position as planning authority, or was unable to consider the planning issues independently.

270. I accept Mr Wolfe's point that it may be an accumulation of events, singly of no great concern, which build up the picture of predetermination or want of independence or objectivity. But it is equally important to see matters as a whole because of the risk that an advocate's accumulation of necessarily selective quotes or of events over the years can give a distorted picture of the process as a whole. There is a role for judicial antennae, suitably sensitive to the problem; one picks up a picture of what is really happening from the documents as a whole, and from the part which particular events may play; one also looks to see how crucial aspects were handled. I did not pick up the sort of picture overall, which Mr Wolfe sought to persuade me I should see from his very detailed analysis. Certainly there could have been a greater degree of separation of functions, but I did not find the overall picture one which showed a want of a proper consideration of the relevant planning issues.
271. I start from the premise that a Council is entitled to promote development in pursuit of its leisure function on its own land. This process will inevitably entail consideration of various factors impinging on estate, finance, leisure and planning. The planning prospects will need to be considered by the promoting committee both before any scheme emerges and as it takes on greater definition, before becoming the subject of a planning application. Planning advice is obviously most valuable if the matters which will most concern development control can be highlighted. The finance side, especially if it involves financial commitments from the Council, will need to be considered. The actual grant of planning permission can often be the last or one of the last pieces of the development jigsaw, simply because there is little value and often much that is counter-productive, in incurring the costs of preparing an application for a proposal, which no developer or financier will be found to support. Public participation as here, in setting out the type and size of leisure and sporting facilities required, affecting the brief to the developer or promoter, will generate controversy, as it did here. This will often lead to Councillors taking a view as to the merits or otherwise of a proposal, whether publicly expressed or leading to support in various relevant committees. Officer and member time and effort is required for a Council to promote complex development as this was, whether as applicant or a closely involved supporter. It is inevitable that there will be some corporate predisposition, at least among the supporting Councillors.
272. I did not find evidence however that Councillors were unable to consider the development control decision independently. Many declared that they were able to do so; neither the debate nor evidence of what they said or did outside the debate showed predetermination. They accepted advice as to what was not a planning consideration which I have concluded went too far, but that does not show predetermination or want of independence on their part. They were well aware of the reality which underlay that point, of the extensive opportunities for the public's views to be made known and that those views were considered by the Leisure and Community Services Committee which reached a view as to the appropriate mix. The Council knew that it was in no better a position from which to reach a different view. There were no different points or view points identified, which the Council as planning authority would have considered on this aspect, from those dealt with by the Committee. There is no evidence of any objector at the planning stage, who wished for a different mix, actually addressing the significant issue of how in design terms, let alone financially that might be addressed. Yet, because of the interaction between those aspects, changes to the mix, of the sort some objectors wanted e.g. larger hall, more pools, would not have been possible without re-examining all those aspects. Hence the approach that the Councillors should not be looking for variations; the question was should these applications be granted or not. There is no evidence of any Councillors saying that this advice affected their vote when in truth they would have voted differently if differently advised. Councillor Mennear complained that there were some matters which he had been told earlier were planning matters but which at Development Control Sub-Committee he was told were not planning matters; but there is no evidential justification for what he said.
273. The reports to the Council provide a fair analysis of the main issues. I did not find in them the vices present in the *Tees Valley Development Corporation* case. They were supportive of the proposals, plainly taking the view that they were to be welcomed. The reports were however not advocacy documents; they did not put forward simply the best professional case which could be made for the proposals. The reports identify accurately the range and nature of objections; they do not omit or misrepresent them. They identify the issues and the disadvantages; the position in relation to the all-weather pitch and the amenity problems are spelt out.
274. There are criticisms which can be made of the analysis of the UDP policies and the language of "due regard" being had to them. However, for reasons which I have already given, I do not consider that those criticisms reveal a failure to comply with section 54A or that there were breaches of policy which were brushed aside. I do not think that they demonstrate a want of objectivity; even though they do not show the highest level of intellectual or analytical rigour, they show the real issues being analysed, at not too great a length, for decision by Councillors.
275. It was known when these reports were drafted that the decision would be made by full Council and that they would be supplemented by Notes and legal advice for non-planning Councillors.
276. The length of the debates at Development Control Sub-Committee and at full Council also show that development control was not dealt with on the nod. Indeed the different levels of assent and dissent on the two controversial applications are strong indicators against a lack of independence and against a predetermined view.

277. Councillors also received specific legal advice as to their participation in the meetings. The issue was addressed by the Borough Solicitor; it cannot seriously be suggested that the advice was unconsciously biased in order to secure the presence or absence of a particular viewpoint.
278. It is in the officer reports, the debates and the advice given where I would expect to see the visible signs of predetermination or want of objectivity. Instead to my mind, they point the other way.
279. I do not accept Mr Wolfe's argument that the fact that Mr Lowton and Mr Brookes had offered advice to the promoting committee or to the Project Group meant that their advice on what were planning considerations and on who should not participate, puts them in a position equivalent to a personally interested or apparently biased judicial clerk, tainting the proceedings at which he officiated. I did not find Mr. Wolfe's references to the Law Society's Rules for Employed Solicitors helpful to his case. They did not provide for the situation here.
280. Mr Wolfe referred to a number of instances where he said the promoting committee had had a degree of political access which a third party developer would never have had, or had enjoyed access to officers, or had had other benefits which an outsider would not have had. To some extent, what he says is and must be right, simply by virtue of the fact that one applicant was a Council Officer on behalf of the Council and the other proposal was promoted by the Council on its own land for the better performance of its function in providing leisure services. It is also true to observe that not merely does statute provide for that to be done and for the Council to remain the decision-maker, but that in this case, one of the consequences of that was a high degree of public participation in the content of the development, and democratic control and accountability over the decisions of the "developer" or "promoter", which also does not occur with an external developer.
281. However, I saw nothing concerning in the level, frequency or nature of contacts between members. Of course, it is possible to devise, formally, more watertight compartments and to preclude attendance of Councillors who are both Environment and Leisure and Community Services Committee members, from one or other of those Committees' meetings when the project is discussed. However, the Leisure and Community Services Committee Chairman deliberately did not attend the full Council meeting. But the development control decision was to be made by full Council, so overlap was inevitable. I recognise that the considered views of the Development Control Sub-Committee were reported to its parent committee and to full Council and they may well have weighed in Councillor's minds. It falls below the standard of "particular scrupulousness" for that Sub-Committee's members to have attended the promoting committee's meetings, if the Sub-Committee were to consider and report to full Council on that proposal. However, I do not infer a want of objectivity or independence from that, in the light of all the other evidence. I also consider that these particular circumstances may also permit adverse inferences to be less readily drawn, compared to the position where the Council is, say, simply selling off land for capital receipts. Here it is seeking, whether its residents agree with the outcome or not, to improve poor leisure provision, using its own land in leisure use for that purpose and covering the costs of doing so.
282. The interaction between planning officers and the Project Group and the promoting committee was relied on in this context by Mr Wolfe. He accepted that a developer would often have a large part to play in the preparation of a Planning Brief, but here, he said, in effect the development control body allowed the developer, through Mr Burley to write the Planning Brief and to present it to the Development Control Sub-Committee. He ceased to be a member of the Project Team in January 1999 and was not part of the development control team. I do not see the degree of interaction between the Project Group and the draftsman of the Planning Brief as objectionable. Mr. Burley was not answerable to the Leisure and Community Services Committee. He had the sort of contact with the "developer" at this stage which is to be expected. He was not instructed by the Project Group as to what to write. It was approved by the experienced Development Control Sub-Committee. It accorded with the UDP and the contrary has not been suggested. Indeed Mr Wolfe sought to exploit that Brief against the Council on planning aspects. But there was no aspect in it which suggested a slanting of the policies or of the relevant considerations so as to facilitate a development, which after all, still had no form to it at that stage and in respect of which the "Client Brief" was being prepared by others, in parallel at the start but with a later finishing date. So far as Ms Silcock's roles are concerned, there is nothing sinister in her attendance at a "team meeting" which involved meeting those with whom she would negotiate as development control officer. The evidence did not show that she actually attended any meeting with the Winch in order to take "a firm line"; it is uncertain whether she even stayed for that part of the Project Group meeting where the line was agreed. Her attendance to give development control advice was not objectionable. I do not consider any adverse inference as to objectivity can be drawn from those circumstances even if in a perfect world, at least if perfection consists of avoiding the inception of judicial review proceedings, the attendance and departure of development control officers at meetings with "promoters" was separately recorded, timed and the words spoken, minuted.
283. The all-weather pitch may or may not have been treated differently if the developer had been a private developer. Mr Wolfe's submission is no more than speculation. It can be speculated that the Council, wanting a development to proceed because of the benefits, would have been prepared to take the chance that the proposal for a replacement at Quintin Kynaston would fail and that no other could be found by the private developer, and would not have made its

replacement a precondition of development. If then the Council had wanted more it would have been impossible to compel the developer to do more than provide the Council with the funds for a replacement pitch if it did not already own suitable land, or to impose a best endeavours obligation to find it.

