APPENDIX 3

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

PLANNING COURT

Claim No.

B E T W E E N

THE QUEEN (on the application of DAVID DOYLE)

Claimant

-and-

SOUTHWARK COUNCIL

Defendant

STATEMENT OF FACTS AND GROUNDS FOR REVIEW

---

1. By this claim for judicial review, the Claimant seeks to challenge the decision of Southwark Council ("the Council") to grant planning permission for the erection of a new two storey school building in the grounds of Keyworth Primary School, Faunce Street, London SE17 3TR ("the School"). The Claimant lives on Sharsted Street immediately adjacent to the site for the proposed new building and will be directly and significantly affected by the proposed development.

2. In summary, the Claimant submits that the Council erred in law in granting planning permission without first having considered whether an alternative location for the development, namely adjoining land in the Council's ownership, would be preferable in planning terms. Further and in the alternative, the Council's decision to grant planning permission and to pursue the development of the new building on an existing school playing field is unlawful pursuant to s 77 School Standards and Framework Act 1998.

Factual background

3. The Claimant recognises a need for new primary school places in Southwark and supports the principle of the expansion of the School. The Council's recognition of the need to expand the school is recorded as follows:

    a. On 18 March 2014, the Council's Cabinet agreed that the School should be expanded from 1.5 Forms of Entry ("FE", equivalent to 30 children) to 2 FE;

    b. On 22 July 2014, in light of new pupil place planning data, the Council's Cabinet agreed that the School should be expanded from 1.5 FE to 3 FE.

4. It appears that the proposals for which planning permission has been granted arose to address the expansion to 3 FE.

5. The Council owns a site immediately adjacent to the School, namely the Braganza Street Workshops which form part of the Kennington Enterprise Centre ("the Workshops Site"). The Workshops Site has been identified by the Council for redevelopment. The Workshops Site was previously identified (as far back as 2008) as a potential site for the expansion of the School. In the Council's consultation document on the proposed redevelop of the Workshops Site it stated:

> "Proposals have been ongoing for this development site since 2008. They initially started with a comprehensive redevelopment approach incorporating the existing Primary School, which remains at the heart of the community, and the existing Royal British legion Club. The school opted out at an early stage…"

6. It is thus apparent that the need for school expansion could have been accommodated on the Workshops Site but that a decision was made not to pursue this option. A number of different plans have since been developed in respect of the Workshops Site. These include proposals for 28 dwellings in September 2010, and revised proposals in September 2011. On 5 July 2014, the Council held a consultation event with local residents in respect of the redevelopment of the Workshops Site. In January 2015, the Council identified the Workshops Site for a "mixed use" development. The

Council's assertion in its pre-action response (paragraph 16) that the "first scheme to deliver [development] is being worked up" is thus incorrect.

7. The Claimant understands that aside from the fact that the potential for the expansion of the School on the Workshops Site was identified in 2008, the Council has taken steps over several years to ensure the readiness of the Workshops Site for development. The Council has declined to provide specific details of the leases and/or licences under which units in the Workshops Site are occupied, but it has confirmed any leases are all for relatively short periods of time on terms which exclude the provisions of the Landlord and Tenant Act 1954. Accordingly it is understood that there is no impediment to the Council obtaining early possession to facilitate the redevelopment of the Site.

8. On 17 December 2014, the Council's Deputy Mayor wrote to the Claimant stating:

> "I have been seeking a redevelopment of the [Workshops Site] (which is also underway) that would enable the school to expand north and east and allow the main entrance to be on the wider, safer Doddington Grove…
>
> …I can't emphasise enough how saddened I am that the plans have developed in a way that ignores the broader potential of the neighbouring [Workshops Site] which is being taken forward separately and out of sync with school needs and local concerns."

9. In response to a request under the Freedom of Information Act 2000, the Council confirmed on 24 April 2015 (amongst other things) that "there would be no planning objections to the change of use in principle to the [Workshops Site]… as an extension to the existing school".

