R. (ON THE APPLICATION OF BEDFORD) v LONDON BOROUGH OF ISLINGTON

QUEEN'S BENCH DIVISION (ADMINISTRATIVE COURT)

(Ouseley J.): July 31, 2002[1]

[2002] EWHC 2044 (Admin); [2003] Env. L.R. 22

H1 *Environmental impact assessment—judicial review—whether Environmental Statement so deficient that could not be regarded as an "Environmental Statement" within the meaning of Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999—whether criticisms as to assessment of impacts showed an error of law or breach of duty on the part of the Local Planning Authority*

H2 The interested party, Arsenal FC (''A''), planned to relocate its stadium to a site largely, but not wholly, owned by the defendant local authority (''LBI''). The proposed development included the new stadium, the relocation of a waste recycling centre, and the redevelopment of the existing stadium, and was the subject of planning briefs and a scoping opinion for the required Environmental Statement (''ES''). There was also a range of financially enabling development, including housing, business and community uses. The ES was subject to extensive public consultation, which included consultation on draft scoping reports, the placing of all application documents and the ES on public deposit in a number of locations, making these available on a CD-Rom, free or for a nominal charge, and the posting of the main report of the ES and key planning application documents on LBI's website. LBI instructed a number of consultants to provide it with further information in relation to this material, and the Institute of Environmental Management and Assessment was asked to provide its appraisal of the calibre of the ES. Following these, and other aspects of a very extensive consultation exercise, LBI's officers recommended that planning permission be granted, despite the proposals not complying with Unitary Development Plan policies in several respects. A resolution to grant was made following a Council meeting in December 2001, and permission granted in May 2002, following the conclusion of a ''s.106 Agreement''. Permission to seek judicial review challenging the resolution to grant permission was refused on the papers in April 2002, primarily on the basis that the challenges were effectively disputes as to planning merits which it was not for the court to resolve. A renewed application was made and the appli-

[1] Paragraph numbers in this judgment are as assigned by the court.

cations and consolidated grounds were ordered to be heard together at a substantive hearing.

H3 There were a great many grounds for challenge, including: that a Public Inquiry should have been held into the proposals; the non-disclosure of a consultant's report on financial matters; procedural unfairness at the December 2001 Council meeting and resulting from the late supply of information; criticism of the s.106 Agreement; and criticism of LBI's officers' reports. One such source of criticism was that e-mail correspondence allegedly showed that officers had views which were not included in the subsequent reports, so that councillors were alleged to have been misled. These views were submitted to include concerns that the noise and vibration impacts of the stadium use had not been adequately addressed. Another was that contaminated land surveys were not required, when under the eventual planning conditions remedial schemes were required instead. A further ground was that there were such deficiencies in the ES that it could not be regarded as an ES for the purposes of the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 (SI 1999, No.293). The alleged deficiencies included that it had been assessed on a higher modal split between non-car and car transport (88:12) than that on which LBI considered transport impact (80:20); that the potential loss of waste-handling capacity in the area had not been specifically addressed; the concerns as to noise impact and contaminated land; and dust from the construction process.

H4 **Held,** in dismissing the application:

H5 (1) The criticisms made as to the e-mail correspondence in respect of noise could not support the view that the officers had views which were not properly represented to LBI in a way which meant that the Council was significantly misled. Nor could they stand in the light of the evidence that these concerns had been addressed by a combination of noise conditions and a noise protocol forming part of the s.106 Agreement. The final view on likely significant effects was set out in the overview report, rather than the e-mail correspondence.

H6 (2) Extensive conditions dealing with contaminated land remediation had been imposed, and the scheme for remedial works would show what surveys, if any, were necessary. The difficulty with the type of site in question was that, as the ES made clear, the location of all of the contaminated land problems would not become known until the works were started. It was clear that this was not seen as a likely significant effect and that the requirement for a scheme of working, which in reality may include a survey as work proceeded, had been considered sufficient to protect health or amenity.