284. As Mr. Hockman said, the Council is entitled to trust itself to do what it would have expected of a private developer. The Council clearly did not want to hold up the development and was fully entitled to rely on its own sense of responsibility as a publicly accountable body with a continuing leisure function to perform. It could not be expected to fashion some planning condition preventing the developments proceeding if, as was clearly the case, it took the view that it preferred to make rapid progress and accept a risk on the replacement pitch. In effect it treated itself as a private developer could have been treated, if its proposal were seen as equally beneficial.
285. The fact that the section 106 agreement follows the development agreement simply reflects the fact that the latter sets out the limits of what the developer has agreed to do, and affected its unwillingness to agree to more onerous obligations for the purpose of a section 106 agreement than have already been accepted. A section 106 agreement has to be agreed. Mr Wolfe did not point to any feature of the Council's planning resolution which had been omitted, or a feature which the Council abandoned in its planning considerations because of the terms of the development agreement. I have already dealt with the all-weather pitch in so far as his point related to that aspect.
286. I do not attach the significance which Mr Wolfe does to this proposal not being treated as a departure. It was considered not to be a departure at the initial stage of publicity for the applications. The analysis of the policies in the reports do not support the contention that it was or ought to have been seen as a departure application.
287. I accept that there are, as I have indicated, a few areas where a greater degree of separation between functions would have been necessary to satisfy what I would regard as a "particularly scrupulous" approach. I do not regard most of the other complaints as well founded in themselves. Looked at overall, and bearing in mind the tone and contents of the reports, the legal advice received before the meetings, compliance with the Local Government code and the nature of the debate, I do not conclude that there was a want of objectivity in the Council's approach to the consideration of the applications such that there was a predetermination or effective delegation of its views to another body or a prevention of the Council fairly considering relevant and only relevant planning factors.
288. The Council did not consider one potential planning aspect, delegating that to the Leisure and Community Services Committees, but that does not affect my view on this broader issue. As I have explained, if properly analysed before the Council, it could not have led to a different decision.

#### Delay

289. Proceedings were lodged more than ten weeks after the decision on 7<sup>th</sup> March 2001. Ms Lambeck, a paralegal employed by the Claimants' solicitors Leigh Day & Co, described how the first four Claimants had been unaware of the possibility of initiating a judicial review or of the time limits for so doing.
290. A campaign meeting, as Ms Lambeck described, it was held on 27<sup>th</sup> March 2001, a suitable date for "all the interested objectors." It was at this meeting that the decision was made to seek legal advice but it was not until 12<sup>th</sup> April 2001 that contact was made with Leigh Day, following an unsuccessful approach to another firm. Time was then taken up obtaining information and advice. The Council took some 12 days in which to reply to the letter before action dated 27<sup>th</sup> April 2001 and it was then the finalising of the claim form which led to the further period of a week or so before the claim form was lodged, on 18<sup>th</sup> May 2001.
291. There has been no dispute before me but that the decision of 7<sup>th</sup> March 2001 was the relevant event for the purposes of CPR Part 54.5(1). There is no "domestic" law challenge to the latter refusal by the Secretary of State to call the applications in; only the fifth Claimant challenges it on human rights grounds. The claim form had to be filed promptly and in any event no later than 7<sup>th</sup> June 2001. There is no special rule in planning cases that an application has to be made within 6 weeks of grounds arising by analogy with the time set for statutory challenges to the grant of planning permission. This period, as the Court of Appeal has recently pointed out in *R (Burkett) v. London Borough of Hammersmith and Fulham* 13<sup>th</sup> December 2000 unreported, is

but a touchstone of varying usefulness in deciding whether an application has been made promptly.

292. I do not consider here that the application was made promptly. The decision was a public decision, and would have been known to the public in the Swiss Cottage area very shortly after it had been reached. There is no reason for Claimants to await a gathering of objectors in a campaign meeting before concluding that they wish to seek legal advice. Legal advice could have been sought nearly one month earlier than it was and, even allowing for there to be a period of reflection by the Claimants before seeking legal advice, there has been no satisfactory explanation as to why a month or so passed before solicitors were instructed. I recognise that the delay caused by the first firm of solicitors contacted, being unable to take the case and by the period then involved in contacting Leigh Day and Co on 12<sup>th</sup> April 2001, is not the responsibility of the Claimants directly, but the obligation to act promptly requires more active steps to be taken by the Claimants than were in fact taken here. I do not consider that the period that elapsed between 12<sup>th</sup> April and 18<sup>th</sup> May 2001 shows any want of promptness in itself, although it shows no marked urgency either, given that by the time the solicitors first looked at the problem, on 17<sup>th</sup> April 2001 nearly six weeks had elapsed since the decision on 7<sup>th</sup> March 2001.

293. What is prompt has to be considered in the circumstances of the particular case. Planning decisions obviously affect the interests and rights of applicants and landowners. Expenditure and commitments frequently follow a resolution to grant planning permission in the form of work on various legal agreements, conveyances, consequential applications and further design. The fact that there is no special time limit in relation to judicial review challenges to planning decisions and the fact that the six week time limit for statutory challenges cannot simply be read across into judicial review, does not mean that planning decisions do not require, by their nature, a speedier challenge than in other areas may be appropriate, in order for them to have been made promptly. The general force of the comments of Simon Brown J in *R v Exeter City Council ex p. J.L. Thomas & Co. Ltd.* 1991 1QB471. p484 continues to apply.

294. I do not consider that any good reason for extending time has been shown. The reasons for the want of promptness, themselves, show that there is no good reason to extend time by reference to the cause of the delay. I have of course had the benefit of full argument in relation to the issues which arise on the merits; there is nothing in the nature of the case which is raised, notwithstanding the complexity and detail of its presentation, which furnishes a good reason for extending time.

295. On the contrary there is good reason not to extend any time, by reference to the prejudice which the Council and the Interested Parties would suffer from the grant of permission or other relief. This prejudice is relevant to the exercise of the discretionary power under CPR Part 3.1(2)(a) to extend the time for compliance with the rules. I consider it appropriate to continue to use the jurisprudence which had developed in relation to the previous power contained in RSC Order 53, Rule 4. The prejudice is set out in Mr McNicol's witness statement and in the witness statements of Mr O'Neil and Mr Murphy on behalf of the interested parties. The evidence shows that the scheme is now being delayed and it is said by Mr McNicol that delay could seriously prejudice the future viability of the project. The financing costs are increasing as each month goes by; the building costs are inflating; a delay in the start on site will postpone the receipt of income by the Council and increase the period during which the present subsidy to the existing leisure centre operator has to continue. The arrangements for the transfer of user groups and the retention of staff during the interim period add to the difficulties. The works in relation to the theatre mean that the implementation of the open space is required to reduce the loss of open space. The implementation of the uncontentious library consent is in fact dependent on the implementation of the leisure centre planning permission and that work is

being delayed at a cost to the Council as the tender for those works remains open. Mr Murphy refers to the risk to the team built up, in particular since March 2001, the risk to the timing of the project and its consequential viability, and to the grant funding for the social housing.

296. It is of course true that the development agreement was not signed until 18<sup>th</sup> May 2001 and that the planning permission and section 106 agreements were not issued until 2<sup>nd</sup> August 2001. The prejudice to the development, to the Council and the interested parties is caused more by the delays and uncertainties in court proceedings than by the period of time that elapsed before the commencement of proceedings. No specific act, beyond the progressing of the agreements, took place before the issue of the claim form. This is not a case for example where a significant land transaction occurred shortly after the resolution.

297. It is also right that the provisions in the development agreement can be said to contemplate, though plainly not to welcome, a potential challenge by way of judicial review because provision has been made for what is to happen in that eventuality. The latter has some weight but not very much, because the fact that parties have made provision against an undesirable eventuality and have arranged how it should affect them contractually, does not mean that the event is incapable of giving rise to considerable difficulties which contractual solutions themselves may be unable to make recompense for; rather such provisions decide how the loss should fall; they do not provide a means for avoiding the loss.

298. It is very often true that it is the delays in determining judicial review proceedings which have been brought in time which will create prejudice to a defendant. However, I consider that the defendant and interested party have shown that there has been prejudice caused by the institution of the proceedings and that there would be prejudice caused by the grant of relief. I do not consider that they have shown any significant prejudice arising from the want of promptness itself although clearly there has been a month or so of increasing costs and revenues foregone. However, I consider that the prejudice does weigh against the exercise of the power to extend time and I decline to do so.

#### Discretion

299. If I had granted permission to apply, I would have declined to grant relief to these Claimants in the exercise of my discretion, in relation to the failure to consider as planning considerations, the leisure content of the new building. First, none of the claimants suggested to the Council that the content of the leisure building was objectionable in the context of seeking a differently designed or larger leisure building making provision for what they might have contended had been omitted. Second, the evidence as to the prejudice which has been suffered by the Council and the interested parties and which would continue to be suffered if the matter went back would weigh against the grant of relief in respect of that potential error. Third, and most important, as I have said I find it difficult to see how correctly approached the emphasis would have been different as a matter of planning substance and accordingly I find that the omission in fact made no difference to the substance of the Council's approach and consideration. The result would still have been the same.