10. On 15 December 2014 the Council applied to itself for planning permission for the works. The application was accompanied by (amongst other things) a Design & Access Statement and a Planning Statement. No "Sustainability Assessment" was submitted. The Design & Access Statement identified the Workshops Site in section 2.4 as a potential constraint on development, stating:

> "Potential future housing development could create issues of overlooking to the 'Posh Garden', and the potenital [*sic*] for disruption if the construction programmes co-incide [*sic*]."

11. Thus the application documents expressly recognised that development of the Workshops Site could occur at the same time as the proposed development of the School. Neither the Design & Access Statement nor the Planning Statement referred to any alternatives considered.

12. The plans submitted with the application indicate that the proposals would involve the construction of a new building on existing play areas within the School. In the "4Futures" report of June 2012 (supplied by the Council in its pre-action response of 9 June 2015), outdoor areas of 5,878m^2 were identified, including 773m^2 of "float". Thus the play area available was identified as 5,105m^2. In the Hawkins\Brown (the scheme architect) Client Meeting 05 Report (14 July 2014, also provided to the Claimant in the pre-action response), a bar chart confirmed that in the existing school there was 5,105m^2 of play space (excluding habitat) and that under the proposed development this would reduce to 4,093m^2 (including habitat). It is thus apparent from these documents that the proposals would result in the loss of play space.

13. On 25 February 2015, the Council notified the Education Funding Agency (acting on behalf of the Secretary of State for Education) that it proposed to rely on the general consent granted under s 77(5) School Standards and Framework Act 1998 for the change of use of school playing fields. In its submission, it contended that the existing area of playing fields at the site was 4,618m^2 and that under the proposals this would increase to 4,619m^2. Despite raising the 1998 Act in the Claimant's solicitors' letter of 17 April 2015, this information was only provided to the Claimant on 16 June 2015.

14. The Claimant has consistently sought to persuade the Council that it should consider the expansion of the School on the Workshops Site in preference to the proposed development. In the context of the planning application, the Claimant's solicitors wrote to the Council on 27 January 2015 and 17 April 2015 objecting to the planning application and referring to the Workshops Site as an alternative. Through that correspondence, the Council agreed that the application should be treated as one for

"Major Development" and thus subject to different consultation requirements which were ultimately complied with.

15. The matter was reported to the Council's Planning Sub-Committee B on 28 April 2015. The Committee Report referred to various matters and stated (at paragraph 21):

> "The land itself has no formal designation within the Saved Southwark Plan or the Core Strategy and historical maps demonstrate that it was previously developed. The application site offers limited alternatives. A suggestion that the adjoining enterprise building could be incorporated as part of the development would not be possible as this building is currently in use, it does not belong to the school and the demand for school places is immediate."

16. An Addendum Report stated:

> "It was questioned whether, because the site includes a playing field (in the view of the solicitors), the consideration of alternative sites had been undertaken in accordance with S.77 of the School Standards and Framework Act 1998. This is a requirement under for the council as the Local Educational Authority under a different regulatory regime- it is not a material planning consideration. Nonetheless, the site does not include a playing field. As noted in the 'Site Location & Description', the site comprises a range of school buildings and associated access and hard and soft play areas. The play areas consist of:
>
> • Grassed area in centre of site (adjacent to Gaza Street)
> • Nature woodland for supervised educational purposes, adjacent to 49 Sharsted Street
>
> None of the above consists of a playing field which is defined in the Town and Country Planning (Development Management Procedure) (England) Order 2010 as a site which encompasses a playing pitch. It remains the case that there would be no loss of a playing field, thus it is not considered that consultation, or the investigation of alternative sites was necessary under planning legislation."

17. At the Committee Meeting, members were referred to the Claimant's solicitors' letter and were advised by the planning officer as follows[1]:

[1] The Claimant has transcribed the Council's recording of the meeting. The Council was invited in pre-action correspondence on 20 May 2015 to agree that the transcript is accurate but in its letter of 9 June 2015 the Council stated that it had not had time to do so. The Claimant's transcript is assumed to be accurate in the absence of any points of dispute having been raised.