H7 (3) The ES was not just the document to which the developer referred as an ''environmental statement''; it was that document plus the other information which the Local Planning Authority thought it should have in order for the document to be an environmental statement. Accordingly, it was the Local Planning Authority which judged whether the documents together provided what Sch.4 of the 1999 Regulations required by way of a description or analysis of the likely significant effects (*R. v Rochdale MBC Ex p. Milne* [2001] Env. L.R. 406 and

R. (on the application of Barker) v Bromley LBC [2001] EWCA Civ 1766). It was quite clear from the material before the court that LBI had concluded that the documents which it had received enabled it to say that it had before it an environmental statement. The Mayor of London had also been satisfied with it. It was inevitable that those who were opposed to the development would disagree with, and criticise, the appraisal, and find topics which mattered to them or which could be said to matter, which had been omitted or to some minds had been inadequately dealt with. Some of the criticism might have force on the planning merits. But that did not come close to showing that there was an error of law on LBI's part in treating the document as an environmental statement or that there was a breach of duty in reg.3(2) on LBI's part in granting planning permission on the basis of that environmental statement.

H8 (4) The criticism of the transport modal split in the ES was one of the few grounds which might have been considered arguable, though it could not succeed on its substantive merits. The s.106 Agreement required A to work towards a modal split of 88:12 compared to 80:20. In effect, LBI argued that the ES had assessed the worst case in terms of non-car modes (88 per cent); so that aspect had been covered in terms of pedestrian impact and bus and tube travel. As public transport improvements were implemented under the s.106 Agreement, the car split would be reduced in the longer term to 12 per cent. In effect, therefore, a likely effect in the short to medium term, namely the extra 8 per cent car split, had not been assessed. However, LBI was entitled to take the view that the anticipated medium term continuance of the same level of traffic in the same area, equivalent to 20 per cent split to car, but with a greater degree of dispersion, could not constitute a ''likely significant effect'' of the development and that the ES did cover, therefore, the likely significant effects. An absence of significant change was not a significant effect which required assessment. That in effect was an aspect which had been assessed as the baseline or existing condition, and could not be regarded as irrational.

H9 **Legislation referred to:**

Local Government Act 1972, ss.100D and Sch.12A

Town and Country Planning Act 1990, ss.12, 21, 36, 39, 54A and 70

The Town and Country Planning General Regulations 1992 (SI 1992, No.1492), reg.3

The Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 (SI 1999, No.293), regs 2(1), 3(2), 13(1), 19, 21 and Sch.4

H10 **Cases referred to:**

Allen v City of London [1981] J.P.L. 685

Bushell v Secretary of State for the Environment [1981] A.C. 75; [1980] 3 W.L.R. 22; [1980] 2 All E.R. 608; 78 L.G.R. 269; (1980) 40 P. & C.R. 51; [1980] J.P.L. 458; 125 S.J. 168

City of Edinburgh Council v Secretary of State for Scotland [1997] 1 W.L.R. 1447; [1998] 1 All E.R. 174; 1998 S.C. (H.L.) 33; 1998 S.L.T. 120; 1997

S.C.L.R. 1112; [1997] 3 P.L.R. 71; [1998] J.P.L. 224; [1997] E.G.C.S. 140; (1997) 94(42) L.S.G. 31; (1997) 141 S.J.L.B. 228; [1997] N.P.C. 146; 1997 G.W.D. 33–1693

Davies v London Borough of Hammersmith and Fulham [1981] J.P.L. 682

Great Portland Estates v Westminster City Council [1985] A.C. 661; [1984] 3 W.L.R. 1035; [1984] 3 All E.R. 744; (1985) 50 P. & C.R. 34; [1985] J.P.L. 108; (1984) 81 L.S.G. 3501; (1984) 128 S.J. 784

Hibernian Property Co v Secretary of State for the Environment (1974) 27 P.&C.R. 197

IBM (UK) Limited v Rockware Glass Ltd [1980] F.S.R. 335

McMichael v United Kingdom (1995) 20 E.H.R.R. 205

R. v Secretary of State for the Environment Ex p. Slot [1998] 4 P.L.R. 1; [1998] C.O.D. 118; [1998] J.P.L. 692; [1997] N.P.C. 168

P & O Property Holdings Ltd v Norwich Union [1994] P. & C.R. 261

Padfield v Minister of Agriculture, Fisheries and Food [1968] A.C. 997; [1968] 2 W.L.R. 924; [1968] 1 All E.R. 694; 112 S.J. 171