#### The fifth Claimant

300. Ms. Cook stands in a different position from the other four Claimants. She alone raises a human rights issue, although it is fair to say that the coincidence of her appearance as a Claimant and the raising of the human rights issue in the terms in which it was then raised, did not obviously show that it was she alone who raised those points. Indeed the letter dated 21<sup>st</sup> August 2001 from Leigh Day & Co to the Council and the amended Claim Form clearly suggest that the issue was being raised generally. This was clarified at the hearing. She raises none of the issues relied on by the other four Claimants.

## Procedural matters

301. Her application for permission is made by way of an undated amendment to the Claim Form. This was made after but not in response to Orders by Maurice Kay J on 4<sup>th</sup> July 2001, adjourning the original application for permission to open court for an expedited 2 day hearing at which delay, permission and substance could be considered, and by Sullivan J on 13<sup>th</sup> August 2001 dealing with the role of the Interested Parties. The fact that the fifth Claimant wished to make an application and that a human rights issue was to be raised, was notified to the Council in the letter of 21<sup>st</sup> August 2001. The amendment to the Claim Form containing the grounds was sent to the Council on 31<sup>st</sup> August 2001. I do not know when the amendment was sent to the Administrative Court, but for present purposes I shall assume that in effect lodging took place on that same day, although I do not understand there to have been any formal lodging of the amended grounds by way of indicating the commencement of a claim by an additional Claimant.

302. There is no provision in CPR Part 54 or in the Practice Direction for the amendment of a Claim Form by the addition of a Claimant. In my judgment, the provisions of Part 54 need to be complied with, even if by the resubmission of the original Claim Form with the added party and grounds. It may well be that in many cases, no particular problem will arise. Here, the additional Claimant also raises new facts and new grounds. The procedures applicable to the commencement of proceedings should be followed; the formal lodging of the new or amended Claim Form marks the end of the period which elapses from the time when grounds for making the application first arose. It enables delay to be considered early on; a refusal of permission because of extensive and unexplained delay may affect the funding of any renewal. It enables directions to be considered on paper.

## Delay

303 Mr Wolfe has acknowledged that consideration has to be given separately to the question of promptness in Ms Cooke's case because of the greater delay. She cannot be treated as someone who merely tags along with a claim made promptly, (if I had so concluded in relation to the first four Claimants), because her claim itself raises separate questions of delay and different grounds of challenge. The lapse of time I shall take to be from 7<sup>th</sup> March 2001 to 31<sup>st</sup> August 2001, the date when the new grounds were sent to the Council, a period of nearly six months. The Secretary of State first refused to call-in the applications on 12<sup>th</sup> March 2001 and again refused to do so on 4<sup>th</sup> May 2001 in response to the request made on behalf of the first four Claimants and others, but not the fifth Claimant.

304. The application was made outside the three month period, on any view of the decision challenged. No reason at all has been given for any of the delay. No basis has been shown for any extension of time. There are clearly reasons of prejudice, to which I have already referred, which weigh against any extension of time, and do so yet more powerfully than in the case of the first four Claimants.

305. I accordingly refuse Ms Cooke permission to apply for judicial review. Had a separate Claim Form or an amended Claim Form formally been lodged which made it clear, as this one most certainly did not, that the fifth Claimant alone raised a human rights point, permission might well have been refused in terms which made it improbable that the time and cost of dealing with any renewed application would have been incurred.

## The merits

306. I have however heard full argument on the merits of her point and, I shall deal with them. The parties, whilst arguing delay points, have all asked me to deal with the merits. Mr Wolfe



assailed both the Council's decision on 7<sup>th</sup> March 2001 and the failure of the Secretary of State to call in the applications for his own determination.

307 So far as the Council's decision was concerned, it was originally said that the civil rights in question were rights to the peaceful enjoyment of property and were reflected in Article 1 of the First Protocol and her rights under Article 8 ECHR to respect for her home and family life. These rights were determined by the decision to grant planning permission. This meant that the "Claimants", as the amended Claim Form put it, were entitled to access to an independent tribunal to resolve "matters of dispute with the Council", which could only be provided were the Secretary of State to call-in the applications. The "matters of dispute" were the factual issues which arose from the whole subject matter of this case. Later, factual issues particular to the fifth Claimant were identified. These required resolution by an independent fact finder. That could only be provided within the statutory framework, by the process of call-in so that an Inspector could hold an Inquiry, reporting to the Secretary of State. In the absence of call-in, the decision was unlawful. The Court could not act as the independent finder of facts, one point which I do accept.

308. The Secretary of State was said to have acted unlawfully in failing to call in the applications: he was duty bound by section 6(1) of the Human Rights Act 1998 to call them in because it was only through his intervention that that independence could be provided. Mr Wolfe made it clear at the hearing that he was not pursuing a challenge to the refusal to call in the applications based on non-human rights grounds.

309 Mr Wolfe originally sought a declaration that section 316(1) of the 1990 Act and Regulations 2 to 11 of the 1992 General Regulations were incompatible with the rights of the Claimants under Article 6 ECHR, in so far as those provisions allowed or required the Council to grant planning permission. Later he submitted the Secretary of State was not bound by Regulations, secondary legislation, to act incompatibly with those rights. It was only if he were unable to act compatibly with those rights that any question of a declaration of incompatibility arose.

310. No human rights issue could arise in respect of the first four Claimants. They had no civil right, and had pointed to none, which was being determined by the Council's decision. They were affected in their enjoyment of Council owned commercially operated facilities; that did not constitute any form of civil right.

311 As Mr Nicholls submitted, their complaint is that they will not be able to continue to use the facilities provided by the Council which they have previously enjoyed. They cannot point to any private law right to use those facilities. The reason they can use them is the decision of the Council to provide and maintain the facilities in the exercise of its public law functions as a local authority. The matters in issue are thus on the public law rather than private rights side of the line. Article 6(1) therefore has no application in their cases.

312. The entirety of the factual material which Mr Wolfe relied on for his case was set out in the Claim Form as amended and as signed as true by the solicitor for the fifth claimant on the last day of the hearing. There was no witness statement from Ms Cooke to elaborate on the brief facts set out in the claim form. I quote it in full.

"Debra Cooke who lives in a 3 bedroom flat on the 5<sup>th</sup> floor at 'Taplow' Swiss Cottage the view from which will be adversely affected by the proposed new high rise block of flats. She has four children. There is a playground associated with the flats which she and her children are entitled to use by virtue of being residence of the flats. Her children spend a considerable amount of time all year round in the playground. If the proposed development proceeds all direct sunlight to the playground will be completely blocked and the playground will be overlooked by a large number of flats in the new block. Her enjoyment

of her property and her family life will be adversely affected by the new development."  
(The playground referred to is not on the development site).

313 This is the basis for Mr Wolfe's submission as to factual issues which needed independent resolution. It was not suggested that Ms Cooke had raised these points with the Council either before or after the 7<sup>th</sup> March 2001; Mr Jordan in his witness statement on behalf of the Council said that the concerns had not been raised with the Council. He pointed out that the playground in question was to the north and east of the proposed development and indeed to the north and east of the Taplow block in which Ms Cooke lives. He pointed out that the assertions in the Claim Form could not factually be true because morning sunlight would reach the playground from the south east as it currently did and that afternoon sunlight was already blocked by the Taplow block itself. No harm was identified by Ms Cooke as following from the fact that the playground would be overlooked in a way in which it currently was not; it was of course already overlooked by the Taplow block. There was no response from Ms Cooke to what Mr Jordan said.

314. During the course of his submissions Mr Wolfe contended that a factual issue also arose in relation to sunlight and daylight within Ms Cooke's flat itself as a result of the proposed development. I have already set out what the officers' report said on those issues in relation to Taplow block and Winchester Road properties.

315. I now turn to the provisions of the European Convention on Human Rights. Article 6 provides:

"1. In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

Are any of the fifth Claimant's civil rights being determined? I accept Mr Nicholl's submission that whilst it is possible for a decision on a planning application to determine the civil rights of persons other than the applicant or landowner, it must be shown that there is a genuine and serious dispute, the resolution of which involves the "determination" of a person's "civil rights and obligations". I also accept that in order for there to be a determination of a person's civil rights and obligations, the link between the decision and the right must not be too tenuous; where it is tenuous the decision does not determine those rights. In *Balmer-Schafroth v Switzerland (1997)* 25 EHRR598 at paragraph 32, the ECtHR held that the dispute had to be over a right which was recognised under domestic law. The dispute could be related not only to the actual existence of a right but also to the manner or scope of its exercise. "The outcome of the proceedings must be decisive for the right in question. As the Court has consistently held mere tenuous connections or remote consequences are not sufficient to bring Article 6 (1) in to play."