"The [solicitors'] letter also queried whether alternative site has, the consideration of an alternative site, has been undertaken as part of this process. This is not a material planning consideration because it is a requirement under Schools and Standards Framework Act 1998, which is separate regulatory regime, as referred to again in the Addendum Report. There's also been query about whether the, any part of the development contains a playing pitch. It does not. It does not comply, with the, any part of the site does not comply with the description of a playing pitch under the Town and Country Planning Development Management Procedure Order 2010."

18. The planning officer was then questioned by Councillor Pollak as to why the Workshops Site was ruled out as an alternative site to expand the school on and was advised:

"That's I'm afraid not a material planning consideration it is my understanding that that particular requirement to consider alternative site is part of separate regulatory regime and is not something that members can place any weight on for this determination."

19. The Chair of the Committee then stated:

"Can I just kindly remind members that they can only pass judgement and deliberate on the application presented to them this evening okay thank you."

20. Councillor Dolezal later said:

"...is my understanding right or wrong that the [Workshops Site] that people have been looking into has not been made available because it is designated for other uses by the council and it is anticipated as part of another scheme?"

21. The planning officer replied:

"I am afraid I'm not aware of the Council's aspirations for [the Workshops Site] but it is not part of the application site and it is therefore for members to deliberate on the application that's before them."

22. The Claimant then addressed the Committee and submitted:

a. That pursuant to Saved Policy 3.3 of the Southwark Plan, because the proposal is for "Major Development" it was necessary to provide a Sustainability

Assessment which demonstrated that environmental, social and economic factors had been balanced to find the most sustainable option for the development;

b. That the development would be on a "playing field" for the purposes of the School Standards and Framework Act;

c. That the alternative site was brownfield land which the National Planning Policy Framework ("NPPF"), London Plan and the Saved Policies of the Southwark Plan prioritised for development;

d. That the Workshops Site and the School site were both owned by the Council and hence that it was misleading to state that the Workshops Site did not belong to the School as no land belongs to the School and it is all Council owned land;

e. That the Workshops Site provided an option which would significantly reduce the blight on neighbouring residents;

f. That the Workshops Site had been identified as being developed in 2016;

g. That the Council as applicant to itself for planning permission had a high duty of transparency and probity and that the development envelope had been artificially limited to ensure the best financial outcome on the Workshops Site.

23. The Council's Manager of Major Applications replied to these points (emphasis added):

> "The point about alternative sites being considered is that this is a requirement under the education legislation that's been referred to it is not a planning requirement. Part of the education legislation requirements is also to consider whether playing fields are being affected and that's not the case here nevertheless when the applicants comes the table they may have a view be able to give more information on the alternative site assessment that I understand has been undertaken but the important point here members is that it is not a planning requirement under the planning legislation to consider alternative sites with this application playing fields as set out by the planning legislation, as defined by planning legislation are not affected here at this site, this is

not the development site in question this evening does not constitute a playing field looking at the definition set down by planning legislation therefore there are no additional consultation requirements required and there is not a requirement under the planning legislation to consider alternative sites. As is the case with all planning applications they have to be considered on the merits based on what is within the redline and that is what officers have done so the application has been properly considered on its merits and having proper regard to the impact on the neighbouring area and I would also come to the point about considering whether development is sustainable and that requires careful consideration of economic environmental and social impacts and that has been carefully considered as part of the assessment as it is required under the NPPF as well so all those 3 strands economic environment and social have all been carefully considered as part of the assessment and as part of the report that is in front of you this evening. The other ones I've just been reminded was about major development and as again was confirmed by the presenting officer this application because it proposes more than 1000 sqm of floor space, new floor space, is a major elements in planning terms it has been considered by officers and it has been publicized as such so just to be absolutely clear for the record it is a major development and it has been considered as such.

...

Brownfield land is land which has been previously developed the the site in question has been previously developed it is understood the site that whilst for 60 to 70 years since the war may have been largely underdeveloped because of bomb damage prior to that it is understood that the site was developed my understanding is that it was a continuation of Sharsted Street of the residential terraces further to the south so the site has been previously developed..."