Phillips Petroleum Co UK Ltd v Enron Europe Ltd [1997] C.L.C. 329

R. (on the application of Adlard) v Secretary of State for the Environment, Transport and the Regions [2002] EWCA Civ 735; [2002] 1 W.L.R. 2515; [2002] H.R.L.R. 37; [2002] 2 P. & C.R. 28; [2002] J.P.L. 1379; [2002] 22 E.G.C.S. 135; (2002) 99 (26) L.S.G. 39; (2002) 146 S.J.L.B. 146; [2002] N.P.C. 73

R. (on the application of Barker) v Bromley LBC [2001] EWCA Civ 1766; [2002] Env. L.R. 25; [2002] 2 P. & C.R. 8; [2001] 49 E.G.C.S. 117; [2001] N.P.C. 170

R. (on the application of J A Pye (Oxford) Ltd) v Oxford City Council [2001] EWHC (Admin) 870; [2002] 2 P. & C.R. 35; [2002] P.L.C.R. 19

R. (on the application of J A Pye (Oxford) Ltd) v Oxford City Council [2002] EWCA Civ 1116; [2003] J.P.L. 45; [2002] N.P.C. 107

R. (on the application of Lichfield Securities) v Lichfield District Council [2001] EWCA Civ 304; (2001) 3 L.G.L.R. 35; [2001] 3 P.L.R. 33; [2001] P.L.C.R. 32; [2001] J.P.L. 1434 (Note); [2001] 11 E.G.C.S. 171; (2001) 98(17) L.S.G. 37; (2001) 145 S.J.L.B. 78

R. v London Borough of Camden Ex p. Cran [1995] R.T.R. 346; 94 L.G.R. 8

R. v North Devon Health Authority Ex p. Coughlan [2001] Q.B. 213; [2000] 2 W.L.R. 622; [2000] 3 All E.R. 850; (2000) 2 L.G.L.R. 1; [1999] B.L.G.R. 703; (1999) 2 C.C.L. Rep. 285; [1999] Lloyd's Rep. Med. 306; (2000) 51 B.M.L.R. 1; [1999] C.O.D. 340; (1999) 96(31) L.S.G. 39; (1999) 143 S.J.L.B. 213

R. v Rochdale MBC Ex p. Brown [1997] Env. L.R. 100; [1997] J.P.L. 337; [1997] C.O.D. 74

R. v Rochdale MBC Ex p. Milne [2001] Env. L.R. 22; (2001) 81 P. & C.R. 27; [2001] J.P.L. 229 (Note); [2001] J.P.L. 470; [2000] E.G.C.S. 103

R. v Secretary of State for the Home Department Ex p. Doody [1994] 1 A.C. 531; [1993] 3 W.L.R. 154; [1993] 3 All E.R. 92; (1995) 7 Admin. L.R. 1; (1993) 143 N.L.J. 991

Kingsley v Secretary of State for the Environment, Transport and the Regions (2001) 82 P. & C.R. 9; (2000) 97(45) L.S.G. 43

H11 **Policy referred to:**

Planning Policy Guidance Note (PPG) 12: ''Development Plans and Regional Planning Guidance''

H12 *Mr R. McCracken*, *Mr G. Jones* and *Mr J. Pike*, instructed by Earthrights, for the claimants.

Mr R. Purchas Q.C. and *Ms K McHugh*, instructed by London Borough of Islington Legal Services, for the defendant.

Mr D. Elvin Q.C. and *Mr D. Kolinsky*, instructed by Gouldens, for the interested party.

JUDGMENT

OUSELEY J.:

Introduction

1 In 1913 Arsenal Football Club (''Arsenal FC'') moved from Woolwich to Highbury Stadium in the London Borough of Islington. The advent of all-seater stadia for Premiership clubs caused a dramatic fall in its ground capacity, the seat revenue from which is a vital part of its national and international success. It concluded that the existing stadium site could not be redeveloped for a stadium of appropriate size, nor could the existing stadium be expanded to give it a capacity comparable to that of the club's major national and international rivals. Accordingly it needed to relocate. Arsenal FC wished to remain close to what for nearly 90 years has been its home location and is the largest concentration of its supporters, albeit but a small percentage of the total.