316. The applicants in that case lived within 5km of a nuclear power station the operation of which was said to be dangerous because it had construction defects and did not satisfy current safety standards. There was a specific statute which created a right for them to have their physical integrity adequately protected from the risks entailed by the use of nuclear energy. The Court held that nonetheless they had failed to "establish a direct link between the operating conditions at the power station which were contested by them and their right to protection of their physical integrity as they had failed to show that the operation of (the) power station exposed them personally to a danger that was not only serious but was also specific and, above all, imminent. In the absence of such a finding ... neither the dangers nor the remedies were established with the degree of probability that made the outcome of the proceedings directly decisive within the meaning of the Court's case-law for the right relied on by the applicants. In the Court's view, the connection between the Federal Council's decision and the right invoked by the applicants was too tenuous and remote."

317. The sequel case of *Athanassoglou v Switzerland* (2001) 31 EHR 13 p 372 illustrates that Article 6 is not to be used as a vehicle for ventilating public law or policy disputes. The two cases together show that the serious dispute about the right in question and the directly decisive nature of the proceedings for its determination must be properly evidenced and not assumed.

318. The decision of Sullivan J. in *Vetterlein v Hampshire County Council* 14th June 2001 is a domestic illustration of the application of that principle. Mr Wolfe pointed out that that latter case concerned people who lived far more remotely from the development in question there, an energy recovery facility, than did the fifth Claimant from the site here. I observe however that the nature of the effects alleged in *Vetterlein*, from air pollution, would have been by their nature more widespread than the effect on a view or daylight or sunlight in this case.

319. Mr. Wolfe did not dispute the principles that derive from those cases but said that they were met in the case of the fifth Claimant here. I do not accept Mr. Wolfe's submissions.

320. There is no evidence that there is a dispute, let alone a serious dispute, either as at 7th March 2001 or subsequently about any property rights or Article 8 rights which she may have. There is no evidence as to what she contends any dispute is about. There is no evidence that she complained to the Council or at any stage raised with the Council the issues which it is asserted on her behalf arise in this case. She cannot through an advocate simply assert that because there is some vague effect upon her, her civil rights are engaged.

321. The overshadowing of the playground associated with the block of flats in which she lives and where her children play, does not affect any property right that has been explained to this Court; it is in any event too remote and tenuous a right, if it exists, to be determined by the decision to grant planning permission.

322. I do not accept Mr. Nicholl's submission to the effect that there cannot be an affect upon the right to the enjoyment of property through the effect upon the daylight or sunlight amenities which are enjoyed by it. If there is a specific right to light or some covenant or easement, the grant of planning permission would be a step on the way to a potential removal or breach of the covenant but would not be directly decisive of it. In any event, no such right is asserted. A mere loss of property value, without any right being infringed or tortious conduct, might involve a determination of civil rights but it would have to be significant and evidenced. Here the nature of the rights which the fifth Claimant has in her flat are not explained or evidenced. I would expect a much more specific definition of the property right which is said to be enjoyed and of the impact which the decision is said to have upon that right, before a Court could regard a third party's property rights as being determined by a planning decision.

323 It is also right to point out that the only claim that Ms Cooke makes in her Claim Form, apart from the effect on the playground, is that the view from her fifth floor flat window would be affected. She did not suggest that there would be any impact on the sunlight or daylight in her flat or that such an effect would have any pecuniary impact.

324. There is no general domestic law right to a view even though development may reduce the pleasantness of an outlook and consequently diminish the value of the property. Indeed even where a restrictive covenant exists, which may protect such a view, the grant of planning permission would again be a step on the way to its potential removal or breach but would not be directly decisive of the right which it embodied. Again no such rights are asserted and no pecuniary loss is asserted or evidenced, even if alone it could suffice.

325. Indeed I have difficulties in seeing how the planning system should work if it can be regarded as determining a civil right in this sort of situation. The private view from a window is not of itself regarded as a planning matter. There may well be a public interest in the protection of the character of an area which may be affected by a development and the impact on a view from a window may also be reflected in a wider loss of residential amenity; indeed in certain circumstances the change of view for an individual may have an impact to such an extent on the residential amenities enjoyed by the property that it does constitute a planning consideration. But normally a change of view from for example, a view over green fields to a view over a new housing estate, is not regarded as a planning consideration even though it may have a financial impact on the value of the houses which lose the view over hitherto open land. The operation of the planning system would have to change if such an impact is regarded as determining a civil right by reference to the value of the property, and yet cannot of itself be considered relevant.

326. Mr Wolfe argued, and it was disputed, that Ms Cooke's Article 8 rights were engaged. Article 8 provides, so far as material, that "everyone has the right to respect for his private and family life, his home and his correspondence". Mr Nicholls submitted that Article 8 could not give rise to "civil right", because those were domestic rights and not Convention rights, which were in any event enforceable only against public bodies. I do not wish to decide that point, but it is at least arguably too narrow, following 2<sup>nd</sup> October 2000, to regard Convention rights in so distinctive a way, even though they are only directly enforceable against public bodies.

327. If it is possible for rights under Article 8 to be domestic or civil rights following incorporation of the Convention in domestic law by the 1998 Human Rights Act, notwithstanding that they would only be enforceable against public bodies, nonetheless on the facts here, any interference with Article 8 rights is so insignificant as to fail to reach the threshold required for breach of that Article. It is inconceivable that overshadowing or overlooking of a playground attached to a block of flats could constitute a want of respect for home or family life; a less attractive view from the windows of one flat cannot do so either. The claim is not made that the effect of the grant of planning permission would be to create some overlooking of the domestic accommodation which would interfere with the normal level of privacy which someone in a central London block of flats could expect to enjoy. Accordingly, no civil rights of the fifth claimant were engaged or determined.

328. Mr Wolfe next submitted, that if the fifth claimant's civil rights were being determined, the existence of factual issues between her and the Council required the safeguard of an independent fact finder in order for the determination to comply with Article 6. There was no dispute but that the Council was not an independent or impartial tribunal. Following the decision of the House of Lords in *R (Alconbury Developments Limited and Others) v. The Secretary of State for the Environment Transport and the Regions* 2001 2 WLR 1389 it was recognised by Mr Wolfe that policy judgments insofar as they were involved in the determination of civil rights should be regarded as determined by an independent and impartial tribunal because of the extent of the powers of the courts on judicial review. He therefore focused on questions of fact.

329. He submitted that there needed to be a two stage process: a process of fact finding which required an independent body because of the inadequacy of judicial review to deal with findings of fact and then a second stage in which the implications of the findings of fact were assessed for the purpose of the overall planning judgment. He did not say that the independent fact finding stage had to be by an inspector through the public inquiry system in order to satisfy Article 6, but that was the only way within the existing statutory framework in which Article 6 in that respect could be satisfied.

330. Mr Wolfe placed particular reliance on passages in the speeches in the House of Lords in *Alconbury* for that distinction. However what Lord Hoffman said at para. 117 must be read as a whole and in context.

"117. If, therefore, the question is one of policy or expediency, the "safeguards" are irrelevant. No one expects the inspector to be independent or impartial in applying the Secretary of State's policy and this was the reason why the court said that he was not for all purposes an independent or impartial tribunal. In this respect his position is no different from that of the Secretary of State himself. The reason why judicial review is sufficient in both cases to satisfy article 6 has nothing to do with the "safeguards" but depends upon the *Zumtobel* principle of respect for the decision of an administrative authority on questions of expediency. It is only when one comes to findings of fact, or the evaluation of facts, such as arise on the question of whether there has been a breach of planning control, that the safeguards are essential for the acceptance of a limited review of fact by the appellate tribunal.

122. My Lords, I conclude from this examination of the European cases on our planning law that, despite some understandable doubts on the part of some members of the Commission about the propriety of having the question of whether there has been a breach of planning control determined by anyone other than an independent and impartial tribunal, even this aspect of our planning system has survived scrutiny. As for decisions on questions of policy or expediency such as arise in these appeals, whether made by an inspector or the Secretary of State, there has never been a single voice in the Commission or the European court to suggest that our provisions for judicial review are inadequate to satisfy article 6."

He continued at paragraph 128:

"The second strand concerns the facts; these are found by the inspector and must be accepted by the Secretary of State, unless he has first notified the parties and given them an opportunity to make representations in accordance with rule 17(5) of the Town and Country Planning (Inquiries Procedures) (England) Rules 2000. This is the point upon which in my opinion, the *Bryan* case 21 EHRR 342 is an authority for saying that the independent position of the inspector, together with the control of the fairness of fact finding by the Court in judicial review, is sufficient to satisfy the requirements of Article 6".

331 Mr. Wolfe submitted that what Lord Hoffmann said was not confined to enforcement notices. He referred to Lord Slynn who at paragraph 46 referred to the importance of the role of the inspector at an inquiry in examining the procedural safeguards which exist in relation amongst other matters to the findings of fact. He said:

"46. On the basis of these decisions it is in my view relevant as a starting point to have regard to such procedural safeguards as do exist in the decision-making process of the Secretary of State even if in the end, because he is applying his policy to which these controls do not apply, he cannot be seen as an impartial and

independent tribunal. The fact that an inquiry by an inspector is ordered is important. This gives the applicant and objectors the chance to put forward their views, to call and cross-examine witnesses. The inspector as an experienced professional makes a report, in which he finds the facts and in which he makes his recommendations."