24. The Claimant addressed the Committee further and emphasised that he did not object to the expansion of the School but that:

> "...the expansion of the school... is only required from September 2016 that is when the actual expansion of the school comes in from one 1.5 forms of entry to 3 forms of entry that will result in another 30 pupils coming on next year you know the need for a large building of this scale which is not on brownfield land has not been proven at all. Expansion is going to be carrying on from this school to 2021 in terms of the intake of pupils there is plenty of time to consider other options that do not negatively impact on residents to the same scale as what they do currently. That is our only objection, we do not object to school numbers increase."

25. Following further consideration, the Committee resolved to grant planning permission. On 7 May 2015 planning permission was granted and the Council published the permission on its website on 13 May 2015.

26. On 20 May 2015, the Claimant's solicitors sent a pre-action letter to the Council and on 9 June 2015 the Council provided a lengthy reply. The Council denies that the grant of planning permission was unlawful.

27. In its pre-action response, the Council argues, amongst other things:

    a. That the need for Primary School places is a matter of "very, very substantial weight"; and

    b. That there is an "overwhelming need for housing in the Borough" and that the Workshops Site form an important part of the Council's housing strategy.

28. However, neither of these matters were advanced to the Committee as being reasons for not having regard to the alternative solution. Indeed, no reference was made at all to the need for the Workshops Site to be used for housing.

29. In respect of Policy 3.3, the Council argues in its pre-action response that the policy dates from 2007. However, in the Committee Report, the Council stated that "All policies and proposals [in the Southwark Plan] were reviewed and the Council satisfied itself that the polices [*sic*] and proposals in use were in conformity with the NPPF". Thus so far as it is now argued that Policy 3.3 does not conform with the NPPF, the Committee was advised entirely differently.

30. The Council also seeks to argue that the pressing need for school places means that the development is required to be carried out as a matter of urgency. However, it has not been able to confirm to the Claimant the timescales for development. Further, the "4Futures" report provided with its pre-action response confirms the availability of an alternative short term solution, namely the provision of temporary classrooms within the School grounds.

Legal framework

31. Where there are clear planning objections to a proposed development alternative proposals (whether for an alternative site, or a different siting within the same site)

may be relevant: see *Trusthouse Forte Hotels Ltd v Secretary of State for the Environment* (1986) 53 P. & C.R. 239, where Simon Brown J. said at 299:

> "Where, however there are clear planning objections to development upon a particular site then it may well be relevant and indeed necessary to consider whether there is a more appropriate alternative site elsewhere."

32. In *R (Langley Park School for Girls) v Bromley LBC* [2010] 1 P&CR 10, the Court of Appeal quashed a grant of planning permission for the redevelopment of a school on the basis that the local planning authority had failed to consider whether an alternative arrangement of the buildings would have a lesser impact on Metropolitan Open Land. It was found that there was a policy imperative to consider whether an alternative arrangement would have a lesser impact on the Metropolitan Open Land. Sullivan LJ found that the principle in *Trusthouse Forte* "must apply with equal, if not greater, force if the suggested means of overcoming the clear planning objection is not that the development should take place on a different site altogether, but that it should be sited differently within the application site itself". His lordship continued (emphasis added):

> "[52] ...The starting point must be the extent of the harm in planning terms (conflict with policy etc) that would be caused by the application. If little or no harm would be caused by granting permission there would be no need to consider whether the harm (or the lack of it) might be avoided. The less the harm the more likely it would be (all other things being equal) that the local planning authority would need to be thoroughly persuaded of the merits of avoiding or reducing it by adopting an alternative scheme. At the other end of the spectrum, if a local planning authority considered that a proposed development would do really serious harm it would be entitled to refuse planning permission if it had not been persuaded by the applicant that there was no possibility, whether by adopting an alternative scheme, or otherwise, of avoiding or reducing that harm.
>
> [53] Where any particular application falls within this spectrum; whether there is a need to consider the possibility of avoiding or reducing the planning harm that would be caused by a particular proposal; and if so, how far evidence in support of that possibility, or the lack of it, should have been worked up in detail by the objectors or the applicant for permission; are all matters of planning judgment for the local planning authority. In the present case the members were not asked to make that judgment. They were effectively told at the onset that they could ignore [the point], and did so simply because the application for planning permission did not include the alternative siting for which the objectors were contending, and the members were considering the merits of that application."