2 After consideration of a number of alternatives, it concluded that a site at Ashburton Grove, Highbury, near to its current ground, afforded it the best opportunity. The site is largely, but not wholly, owned by the London Borough of Islington.

3 The club's proposals emerged publicly and formally in 1999. The London Borough of Islington produced planning briefs for public consultation and a scoping opinion for the Environmental Statement which this development would need. The development would encompass not just the new stadium at Ashburton Grove, but redevelopment at nearby Lough Road to accommodate a waste recycling centre, to be displaced from Ashburton Grove and also the redevelopment of the existing Highbury stadium site. So three sites close to one another near Highbury were involved. The range of financially enabling or supportive development involved included housing, business and community uses. The combined proposals were to provoke controversy and division amongst residents near the three sites, and indeed amongst supporters of the club.

4 The Environmental Statement produced by the club is a lengthy document which was subject to extensive public consultation. Eventually Islington's officers recommended that, although the proposals did not comply in a number of respects with UDP policy, planning permission should be granted.

5 Following a Council meeting on December 10, 2001, at which local residents on both sides and the developer were heard, Islington resolved to grant planning permission for all three developments. On May 30, 2002, following the conclusion of an Agreement under s.106 of the Town and Country Planning Act 1990, Islington granted the planning permissions.

6 Although earlier threats of judicial review proceedings had not come to pass, judicial review proceedings which challenged the resolution of December 10, 2001 were launched by the Islington Stadium Communities Alliance ("ISCA") and four individual local residents. Sullivan J. refused permission on paper on April 19, 2002. The grounds before him were seen to have no merit and to amount to no more than a dispute about the planning merits which it was not for the court to resolve.

7 A renewed application for judicial review was heard by Richards J. On May 30, 2002, he ordered that the applications for permission should be dealt with at the same time as the substantive hearing. He ordered consolidated grounds to be served which would cover both matters newly raised before him and those previously raised before Sullivan J. insofar as they were still pursued.

8 The matter now before me is brought by only two residents. The other claimants have fallen by the wayside. The consolidated grounds in part were not really pursued, notably to the extent that they raised human rights grounds, which were misconceived and unsupported by any evidence. A number of additional grounds were sought to be raised. The grounds raised were refined and altered in the skeleton argument, and before me, from those set out in the claimants' skeleton argument. No possible point or permutation of a point has been overlooked by counsel for the claimants. I hope I do justice to the variety and ingenuity of his multifaceted arguments. They have put the decision-making process of the London Borough of Islington through a demanding legal audit as if a roving commission were being conducted on behalf of all objectors. I have examined all of those points. In the end I have concluded that these applications fail. Most of the points raised are indeed unarguable.

The Background

9 It is necessary in this case to set out a little of the process of the decision making in the light of the range of allegations which have been made, because one matter is clear. The London Borough of Islington has been concerned from the outset to consult very widely about this proposal at all stages and has been very open about its thought processes. Arsenal FC, too, has properly been concerned to consult widely in its own way. I take the following description of the processes briefly from the witness statement of Mr Harrington, the Council's Planning Officer who had overall responsibility for the three applications.

10 Mr Harrington describes how he established the Ashburton Grove Highbury Review Group after the proposals emerged. This group comprised around twenty representatives of community and business groups, Council officers, councillors and representatives of Arsenal FC. It has met a total of 23 times. Regular participants included the first claimant, Mr Bedford, and a number of other representatives who were at one time part of the original proceedings.

11 Mr Harrington describes the need to prepare supplementary planning guidance (''SPG'') in respect of the proposals so as to guide the anticipated applications and to provide a basis for engaging local people and businesses in the debate about the proposals. He describes the very extensive arrangements put in place for consulting on the draft SPG. Invitations were sent to residents and property owners within the Ashburton Grove area. A summary leaflet was sent to 15,000 addresses and was displayed elsewhere. Newspaper advertisements were published and posters were put up. Three public meetings were held and there were discussions in neighbourhood forums. The draft SPG and the results of consultation were considered by the Council and the SPG was adopted in August 2000.