332. Lord Clyde also placed substantial reliance on the role of the inspector at paragraphs 157 to 168. Lord Nolan does not refer to the point and Lord Hutton regards it as less important than the point that a review on the merits is not required in relation to administrative decisions taken in the public interest. Mr Wolfe also referred me to the decision of Richards J in *R v. Kathro and Rhondda Cynon Taff County Borough Council* 2001 EWHC Admin 527, 6<sup>th</sup> July 2001. Richards J in paragraph 20 pointed out that the differences between the decision-making process of a local planning authority and that of the Secretary of State are potentially important in relation to fact-finding.

"It remains the case however, that the jurisdiction to review facts is a limited one; and in reaching the conclusion that this limited jurisdiction is sufficient, their Lordships [in *Alconbury*] placed considerable emphasis on the role of the inspector in the decision-making process of the Secretary of State – a role which has no equivalent in the decision-making process of a local planning authority".

He summarised his assessment of the decision in *Alconbury* at paragraph 28

"Looking at the overall tenor of the speeches in *Alconbury* and the underlying decisions of the Strasbourg Court however, I accept that the finding that the Secretary of State's decision-making process was compatible in principal with article 6 was based to a significant extent on the fact-finding role of the inspector and its attendant procedural safeguard. By contrast, there is no equivalent in the decision-making process of a local planning authority. That process includes a right to make representations and to submit evidence, and persons may be heard orally at a meeting of the relevant committee. But there is nothing like a public enquiry, no opportunity for cross-examination and no formal procedure for evaluating evidence and making findings of fact. The report of the planning officer to the committee generally contains an exposition of relevant facts, including any areas of factual dispute, but does not serve the same function as in inspector's report. In general there will be no express findings of fact by the committee itself. All of this considerably reduces the scope for effective scrutiny of the planning decision on an application for judicial review. It makes it more difficult, if not impossible, to determine whether the decision has been based on a misunderstanding or ignorance of an established relevant fact, or has been based on a view of the facts that was not reasonably open on the evidence.

29. For those reasons there is in my view a real possibility that, in certain circumstances involving disputed issues of fact, a decision of a local authority which is not itself an independent and impartial tribunal might not be subject to sufficient control by the court to ensure compliance with article 6 overall".

333. Richards J was dealing with a case in which the challenge preceded the proposed determination of the planning application and accordingly it was unclear to what extent there would be for example in relation to traffic and parking any factual issue when the decision was ultimately made. He was unable to see therefore, how matters might turn out for the purposes of assessing

whether the powers of the court would be sufficient in that instance to provide the independent and impartial tribunal which Article 6 required.

Richards J continued:

"In those circumstances it is quite impossible to conclude that the absence of a fact-finding procedure equivalent to that of the Secretary of State's decision-making process will result in an inevitable breach of article 6 in that the decision of the defendant council will not be subject to sufficient judicial control. The claimants' pre-emptive strike on the ground that the procedure is inherently in breach of article 6 or will inevitably give rise to such a breach cannot succeed. Whether judicial review is adequate for the purposes can only be assessed in the light of an actual decision and by reference to the particular grounds, if any, upon which it is sought to challenge that decision.

It is only in relation to fact-finding that the position of the local planning authority differs materially from that under consideration in *Alconbury*. In other respects it seems to me that the reasoning of the House of Lords applies and that the present challenge under article 6 must fail on the same basis as the *Alconbury* challenge failed."

334 Mr Wolfe also referred to the analysis of types of issue set out in the judgment of Forbes J in *R (Friends Provident Life and Pensions Ltd) v Secretary of State for Transport, Local Government and the Regions* 2001 EWHC Admin 820 19<sup>th</sup> October 2001. Forbes J was considering a similar submission to the one made by Mr Wolfe that the factual issues involved in a planning application required resolution by an independent body. Forbes J said:

"89. In developing his submissions Mr Sales made the helpful and valid point that there is a range or spectrum of the types of issue which can arise in cases of administrative decision making, of which the following may conveniently be regarded as obvious examples:

- (i) the decision may depend on the administrative decision maker making a finding as to some present or future fact - typically in enforcement proceedings (see Lord Hoffman in *Alconbury* at paragraphs 90, 95 and 117);
- (ii) the decision may depend on the administrative decision maker making a judgment as to the progress or outcome of some future event or events: e.g. (as in the present case) the impact of a particular development on a particular locality; or
- (iii) the decision may be based by the administrative decision maker on purely planning (i.e. policy) grounds."

335. Mr Wolfe submitted that this list, which Forbes J recognised was neither exhaustive nor composed of mutually exclusive categories, was capable of refinement. "Future fact" meant what it said, and whilst the impact of future traffic levels, or the degree of retail impact might be issues more obviously of judgment, the future loss of sunlight or daylight was one of fact.

Forbes J concluded :

"93. In my judgment, however these issues are characterised, the assessment of such matters as the likely impact of the proposed development on Norwich City Centre and its associated traffic issues is clearly very different from findings "of facts, or the evaluation of facts such as arise on the question of whether there has been a breach of planning control": see Lord Hoffman at paragraph 117 of his speech in *Alconbury*. As it seems to me, this is a reference by Lord Hoffman to the type of dispute which requires the making of findings of primary and immediate fact by the administrative decision maker - findings which are needed to resolve substantial issues of fact in the dispute in

question, which issues have to be resolved in order make the decision which will determine that dispute. In my view, it is that sort of dispute which typically comes within Mr Sales' category (I). I accept that the "safeguards" of the quasi-judicial process of a public inquiry before an independent inspector may well be needed in such a type of investigation, if the High Court's power of review is to be sufficient for the purposes of Article 6. However, I do not believe that there is an absolute rule of law to that effect, although it may be difficult to think of exceptions to it. In my opinion, each case must be judged upon its own facts when deciding, in any particular case, whether the High Court's power of review is sufficient to make the overall "composite process" Article 6 compliant - i.e. to decide whether the High Court has "full jurisdiction" for the purposes of Article 6.

94. However that may be, I am completely satisfied that the "impact assessment", which has to be made in the present case as part of the planning decision making process, does not give rise to the type of investigation of fact which requires the "safeguards" attaching to a public inquiry before an independent inspector so as to ensure that the determination of Friends Provident's civil rights is Article 6 compliant. In my judgment, that assessment is, in all its essentials, a matter of local planning judgment, policy and expediency. Local planning judgment is a matter which is properly for local planning authorities to exercise. It is not a matter for the court. the exercise of that judgment is something which Parliament has left to democratically elected planning authorities and there is a democratic imperative in ensuring that such policy matters are determined by democratic institutions.

336. Mr Nicholls submitted first that the challenge actually raised did not give rise to any issues which could not be dealt with by way of traditional judicial review, and second that there was no evidence of any dispute of fact being raised with the Council. Article 6 was concerned with the resolution of existing disputes; the Council could not be faulted for not reaching explicit determinations on issues not before it.

337. Mr Nicholls submitted that it was critical how the dispute was classified: for example, how much sunlight was lost was not a factual issue because it was so bound up with policy judgments. If a factual dispute impinged on or was bound up with policy or planning judgments, it should not be regarded as the sort of factual issue which required a finder of fact such as an inspector in order for the whole determination of the civil right to have been made by an independent and impartial tribunal. Issues such as how much sun would be lost was bound up with the height of the tower; an issue concerning future traffic levels could involve a series of judgments and in turn affect other consequential judgments.

338. Even where an issue of fact was involved, it did not follow that the overall procedures, including judicial review, could not satisfy Article 6. Mr Nicholls instanced *Zumtobel v Austria* 1993 17 EHRR 116 in which part of *Zumtobel's* land was expropriated for the construction of a highway. There, before the expropriation order was made, *Zumtobel* was granted a private hearing before the Office of the Provincial Government, the highway authority of which was seeking to expropriate the land. There was no disclosure of the many of the expert reports upon which the Government was relying. There was no cross-examination of its experts or officers. *Zumtobel* simply submitted its experts' reports and made observations. An appeal to the Administrative Court complaining of breaches of procedural and substantive law was dismissed by way of the written procedure:

"In the court's opinion, the complaint that the scheme objected to was not based on any reasonable overall plan was not enough to establish that the contested decision had been unlawful. The court added as follows:

In the context of the power of review conferred on it by Article 41 of the Administrative Court Act (*Verwaltungsgerichtshofgesetz*), the Administrative Court cannot hold to be unlawful the fact that the respondent authority had regard to road traffic requirements and based its decision principally on the consideration that no other more appropriate solution -



than the construction of the proposed section of the L 52 over the land in issue - was possible. As can be seen from the findings of fact in the contested decision, the respondent authority took the view that it was in the interests of road users to divert through-traffic from the Rankweil-Brederis built-up area, which at the same time would create a useful addition to the existing road network in the Feldkirch-Rankweil area."