33. On this basis, the grant of planning permission was quashed.

34. Section 77 School Standards and Framework Act 1998 imposes controls on the disposal or changes in use of school playing fields. So far as is relevant it provides:

> **"77.— Control of disposals or changes in use of school playing fields**
>
> (1) Subject to subsections (2A) and (2B), except with the consent of the Secretary of State, a body or trustees to whom this subsection applies shall not dispose of any playing fields—
>
> (a) which are, immediately before the date of the disposal, used by a maintained school for the purposes of the school, or
>
> (b) which are not then so used but have been so used at any time within the period of 10 years ending with that date.
>
> (2) Subsection (1) applies to--
>
> (a) a local authority;
>
> ...
>
> (3) Subject to subsection (4A), except with the consent of the Secretary of State, a body or trustees to whom subsection (1) applies shall not take any action... which is intended or likely to result in a change of use of any playing fields—
>
> (a) which are, immediately before the date when the action is taken, used by a maintained school for the purposes of the school, or
>
> (b) which are not then so used but have been so used at any time within the period of 10 years ending with that date,
>
> whereby the playing fields will be used for purposes which do not consist of or include their use as playing fields by such a school for the purposes of the school...
> ...
>
> (5) For the purposes of this section the Secretary of State's consent may be given in relation to a particular disposal or change of use or generally in relation to disposals or changes of use of a particular description, and in either case may be given subject to conditions.
>
> ...
>
> (7) In this section—
> ...

"playing fields" means land in the open air which is provided for the purposes of physical education or recreation, other than any prescribed description of such land.
...

35. Pursuant to s 77(5), the Secretary of State has given The School Playing Fields General Disposal and Change of Use Consent (No 5) 2014. This gives consent for, amongst other things (emphasis added):

> "9. The change of use of playing field land to allow the reconfiguration of school sites, where the following conditions are satisfied:
>
> a) after the project is completed the school will have at least the same size and quality of playing field land as it had before - there must be no net loss
>
> b) there is no disposal of school playing field land
>
> c) the local authority and/or school ensures that the requirements of the School Premises Regulations 2012 continue to be met."

Grounds

Ground 1: Failure to consider alternatives

36. The Committee was misdirected by being repeatedly told that it was not open to them to consider alternative solutions, namely the Workshops Site. As the Court of Appeal found in *Langley Park*, this was a clear misdirection. The Committee should have been directed to make a judgment as to what weight to accord to the availability of the alternative solution.

37. The need to consider alternatives in the present case was acute because of, and members were significantly misdirected in respect of, the following matters:

    a. Saved Policy 3.3 of the Southwark Plan states that "Planning permission will not be granted for major development unless the applicant demonstrates that the economic, environmental and social impacts of the proposal have been addressed through a sustainability assessment... Sustainability assessment are required in order to assess the most sustainable option to... Ensure that their environmental, social and economic impacts are assessed and balanced to find the most sustainable option for the development". In the present case no sustainability assessment was provided at all despite the belated recognition by

the Council that this was an application for major development. Members were not advised as to the failure of the applicant to provide a sustainability assessment, nor of the need for such an assessment to demonstrate that the most sustainable option had been identified. Indeed, members were not referred to Saved Policy 3.3. at all. Thus there was an express policy requirement to consider alternatives, and members were misdirected through not being informed of this and instead being told that they could not consider alternatives. As noted above, the contention in the pre-action reply that Saved Policy 3.3 fell to be watered down in light of the NPPF is entirely at odds with the advice to members that the saved policies of the Southwark Plan conformed with the NPPF;