12 It was evident early on that an Environmental Statement would be required. In order to facilitate and inform the Council's approach, the scoping opinion which is envisaged by the Environmental Statement Regulations was initiated by the preparation of draft scoping reports in June and September 2000. Upon these reports the Council again consulted local community and business representatives and a variety of other interested parties. The June scoping report was also considered by the review group and the consultation responses were all taken into account when the scoping opinion for the Environmental Statement was adopted in October 2000.

13 The main Environmental Statement was produced in May 2001. It dealt with all three sites and comprised a main report of 252 pages, 13 technical annexes and a non-technical summary. As the plans were revised, supplements to the Environmental Statement were produced. All the application documents and the Environmental Statement were placed on deposit for public inspection in a number of locations. The application material was placed on CD-Rom which was made available free of charge to members of the review group and, subject to a nominal charge, to others living within a wide area around the three sites. The main report of the Environmental Statement and key planning application documents were posted on the Council's web site. The Council also instructed a number of consultants to provide it with further information in relation to this material. In addition, the Institute of Environmental Management and Assessment was asked to provide its appraisal of the calibre of the Environmental Statement, which it did. The Environmental Statement was said by the Institute to have sections that were good and sections that were satisfactory. None of the sections of the Environmental Statement as it finally stood was subject to significantly critical comment. The consultation responses were then considered by the Council.

14 The planning applications themselves were the subject matter of a very extensive consultation. These included the review group, drop-in centres, internet

information, public meetings, the leafleting of 45,000 local individuals, and various other projects. The Council received more than 2,000 comments in response to the first set of applications and nearly that number in response to the later variations. These were summarised in the reports to the Council meeting of December 10, 2001. The Council reports were also sent out to a number of statutory and other interested bodies, and were posted on the Council's web site and were made available on request at the same time. This was ten days before the meeting on December 10, 2001.

15 It is plainly a very extensive process that has been carried out. There is further detail which supports the thrust of that summary in other witness statements before me. I do not go further into them, but for those who are interested in the history and evolution of the Environmental Statement, that can be found in the first statement of Mr Hepher, the Arsenal FC Planning Consultant.

A Public Inquiry

16 From that background I turn to the first issue which is raised on behalf of the claimants. This is whether there should have been a public inquiry into the proposals. There were a number of bases upon which it was said that there ought to have been such an inquiry. The first basis concerned the way in which the proposals related to the UDP and to the UDP review. The point of law here was not entirely clear because this was not a challenge to the UDP or to the UDP review process on account of the failure of the UDP review to contain a proposal or policy for Arsenal FC to relocate to the Ashburton Grove site. The challenge is a challenge to the resolution to grant, and to the actual grant of planning permission. It is said that there was a failure to comply with a duty in relation to the UDP review. Mr McCracken said that the breach of that duty could lead to the quashing of the planning permission because were the law otherwise, the law would be a toothless tiger and the claimants would be without effective remedy for such a breach of duty as there was in the Council's failure to put the Arsenal FC proposal through the UDP review process.

17 Mr McCracken recognised that that was a bold submission, but submitted that the statutory structure in relation to the UDP and s.70 of the 1990 Act led to that conclusion. The starting point for that argument is the nature of the obligation on a Local Planning Authority in relation to a UDP.

18 Sections 12 and 21 of the 1990 Act were referred to. Section 12 so far as relevant provides:

> ''(1) The Local Planning Authority shall, within such period (if any) as the Secretary of State may direct, prepare for their area a plan to be known as a unitary development plan.
>
> (2) A unitary development plan shall comprise two parts.
>
> (3) Part I of the unitary development plan shall consist of a written statement formulating the authority's general policies in respect of the development and use of land in this area.
>
> . . ..

(4) Part II of a unitary development plan shall consist of—
(a) a written statement formulating in such detail as the authority thing appropriate (and so as to be readily distinguishable from the other contents of the plan) their proposals for the development and . . . use of the land in their area . . ..
. . ..''

19 Section 21 provides so far as relevant:

''(1) A Local Planning Authority may at any time prepare proposals—
(a) for alterations to the unitary development plan for their area; or
(b) for its replacement.
. . ..''