339. The European Court of Human Rights held that Article 6(1) had not been breached:

"27. According to the applicants, none of the authorities before which their case came in the contested proceedings could be regarded as a 'tribunal' within the meaning of Article 6(1). This was so, in the first place, with regard to the Office, an organ of the Provincial Government. It was also true of the Constitutional Court, as it was prohibited by law from reconsidering all the facts of a case. The Administrative Court was bound by the findings of the authorities, except in borderline cases - not the position here - in which such findings were material to determining the effect of an alleged procedural defect; even in those cases, the Administrative Court could not correct or supplement the facts, or rule in the relevant authority's stead, but had always to remit the file to the latter. In short, its review only concerned the question of lawfulness and could not be considered equivalent to a full review.

29. The Court notes in the first place that none of the participants in the proceedings argued that the Office of the Government constituted a tribunal for the purposes of Article 6(1). Its decisions may give rise to appeals to the Constitutional Court and the Administrative Court, but the proceedings for the consideration of such appeals will be consistent with Article 6(1) only if conducted before 'judicial bodies that have full jurisdiction.

31. As regards the review effected by the Administrative Court, its scope must be assessed in the light of the fact that expropriation - the participants in the proceedings all recognise this - is not a matter exclusively within the discretion of the administrative authorities, because Article 44(1) of the Regional Highways Act makes the lawfulness of such a measure subject to a condition: the impossibility 'of constructing or retaining a section of highway which is more suitable from the point of view of traffic requirements, environmental protection and the financial implications. It was for the Administrative Court to satisfy itself that this provision had been complied with.

32. In addition, it should be stressed that the submissions relied upon before the Administrative Court concerned solely the proceedings before the Government Office. The Administrative Court, in fact considered these submissions on their merits, point by point, without ever having to decline jurisdiction in replying to them or in ascertaining various facts. The European Court should confine itself as far as possible to examining the question raised by the case before it. Accordingly, it should only decide whether, in the circumstances of the case, the scope of the competence of the Administrative Court satisfied the requirements of Article 6(1).

Regard being had to the respect which must be accorded to decisions taken by the administrative authorities on grounds of expediency and to the nature of the complaints made by the Zumtobel partnership, the review of the Administrative Court accordingly, in this instance, fulfilled the requirements of Article 6(1)."

340. I draw two conclusions from that case: first, the need for a partial tribunal to reach factual conclusions for the purpose of reaching decisions on the grounds of expediency or policy which determine a civil right, does not of itself require either a full appeal on the facts or the passing over of those factual issues to another body for resolution, in

order for Article 6 to be complied with; second, the question of whether Article 6 is complied with in any case depends on the nature of the issues and of the decision in which they are raised, and the extent of the powers of judicial intervention, in relation to the asserted deficiencies.

341. Mr Nicholls also referred to *X v UK 1998* (25) EHRR CD89. It concerned the disqualification of an insurance company director on the grounds that he was not a fit and proper service. He was given the opportunity to make representations to civil servants from the very Government Department which had initiated the disqualification process. Article 6(1) was at issue. The Commission concluded that the claim was manifestly ill-founded and inadmissible. Its reasons support the conclusions which I have drawn from *Zumtobel*. The case involved an examination of the complaints made about disclosure of information, the extent of the reasoning, and partiality, in the context of the judicial review powers of the Scottish courts. The Commission did not reach any general conclusion that the procedures involved would necessarily breach Article 6; it all depended on the circumstances of the case.

342. It was very relevant, submitted Mr Nicholls, that in the case before me there had been extensive public consultation over all aspects of the development, and public participation in the planning decision-making process through oral and written material.

343. I approach this issue as follows. Decisions as to whether or not to grant planning permission are policy, or "expediency" decisions which call for a range of planning judgments. These are decisions entrusted to democratically accountable bodies, because of the policy content. Article 6(1) is complied with because of the availability of judicial review. On that review, the Court has the full jurisdiction to deal with procedural and substantive errors of law. Its jurisdiction therefore permits a challenge to be brought on the basis that a material fact has been ignored or misunderstood or that a view of the facts or their evaluation has been reached unreasonably. *Hollis v Secretary of State for the Environment* 1982 JPL 164 is a striking example of the quashing of a decision reached in ignorance of an established existing fact. If representations raise relevant issues, they need to be considered; if not, material considerations will have been ignored. Of course the absence of an express process of reasoning may make error more difficult to discern or prove, although the officer's report and other material do permit errors to be discerned. However, potential evidential difficulties in any particular case do not show an inadequacy in principle with the review process. I do not consider that the comments in the speeches in *Alconbury* and of Lord Hoffman in particular can be taken to suggest that findings of fact and the evaluation of fact involved in the decision whether or not to grant planning permission, require the interposition of an Inspector in order for the limited review of fact by the Court to satisfy Article 6.

344 Were that so, the House of Lords, notwithstanding all that it otherwise said and decided in the *Alconbury* case, must be taken to have suggested that for local authority decision-making there should be some kind of staged process of finding fact, evaluating fact and reaching a planning judgment, either with different bodies for various stages or inevitably with an Inquiry. I say "inevitably" because all planning decisions will involve aspects that can be described as findings of fact or their evaluation.

345. In my judgment the House of Lords contemplated no such staged process. The determination involved in the decision whether or not to grant planning permission is a single determination comprising a whole range of issues and types of judgment, which cannot be compartmentalised and parcelled out. Consider traffic issues: the current levels of traffic on one or more roads might be thought to be a question of fact, although by the time the accuracy, reliability and frequency of survey material has been chewed over to establish an annual average daily figure, it looks more like a matter of opinion or expert judgment. Estimates of future traffic generation and its routing could be seen, though less probably, as what Mr Wolfe would call future fact. Consider daylight: having debated the appropriateness of various methodologies, the value of which is a matter of opinion, the

application of their various formulae may produce a mathematical result which could be called a fact, the significance of which is a matter of planning judgment, both for particular premises and in the overall balance. Inspectors, understandably, no longer make distinctly marked out findings of fact in their reports, because the artificiality of such a process of dividing up issues disrupted analysis.

346. It is a misunderstanding of the significance of Lord Hoffmann's reference to "findings of fact or the evaluation of facts" which underlies Mr Wolfe's submission. He was not saying that a factual issue or an issue as to the evaluation of fact of itself required more extensive safeguards. He was not suggesting that any dispute of fact or of its evaluation entailed less limited safeguards than judicial review provided.

Lord Hoffmann, in the passage cited by Mr Wolfe, was examining what was requisite for compliance with Article 6 particularly in relation to decisions where there had been an allegation that a rule had been breached, as in the question of whether there had been a breach of planning control, albeit that that may involve not just the factual issue as to what happened, but also an evaluation as a matter of fact, degree and planning judgment as to whether what happened constituted a breach of planning control. This was not a policy issue. Whether planning permission should be granted is a policy issue, even though en route to its resolution a range of types of issues may arise. Paragraph 117 is quite clear.

347. *Zumtobel* illustrates the existence of factual or evaluative issues over the need for the road, yet the ECtHR was of the view that this was a policy or expediency issue and Lord Hoffmann relied on it when contrasting the types of decision. It is not the nature of the dispute, factual or evaluative which requires the safeguards; it is the nature of the decision in which those issues arise.

348. The distinction which Lord Hoffmann so clearly drew between policy decisions and decisions about breaches of rules, the former not entailing "safeguards" in the form of the interposition of an Inspector, was not expressly drawn or denied by Lord Slynn. He dealt with the Secretary of State's position because that was what was before the House.

349. Lord Clyde noted the fact that in the *Alconbury* cases there would be a public inquiry before an inspector, but did not suggest that it was a necessary feature of compliance, nor did he draw or deny Lord Hoffmann's distinction whilst emphasising the point that planning matters are essentially matters of policy and expediency, not of law. He did not deal with the position of local authorities. Lord Hutton's speech was in the same vein as Lord Clyde's. At paragraph 189 he said:

"I consider that the Strasbourg jurisprudence recognises that, where an administrative decision to be taken in the public interest constitutes a determination of a civil right within the meaning of article 6(1), a review of the decision by a court is sufficient to comply with article 6(1) notwithstanding that the review does not extend to the merits of the decision. Because it is a common feature of the judicial systems of the democratic member states of the Council of Europe that a court does not decide whether an administrative decision was well founded in substance, the Commission and the European court have held that article 6(1) does not guarantee a right to a full review by a court of the merits of every administrative decision affecting private rights, but that there is compliance with the article where there is a right to judicial review of such a decision of the nature exercised by the High Court in England."

350. The role of the independent fact finder in enforcement cases was an important aspect of compliance with Article 6 in those cases. I do not see his remarks as suggesting that the role of the Inspector in finding facts was a necessary safeguard for Article 6 compliance in policy decisions.

351. Of course it is understandable that the role of the Inspector should have been prayed in aid by the Secretary of State in *Alconbury* and that the role of the Inspectorate should be referred to in the speeches. But I do not discern any principle that, in policy or expediency decisions such as those involved in *Alconbury* or here, there is a need for an independent fact finder. To the extent that Lord Hoffmann is relied on, he makes it clear that what he says is in the context of a firm

distinction between policy or expediency decisions, as here, in which no such "safeguards" are necessary, and decisions on whether rules have been breached. He does not suggest, and no one else does either that some hybrid decision making process should emerge.

