Case Name: *Addison, R (On the Application Of) v London Borough of Southwark* [2022] EWHC 3211 (Admin) (15 December 2022)

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Commentary:
This was a challenge to the decision of the London Borough of Southwark to grant planning permission for the redevelopment of the Champion Hill Stadium, East Dulwich and the neighbouring Astroturf pitch to create 219 new residential units, a new football stadium and a multi-functional "kickabout" space.
The Astroturf pitch was classified as Metropolitan Open Land and therefore enjoyed the same level of protection as land in the green belt – with policy requiring refusal of inappropriate development save if stringent "very special circumstances" can be demonstrated. However, Southwark had concluded that there were "very special circumstances" justifying its loss including the fact that the Astroturf was in poor condition, had only opened for informal play and recreation by the general public in 2018 and would be replaced with a new kickabout space, which although much smaller, would be a significant improvement.
The Claimant challenged the decision on four main grounds.

Ground 1: mistake of fact

The Claimant argued that the Council made a mistake of fact on the question of whether the application site was in an area of open space deficiency. The officer's report ("OR") had included a line which stated "The area is not one with an open space deficiency, with large nearby parks including Goose Green, Ruskin Park and Dulwich Park". The Claimant argued that this reference in the officer's report conflicted with what was contained in the Council's Open Space Strategy publication ("OSS") as the OSS identified Camberwell (the relevant locality for the planning permission in issue) as a sub-area "deficient in quantity of open space". In dismissing this ground, the Court held that when referring to the location as not being an area with an open space deficiency in the Officer's Report, all that Members were being told was that there was sufficient open space in the vicinity of the Site, i.e. in the "area" in general terms. Further, the OSS on its own wording made clear that the "sub-areas" it creates are not intended to be used as firm boundaries for judging planning applications, rather as a mechanism for setting out information. The fact that Camberwell was generally regarded as deficient in open space did not mean that any area within Camberwell was de facto deficient.

Ground 2: failure to properly apply the policies in respect of Other Open Space

The Claimant argued that the Council failed to properly apply the Saved Southwark Plan Policy 3.27 which stated that development on Other Open Space ("OOS") would only be permitted if certain specified criteria were met or "or (vi) Land of equivalent or better size and quality is secured within the local catchment area for similar or enhanced use

before the development commences". The Court held that Policy 3.27 was not relevant as the Astroturf was not designated as OOS. The Claimant therefore also failed on this ground.

Ground 3: Failure to apply the policies on play and informal recreation

The Claimant argued that the Council failed to consider whether the loss of the Astroturf as an informal recreational facility would be compliant with the development plan – specifically London Plan Policy 3.6, London Plan Policy 3.19, and Strategic Policy 11 of the 2011 Core Strategy. In dismissing this ground of challenge, Saini J agreed with the Council's representations on this point and held that:

(i) the Council considered the loss of the Astroturf in accordance with its development plan designation as a sports ground on land classified as Metropolitan Open Land;
(ii) (ii) the Council also considered the current informal recreational use of the Astroturf as an other material consideration;
(iii) the Council correctly applied London Plan Policy 3.6 and the Mayor's Supplementary Planning Guidance ("the SPG") to the issue to which they were directed: that is, whether adequate play provision would be made for the new residents of the development;
(iv) the Council did in fact apply London Plan Policy 3.19 and (consistently with the Mayor's Stage 1 Report) judged that the superior quality of the new sports facilities (whose use would be controlled via the s.106 Agreement) justified the net loss of sports and recreation land; and
(v) Strategic Policy 11 of the 2011 Core Strategy does not contain a development control test. Insofar as it refers to protecting MOL, the OR lawfully judged that very special circumstances existed which outweighed the harm to the openness of the MOL.

Ground 4: Failure to discharge the Public Sector Equality Duty ("PSED")

The Claimant argued that the Council failed to comply with the PSED imposed under s.149 Equality Act 2010. The Claimant considered the Council's consideration of the PSED was legally flawed for the following two reasons:

1. The OR noted that officers did not have the statistical data to fully verify and understand the demographics of those using the artificial pitch, but that they are informed it is used largely by families and children or youth. The Claimant argued that the Council had a duty to make reasonable enquiries; and the very purpose of the consultation exercises should have been to gather the information needed. Moreover, the Council failed to have regard to the information it

possessed regarding the local population of Camberwell, and which could have been used to inform its assessment of the impact of the development.

2. The OR did not consider at all the protected characteristic of race, despite the fact (i) officers were informed specifically about the use of the Astroturf by youth from the BAME community and (ii) information held by the Council revealed a significant proportion of 'non white' residents within the ward.

In considering the first complaint, Saini J held that the relevant legal test was whether the manner of intensity of the Council's inquiry was unreasonable in the circumstances. He held that, on the facts, the Council were not required to carry out further investigations – the nature of the use of the Astroturf and the groups using it was clear from the consultation responses and was extensively documented in the OR. The Council understood the impacts of the development and took adequate steps through the s.106 Agreement to secure a new kickabout space suitable to meet the needs of the local community.

As to the second complaint, it was held that the absence of an express reference to race in the OR did not demonstrate a failure to fulfil the PSED – the concern in relation to the BAME community was well known and noted in the Addendum OR and the Delegated OR – the Council did not therefore overlook a main impact of the proposal.

Even if there was some substance to the two pleaded PSED related complaints, the court found that this ground would have been refused under s.31(2A) Senior Courts Act 1981 as it was highly likely that the outcome of the decision would not be substantially different had the Council complied with its PSED obligations.

As all four grounds of challenge had failed, the claim for judicial review was dismissed.

Case summary prepared by Emma McDonald