20 Mr McCracken also relied on the decision of the House of Lords in *Great Portland Estates v Westminster City Council* [1985] A.C. 66, 674D–G, where Lord Scarman said:

> ''The statute requires that a local plan shall formulate in such detail as the council thinks appropriate their proposals for the development and use of land: s.11 and Sch.4, para.11(2) of the Act of 1971. If a Local Planning Authority has proposals of policy for the development and use of land in its area which it chooses to exclude from the plan, it is, in my judgment, failing in its statutory duty. An attempt was made to suggest that the non-statutory guidance in this case went only to detail, as to which the council is given a discretion. But the council provides the answer to this point; it speaks in its guidelines of its non-statutory policies. In the Court of Appeal, Dillon L.J. demonstrated by his quotations from paras 3.2, 3.3 and 3.4 of the non-statutory guidelines that they do indeed, as the council itself says, contain matters of policy relating to the control of office development outside the central activities zone.
>
> It was the duty of the council under Sch.4 of the Act of 1971 to formulate in the plan its development and land use proposals. It deliberately omitted some. There was therefore a failure on the part of the council to meet the requirement of the Schedule. By excluding from the plan its proposals in respect of office development outside the central activities zone the council deprived persons such as the respondents from raising objections and securing a public inquiry into such objections.''

21 Mr McCracken submitted that the upshot of all this was to impose a requirement on the Local Planning Authority to include its proposals and policies in the UDP. Breach of that duty by a failure to put policies or proposals through a UDP could lead not just to the quashing of the UDP but also to the quashing of a planning permission in order that an effective remedy be provided for that breach in a case such as this. In support of that he relied on a passage from a

decision of the House of Lords in *Padfield v Minister of Agriculture, Fisheries and Food* [1968] A.C. 97, 1030B–D:

> ''It is implicit in the argument for the Minister that there are only two possible interpretations of this provision—either he must refer every complaint or he has an unfettered discretion to refuse to refer in any case. I do not think that is right. Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the court. In a matter of this kind it is not possible to draw a hard and fast line, but if the Minister, by reason of his having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the court. So it is necessary first to construe the Act.''

22 Mr McCracken also referred to PPG12 entitled ''Development Plans''. This deals with the plan led system and in paras 2.22 and 2.23 deals with the importance of reviewing plans to make sure that they are up to date so that site allocations can be re-examined and alternative uses considered. It was expected that plans should be reviewed in full at least once every five years, but that partial or topic reviews could take place on a more frequent basis.

23 In order to counteract arguments in relation to the UDP timescale, Mr McCracken referred to paras 6.31 and 6.32 of PPG12. It says that where the plan is very close to adoption when new information becomes available, it may be preferable to adopt the plan and then to start an early review. ''Close to adoption'' meant where the modifications process had already been completed and where no further modifications were expected to be made. If a plan is adopted where it is too late to consider new information in the course of the plan, the guidance envisages that an early review could be instituted.

24 In his criticism of the local authority's approach, Mr McCracken referred to an e-mail in which the question of whether the proposal by Arsenal FC should be dealt with through the UDP review was the subject matter of legal advice. The e-mail, which is dated April 30, 2001, reads:

> ''Thanks to Graham H for forwarding Richard Buxton's letter on behalf of ISCA threatening to Judicially Review the Ashburton Grove Planning Brief unless we revoke it in 14 days—on the grounds that the Brief is inconsistent with UDP policy (*i.e.* nature Conservation, Design and Employment policies for Ashburton Grove which may be breached by the proposals). RB points to PPG12 which advises that Briefs should be consistent with the UDP, and he asserts that LBI used the Brief, rather than changes to UDP policy, to 'promote' the Arsenal relocation proposals in order to avoid public scrutiny.

> I have prepared a draft response which I attach. I understand the point RB makes. Our Leading Counsel advised in November 1999 that 'There is absolutely no doubt that proposals of this scale should normally evolve through the development plan process . . .. SPG is normally intended to supplement or elaborate on UDP policies—what is proposed here is wholly different'. However, bearing in mind the advanced stage of the UDP Review when the Arsenal relocation proposals emerged, and the fact that other arrangements for full public participation could be made, Counsel advised that the best course would be to proceed by way of a Planning Brief and planning application, not via the UDP. The UDP Inspector agreed with this approach when objectors raised Arsenal related issues during the UDP Inquiry (but he did not have much detail about the proposals or the UDP policies affected in reaching this conclusion). In the circumstances I think it is very unlikely that a JR seeking revocation of the Brief will succeed. Even if it does, it will not debar the Council from considering all the issues in the Brief in determining the applications, although they will carry less weight.
> . . .."