352. Forbes J in the *Friends Provident* case treats the nature of the full jurisdiction as turning on the nature of the decision. I agree. He saw the decisions in which "safeguards" were necessary, whether a different level of judicial scrutiny or the interposition of a fact finder as relating to cases which are determined by the resolution of substantial issues of disputed primary and immediate fact. I regard that as very useful; it affords a useful contrast with policy decisions, such as arise when a decision is reached on a planning application. Even though there might be substantial issues of disputed fact which may be ultimately of determinative weight, it is still a policy issue because of the judgment as to the weight to be given to the factual conclusions. They do not of themselves resolve the issue.

353. Of course, to the extent that Richards J in *Kathro* was recognising that compliance with Article 6 is to be judged by reference to the way in which a particular decision was arrived at, and the grounds upon which it is said that the decision, even with judicial review, is not Article 6 compliant, he is obviously right. It may be that therefore it is not possible or wise to lay down a rule that covers circumstances not before the court. But in so far as Richards J is read as implying that some hybrid decision-making process is necessary or as envisaging a general need for call-ins if factual issues arise, I do not consider that reading is justified. At most, he is keeping open the possibility that in very particular circumstances not envisaged, compliance with Article 6 might require a different process. He is not laying down some general principle or even making any general suggestion as to how factual issues should be dealt with in policy decisions. I consider that Lord Hoffmann deals with the matter quite clearly; but at all events it would have to be something quite exceptional in the policy context to warrant consideration of a different approach.

354 In the present circumstances, if additional safeguards to those provide by judicial review are relevant, the transparency of the decision-making process is relevant. Decisions were made after public debate by Councillors; the officer reports were public documents; the public were consulted and participated.

355. The jurisprudence of the ECtHR, in addition to *Zumtobel* , does not support the drawing of any particular distinction in policy cases between issues of fact and issues of judgment or policy. They are all seen as components within the single policy decision. In the making of those policy decisions the limited powers of review are generally seen as sufficient for compliance with Article 6(1). There is no procedure laid down in that jurisprudence for decision-making by an executive body whose decision is for review. The acceptance of a range of procedures which cannot themselves be Article 6(1) compliant, shows the importance of looking at the process of determination as a whole and the critical nature of the role of judicial review in ensuring that the determination complies with Article 6(1). Whether that Court has the necessary full jurisdiction for the determination made to have complied with Article 6(1), depends on the nature of the decision made. In *Stefan v UK* (1997) 25 EHRR CD130, the role of the GMC Health Committee, which was in effect the prosecutor, judge and medical fact finding body did not cause the overall process to involve a breach of Articles (6)1 even though limited reasons were given, the hearing was in private and the appeal to the Privy Council did not and could not redetermine the facts of the case.

356. In *Kingsley v UK* (2001) 33 EHHR13 p 288 the applicant contended that he had not had a fair hearing before the Gaming Board Panel, which decided that he was not a fit and proper person to hold the certificate of approval which he needed to operate the casinos from which he made his livelihood. Although the ECtHR concluded that the applicant's Article 6(1) rights had been breached because the Panel was biased and the English Courts because they did not have jurisdiction to remit the case to an unbiased body, accordingly lacked the necessary "full

jurisdiction" for compliance with Article 6, the Court treated the nature of the decision as being analogous to the planning enforcement case of *Bryan v UK* (1996) 21EHRR 342 and *X v UK* in so far as the subject matter of the decision appealed against was "a classic exercise of administrative discretion".

357. The Court did not accept the contention that "because of what was at stake for him, he should have had the benefit of a full Court hearing on both the facts and the law." Had it not been for the fact that the Panel had actually been biased, the Court would have regarded it as a satisfactory body to deal with the issue of whether the applicant was a fit and proper person, notwithstanding that it was not independent of the Board which was acting as the regulator and notwithstanding that there was no appeal on fact available. It was held by Sullivan J. in *Vetterlein* that a fair hearing does not necessarily require an oral hearing or a hearing with cross examination.

358. I do not consider either that any issue of fact has been shown to exist as between Ms Cooke and the Council, let alone one of any significance. Such an issue of fact cannot be raised after the decision has been reached which is said to show that her civil rights have been determined.

359. It is difficult to see how it can sensibly be said that, if she had disputed the calculations of loss of sunlight and daylight and perhaps proffered her own, that issue or the whole decision then had to be called-in. If that were so the the whole process of local authority determination of planning applications is inadequate for the purposes of Article 6. Mr Wolfe understandably did not suggest that.

360. Both the features in respect of which Mr. Wolfe at least originally contended that Article 6 was not complied with by the Council, namely its landowning interests and its being a promoter of the scheme in respect of which it was reaching a planning decision, were considered in the *Alconbury* group of cases. The Ministry of Defence owned land the development of which was at issue at *Alconbury*. Legal and General Assurance Society Limited owned land which was subject to a compulsory purchase order, promoted by the Highways Agency, an agency within the Secretary of States' department which was to decide whether the order should be confirmed. The powers of the Court on judicial review were sufficient to provide the full jurisdiction necessary for the process as a whole to be Article 6 compliant, at least as a matter of principle. If irrelevant considerations were taken into account or if there were a predetermination or a failure on the Secretary of State's part fairly to consider the report of the Inspector, the remedy of judicial review would be available and the process would thus be Article 6 compliant, in principle. Those features here do not warrant a different procedure, according to the House of Lords; see Lord Slynn paragraph 55, Lord Nolan paragraph 64, Lord Hoffmann paragraph 130, Lord Clyde paragraph 157 and Lord Hutton paragraph 197.

361. Accordingly, even if the fifth Claimants' civil rights were determined, their determination has involved no breach of Article 6(1).

362. Mr. Wolfe recognised the force of Mr. Nicholl's next submission that even if Ms Cooke's civil rights were engaged and the way in which the Council dealt with the applications involved a breach of Article 6, it was not the duty of the Secretary of State to judge the adequacy of the procedures adopted by the Council and then to intervene to ensure that the procedures which it adopted complied with Article 6. The Secretary of State has no power to do that. It is for the Courts to review the decisions of public bodies and not the Secretary of State. It is the Court which tells the Council what it must do as a public body to comply with the obligations in section 6(1) of the Human Rights Act 1998 so as to avoid acting in ways which are in breach of a convention right. If the Courts conclude that there has been a breach of Article 6 by a Council it will tell the Council what it has to do in order to comply with Article 6 and it would then be for the Council to comply with those directions. I accept Mr. Nicholl's submission that the combination of the Court's

direction as to the procedure to be followed and the obligation of the Council to comply with that direction provide a complete system by which compliance with Article 6 is then ensured. None of that procedure involves the Secretary of State's intervention. It follows that the Secretary of State does not act incompatibly with Article 6 rights if he declines, as he did in this case, to call the case in for his own decision. There is no duty under which he himself is obliged, by virtue of section 6(1) of the Human Rights Act to call in the planning applications.

363 The Secretary of State has no duty to substitute his supervision of the Council's procedures for that of the High Court. It is the High Court, in the exercise of its power of review, which has the role of authoritatively deciding what minimum standards of fair procedure are required by Article 6 as a matter of law in the particular case. This argument was accepted by Forbes J. in the *Friends Provident* case.

364. Mr Nicholls submitted that section 6.(2) of the 1998 Act meant that the Secretary of State did not act unlawfully in refusing to call in the applications even if such an act has been incompatible with Article 6. Section 6 provides:

- "(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.
- (2) Sub-section (1) does not apply to an Act if –
  - (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or
  - (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or give an effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions".

365. Mr Nicholls relied on Section 77 of the Town and Country Planning Act 1990 which provides the power to the Secretary of State to call in an application. It provides a discretionary power. It states:

"The Secretary of State may give directions requiring applications for planning permission, or for the approval of any local planning authority required under a development order, to be referred to him instead of being dealt with by local planning authorities."

366. He submits that the logic of the claimant's argument is that in those circumstances there is a duty on the Secretary of State to call the applications in. Otherwise there would be no remedy for the breach of Article 6 if the Court were to conclude that a redetermination by the Council compliant with Article 6, would not be possible. Mr Nicholls referred to the decision of the Divisional Court in *Alconbury* 2001 2 All ER 929 in which it held that the obligation in Section 3 of the Human Rights Act 1998, that primary and subordinate legislation be read and given effect to, so far as it is possible to do so, in a way which is compatible with Convention rights, did not enable Section 77 to be read as containing a duty. It held that it was illegitimate to read down a legislative provision so as to extinguish it, and that Section 6(2)(b) of the 1998 Act applied to Section 77 of the 1990 Act, preventing the Secretary of State's acts from being unlawful under Section 6(1) in

two of the *Alconbury* cases. This aspect was not considered by the House of Lords because they reached a different view on what was required for compliance with Article 6.

367. Notwithstanding the overturning of the Divisional Court's decision in the crucial aspects by the House of Lords, I consider that its approach to this issue is correct. I do not consider that a discretionary power can be turned into a duty by virtue of Section 3 of the 1998 Act, or a duty which applies in limited and not easily specified circumstances.