b. The National Planning Policy Framework (NPPF) sets as a core planning principle the need to make use of previously developed land. Members were misdirected through being told that the site of the proposed building was previously developed land. The Glossary to the NPPF excludes from that definition "land in built-up areas such as private residential gardens, parks, recreation grounds and allotments; and land that was previously-developed but where the remains of the permanent structure or fixed surface structure have blended into the landscape in the process of time". The land in question is both land in a built-up area such as a recreation ground, and land what was developed but where the remains of structures have blended into the landscape, in the sense that the area is at least in part laid out as a garden area. At the very least members should have been directed that this was not previously developed land and that accordingly there was a policy presumption against its development and in favour of sites (such as the Workshops Site) which are previously developed land. They then could have assessed what weight to give to the alternative of developing the Workshops Site. Instead they were misdirected that the site was previously developed and told that they were not entitled even to consider the possibility of the Workshops Site being used for school expansion;

c. The Council was subject to a statutory duty not to take any action intended or likely to result in the change of use a playing field (see further below).

Members were misdirected by being informed that "Part of the education legislation requirements is also to consider whether playing fields are being affected and that's not the case here". On the contrary, as the Council now accept, the proposal is for the change of use playing fields as defined in s 77(7) School Standards and Framework Act 1998 (see further below). Thus members were misdirected as to the statutory duties imposed on the Council as applicant and decision-maker through the 1998 Act. Given the statutory duty in this regard, clearly the question of whether there was an alternative solution which would not involve the change of use of a playing field was a matter for the Committee. It was misdirected by being repeatedly told that it could not consider any alternatives;

d. Members were advised by officers that the Council had undertaken an alternative sites analysis for the purposes of compliance with education legislation. This was wrong and misleading. No such assessment had been carried out.

38. For those reasons, there were distinct and pressing reasons to consider alternative solutions in this case. Through a series of misdirections, members were told that they could not consider the Workshops Site alternative. They should have been advised that they could consider that alternative, and indeed that they could refuse to grant consent if they were satisfied that the availability of the Workshops Site justified such a refusal. Accordingly members were significantly misdirected and the permission should be quashed.

Ground 2: Breach of s 77 School Standards and Framework Act 1998

39. By virtue of s 77(3) School Standards and Framework Act 1998, the Council is prohibited from taking "any action" which is intended or likely to result in the change of use of a school playing field without the consent of the Secretary of State for Education. The statute does not provide any indication as to a limitation on which actions are subject to s 77(3).

40. The definition of "playing fields" in s 77(7) is broad and includes the land upon which the new building is proposed to be sited. The Council accepts in its pre-action reply that the proposals do consist of a change of use of playing fields.

41. The Council has taken and continues to take actions which are intended to result in the change of use of a school playing field. Specifically it has:

    a. Sought planning permission for the change of use of a school playing field;

    b. Granted planning permission for the change of use of a school playing field;

    c. Confirmed in its pre-action response that it intends to pursue the development authorised by the planning permission which would result in the change of use of a school playing field.

42. The Council purports to rely on the general consent given by the Secretary of State in paragraph 9 of The School Playing Fields General Disposal and Change of Use Consent (No 5) 2014. However, it is a condition of that consent that "after the project is completed the school will have at least the same size and quality of playing field land as it had before - there must be no net loss". That condition is plainly not met in the present case. The documents disclosed in the Council's pre-action response demonstrate that there will a loss of playing fields in excess of 1,000m^2, reflecting the fact that the new building will be constructed on a playing field.

43. Accordingly the Council has acted unlawfully in seeking and granting planning permission, and proposes to continue to act unlawfully in carrying out the development.

Relief

44. The Claimant seeks an order quashing the grant of planning permission and a declaration that the continued promotion of this development is contrary to s 77 School Standards and Framework Act 1998.

45. The Council argues in its pre-action reply that the decision to grant planning permission would inevitably have been the same given the pressing need for primary

school places. However, (i) the Workshops Site is available to the Council in short timescales and there is no planning impediment to its development and (ii) the immediate need is for a single form of entry in 2016 which can be accommodated through interim measures even if the construction is delayed.

Costs

46. In its pre-action response, the Council agreed that this claim is an Aarhus Convention Claim for the purposes of CPR 45 and accordingly the Claimant's liability to the Council is limited to £5,000 and the Council's liability to the Claimant is limited to £35,000.

Richard Turney
Landmark Chambers

17 June 2015