25 The question of whether Arsenal FC's proposal should be put through the UDP review was considered by the Local Planning Authority and its explanation was given to the UDP Inspector. The UDP Review Plan Inspector also considered the issue. Islington said to the UDP Inquiry:

> ''This proposal presented a dilemma from the UDP point of view, particularly as the loss of employment land at Ashburton Grove would be a departure from the Plan. It was decided not to include Arsenal's proposals in the Plan for the following reasons:
> - inclusion of the proposal would amount to an endorsement of the scheme, and this would be premature without knowledge of full details of the club's proposals.
> - inclusion would tend to sideline consideration of other important planning issues, and would delay adoption of the new plan.
> - the best way to judge a scheme of this complexity is to carry out a comprehensive assessment of its benefits and disadvantages, as measured against the policies and objectives of the UDP. This will help the Council (or the Secretary of State if the scheme is called in) to make an informed decision.''

26 At para.17 the London Borough of Islington continued by making clear how it saw the UDP review relating to the proposal:

"LB Islington Response

The Council accepts that proposals of this scale should normally evolve through the development plan process, in accordance with advice in PPG1 and PPG12. However, AFC's proposals are unique for Islington, in terms of both their scale and complexity, and first emerged last November (after proposed changes were first put on deposit at the First Deposit Stage). The Council, therefore, took the view that it would be inappropriate to introduce these major proposals at such a late stage in the UDP process. In the circumstances, the only ways in which the proposals could emerge properly through the UDP process would appear to be by (a) abandoning the review and starting again or (b) incorporating AFC's proposals in the next review of the UDP. The Council takes the view that either of these courses of action would be highly undesirable. Abandoning the review would prevent the Council from having an up to date development plan. Waiting for the next review in five or six years time would be too late for the club, which, as the Council understands, has a strong business case for a larger stadium to be open by August 2004. Without knowledge of full details of the proposals, which are only now emerging, it would continue to be difficult for the Council to promote the proposals via the development plan process."

27 The Inspector's comment is set out in his report:

"A possible relocation of the Arsenal FC stadium to Ashburton Road and the associated 'knock on' effects that may have on the Lough Road/Eden Grove area would provide a common linking theme to those three parts of the larger area referred to as the 'Holloway Transverse'. This possible relocation and associated development has not however been included in the review of the UDP for reasons set out in the Council's responses (see paras 49–50 of IS/C/General/1, paras 16–19 of IS/R/Proposals/2, para.15 of IS/R/Implementation/2 and para.20 of IS/O/Closing/3). Given the interim nature of the stadium relocation proposal, I concur with the approach the Council has taken on this matter in the review Plan."

28 It can be seen that the consideration given to this matter in the e-mail is consistent with what the local authority placed before the UDP Inspector, and consistent with the view to which he has come.

29 The relationship between the two was also considered in the Overview Report, Report A, to the Council on December 10, 2001:

"7. **Planning Policy**

Unitary Development Plan

7.1 Islington's Unitary Development Plan ('UDP') was adopted in 1994. It is the Council's development plan. Section 54A of the Town and Country Planning Act requires that planning applications shall be determined in accordance with the Plan, unless material considerations indicate otherwise.

7.1.1 The Council is currently reviewing its UDP. Arsenal's proposals emerged in the summer of 1999, after the proposed changes to the UDP were first placed on deposit for formal objection in June 1999. The Council did not know whether or not the proposals should be supported in principle. Furthermore, it was advised that should LBI have wanted to promote the proposals through the development plan process, it would have had to either abandon the review process and start again or wait for the next review of the UDP in around five years time.

7.1.2 Sometimes unexpected proposals emerge that are not provided for in the Plan, and in these cases the UDP provides the best (indeed, only) policy framework by which these proposals should be judged. Officers consider that, in the circumstances, the best way of responding to the club's proposals is within the policy framework set by the UDP. This approach was endorsed by the Inspector who presided over the Local Public Inquiry into objections to the proposed changes to the UDP, when he accepted that the uncertainties that apply to the proposed development package justify not having made it a proposal of the Plan.