368. Mr Wolfe submitted that section 6(2)(b) did not save the Secretary of State because it was the provisions of subordinate legislation, the General Regulations, which required the local planning authority to reach the decisions. It is true that that is where the local planning authority's obligation to determine applications in respect of its own land is to be found. But that provision derives from section 58. All the other provisions of the 1990 Act impose a duty on the local planning authority to decide applications made to it and the General Regulations follow that pattern.

369. Mr Wolfe's point in relation to section 6(2)(b) would have more bite if the power which the Secretary of State was exercising was itself contained in subordinate legislation. The power which the Secretary of State is exercising, and which is the one at issue in ascertaining whether he has acted unlawfully or not, is in Section 77. The focus of his decision is not the making of the General Regulations.

370. Mr Wolfe submitted that it was open to the Secretary of State to promote amending subordinate legislation under section 58 which would direct that applications in this sort of case were referred to him and not decided by the local authorities. This point would only be good if the basis of the argument were that local authorities could not reach decisions compatibly with Article 6 on planning applications made by them or in respect of their own land. However, that is not good law: they clearly can determine such applications compatibly with Article 6(1).

371. Mr Wolfe submitted that the duty to call in the applications would only arise if upon the quashing of the Council's decision, it would not be possible to remit the decision to the Council because, however constituted, it would be irreversibly tainted by bias as happened in the *Kingsley* case. He did not suggest that there were no councillors who could reach an unbiased decision.

372. If, however Mr Wolfe submitted, the Secretary of State was entitled to act as he did and the consequence was that there was nonetheless non compliance with Article 6(1) and the decision could not be remitted to a body of councillors who were capable of reaching an unbiased decision, there would be an incompatibility between the legislation and Convention rights. For the reasons which I have given none of the stepping–stones necessary for such possible arguments to succeed are in place.

## CONCLUSION

373. I do not consider that the Council, in the process of reaching a decision on the planning applications, has acted in a way which is incompatible with Article 6 in the light of the full jurisdiction which this Court has by way of judicial review. No civil rights of the fifth claimant were in fact engaged at all. The Secretary of State has not acted incompatibly with his obligations under section 6(1) nor have the 1990 Act and the General Regulations been shown to be incompatible with any Convention right.

374. For all those reasons each of the applications for permission in this case are dismissed.

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MR JUSTICE OUSELEY: For the reasons set out in the judgment which has been handed down, these applications are dismissed or, more strictly, refused. The judgment that has been handed down I think still has a few typographical errors to be corrected. I do not propose to take the lists of those now sitting in court. If those who have typographical corrections to make wish to hand them in within the next day or so then they will be dealt with, preferably by close of play today.

MR HOCKMAN: My Lord, thank you very much indeed. We ask for the applications to be refused accordingly.

My Lord, I am expressly instructed not to make application for costs.

MR JUSTICE OUSELEY: Very wise.

MR HOCKMAN: The only concern we have is that your Lordship's decision should, if at all possible, bring finality to this matter.

MR JUSTICE OUSELEY: Yes.

MR HOCKMAN: We recognise that there is a theoretical right to renew the application before the Court of Appeal; we understand that would have to be done, if at all, within the next seven days.

My Lord, we would ask that your Lordship should direct that the council should be given notice simultaneously of any application to the Court of Appeal, so that we are immediately aware if that occurs. My Lord, beyond that, I am not sure that there is any further relief that I can or should seek from your Lordship this morning.

MR JUSTICE OUSELEY: Indeed.

MR BLAKE: My Lord, I adopt Camden's comments on notice of appeal, seeking leave to appeal; and similarly the Secretary of State does not make an application for costs.

MR HARRISON: My Lord, I do make an application for costs on behalf of the interested parties, for these reasons. It was, in our submission, necessary for us to be in court: we had our own separate interest to defend; and your Lordship has clearly taken into account our evidence in the findings in relation to delay. It would be an order in the usual terms against a party funded by the Legal Services Commission.

MR JUSTICE OUSELEY: I need not trouble you, Mr Woolf.

JUDGMENT ON COSTS APPLICATION BY THE INTERESTED PARTIES



MR JUSTICE OUSELEY: The application for costs by the interested parties is an application, which, of course, I understand. Mr Harrison is entirely right to point out that they had a separate interest in this matter and they are entitled to be heard in relation to that interest. But that does not of itself form a sufficient basis upon which to order the payment of costs to an interested party. It is necessary for it to be shown that there was some particular point in general terms which could not properly and adequately be dealt with by the other parties. I consider that, although the witness statements of Mr O'Neill and Mr Murphy were of assistance, as indeed, of course, were Mr Harrison's own submissions, there was not so distinct a point that was raised as to entitle them to have what would be an unusual order, that is an order for costs in favour of the developer. So that application is dismissed.

Mr Woolf, do you want to say anything?

MR WOLFE: My Lord, I certainly need to ask for detailed assessment of costs.

MR JUSTICE OUSELEY: Yes, you may have that.

MR WOLFE: My Lord, we do at least at present propose to renew the matter in the Court of Appeal in relation to the first four claimants on the non-Human Rights Act argument; we would not propose to take forward the fifth claimant in the Human Rights Act argument.

I am momentarily thrown by Mr Hockman's stance, because I had understood that we would need permission to even do that. However, I may be wrong. If I do need permission, I suspect I need to ask your Lordship permission to appeal against your Lordship's judgment, and I should perhaps do so on a precautionary basis.

MR JUSTICE OUSELEY: If you do it on a precautionary basis, I will refuse it. I am not sure, however, on my reading of the rules – but you will have to advise your client rather than me – on my reading you do not require my permission; but if you do, I will not give it to you, although on the merits there are some points which are arguable. So if that had been the point, it would have passed the threshold test for a permission application. The view that I formed is sufficiently clear, coupled with delay, to mean that I do not think you passed the test of a reasonable prospect of success for the Court of Appeal. So if it is my decision, the answer is no.

On the other hand, I have to say my experience is that people are uncertain as to whether they need permission or not, and some assume they do and some assume they do not. So far as I am concerned that is a matter between them, the White Book and the Court of Appeal. I do not

propose to advise anybody on this. So I am not going to do more than refuse your request if you make it.

MR WOLFE: It may be against that backdrop that there is not any point in making the application.

MR JUSTICE OUSELEY: If you do need it, I refuse it. But I am not, by refusing it, saying that you necessarily do need it.

MR WOLFE: Can I take instructions momentarily?

MR JUSTICE OUSELEY: Yes.

MR WOLFE: (Instructions taken.) My Lord, I am grateful for that indication.

MR JUSTICE OUSELEY: I think that is because I have refused you permission, ie because I refused you permission on the oral application for permission, you are entitled to renew – effectively make an appeal – but not one that requires my permission; if I had granted you permission and dismissed the substantive application, then you would need permission. That is how I had seen it.

MR WOLFE: I think that is probably right.

MR JUSTICE OUSELEY: And that is what underlies the submissions from Mr Hockman, Mr Harrison and Mr Blake.

MR WOLFE: In that case, if I can indicate in open court what our position is likely to be, given that the next seven days are not really available to many of us. I think we are likely to renew – I say this openly for Mr Hockman's benefit. Obviously there will be at least funding questions to be resolved, and in the circumstances they are clearly not going to be resolved within that seven day window.

MR JUSTICE OUSELEY: I am sure you will tell the funder what I said. But would you also tell the three parties – that is, the council, the developer and the Secretary of State – if you have lodged, and, alternatively, if you have decided not to lodge.

MR WOLFE: We will certainly do that, my Lord.

MR JUSTICE OUSELEY: Thank you very much.

MR HARRISON: Just so there is no understanding about it, as we read the rules, lodgement must be by 29th December unless there is going to be an application to extend.

MR JUSTICE OUSELEY: It is very helpful for Mr Woolf to be alerted to that; but I just want to deal with the first thing. I do not want to make a formal direction if I do not have to, but you are

happy to tell the three others —

MR WOLFE: My Lord, we are.

MR JUSTICE OUSELEY: — when you lodge, that you are doing so, and if you decided not to, that you have indeed decided not to?

MR WOLFE: Can I take instructions? (Instructions taken.) My Lord, I think our intention — our fairly firm intention, unless we change our mind in the few minutes, is that we will lodge today, and we will lodge today, because if we do not lodge then perhaps we not lodge by the 29th.

MR JUSTICE OUSELEY: You decide what you are going to do; but once you have decided it, will let the others know?

MR WOLFE: Certainly.

MR JUSTICE OUSELEY: I do not intend to make an order to that effect in the light of what you said, Mr Wolfe.

If anybody wants to publish the judgment, you can obviously comment if you like, but the finally approved version will be available within a day or two yet.

MR HOCKMAN: Could I ask your Lordship just to consider whether it might be possible, on the assumption that the Court of Appeal are going to become involved, for your Lordship to indicate that the case is one that is suitable for handling with very great expedition?

MR JUSTICE OUSELEY: It is suitable for expedition.

MR HOCKMAN: Thank you.