. . ..

7.14 The review of Islington's UDP has reached an advanced stage, having had objections to the proposed changes considered at a Public Local Inquiry, and the subject of an Inspector's Report, which recommends further modifications to the Plan. The Environment and Conservation Committee agreed responses to the Inspector's report at its meeting on the June 25, 2001 and modifications were placed on deposit over the summer. The Policy Committee is being recommended to adopt the revised UDP at its meeting on the December 13, 2001 and it expected that the Council would adopt the revised UDP in mid January 2002.

. . ..

7.16 A number of the UDP policies reflect the Council's corporate priorities and strategies. These strategies are referred to, as appropriate, throughout this and the other reports."

30 Mr Hepher, in his first witness statement at paras 3.2(a) and (b), refers also to reasoning which would justify (at least on planning merits) the approach taken by Islington.

31 I do not accept Mr McCracken's submission. First, the duty under s.70 of the 1990 Act to determine applications made to a Local Planning Authority is a significant part of the Act. Whilst by virtue of s.54A the adopted UDP is the plan in

accordance with which decisions must be made in the absence of other material circumstances, the decision maker's obligation under s.70 does not simply operate after the adoption of a development plan. It is not suspended while a review plan is in preparation; nor is it suspended in relation to some category of major development which does not comply with the plan for so long as a review plan is going through its statutory processes. There is no such statutory provision. It would be a perverse reading of the statutory duty to determine an application, to hold that that duty in such circumstances was either suspended or was one which could only lead to a refusal of permission. Although Mr McCracken submitted that the discretion to which the *Padfield* principle would apply was that contained in s.70, the reality of his submission was that there would be no duty at all to determine an application by way of grant or refusal; there would simply be an obligation to do nothing or to refuse permission, notwithstanding any view that might be formed in relation to its merits.

32 It would mean that no decision could be made, and certainly no grant of planning permission made, so long as the review process of a plan continued. This so-called ''discretion'' in s.70 is however a duty to form a planning judgment; it is not a discretionary power to decline to determine applications.

33 Indeed, given the emphasis which Mr McCracken placed on the possibility of partial or topic reviews more frequently than the five-year cycle envisaged in PPG12, it is difficult to see how the effect of his submissions is confined to the period when the plan is in the process of being reviewed. It would be equally applicable where it could be said that a review or topic plan should be prepared and that a further review should have been under way. I do not consider that any such approach is warranted by the two related but distinct duties within the Act in relation to plan-making and planning application determination.

34 Moreover, proposals which are omitted from a UDP when they should be in it do not become for that reason unlawful. They do not become proposals the existence of which is to be ignored. They might become a basis for a call-in; but it is important to remember that there are two duties, notwithstanding that there is an interaction between plan making and decision taking. Mr McCracken's submissions involve a misunderstanding of the effect of the duty to include policies and proposals in the plan.

35 Second, there is no reason in law why a Local Planning Authority cannot determine applications while a UDP is progressing. The fact that it might do so in a way which pre-empted the independent scrutiny which a UDP Inspector's views might provide is a relevant factor for the Local Planning Authority to consider in relation to the exercise of its s.70 powers. But it is perfectly clear on the authorities that even where an Inquiry Inspector is seized of the matter as a proposal, the Local Planning Authority can nonetheless grant permission and so preempt any recommendation either way by the Local Plan Inspector. The mere fact that a UDP review is going through its processes does not mean that a major proposal, which, subject to timing, could form part of the UDP review, must be included in the plan or, failing that, that an inquiry must under some guise (statutory or non-statutory) be held into the proposal.

36 I was referred to two authorities which deal with the interaction between decision making and plan making. In *Davies v London Borough of Hammersmith and Fulham* [1981] J.P.L. 682, CA, Stephenson L.J. said:

> "That, he thought was common ground between counsel in this case, except that Mr Wilkie submitted that a local authority should never override an objection, that was to say, override or make impracticable the carrying out or enforcement of an objection to a development plan or part of it, except in circumstances of real urgent necessity. For instance, if this was a dangerous structure requiring to be pulled down for the safety of people, that would be a reason which would justify the council in doing what it did; but something of that sort it was argued, was required before a council acting in one capacity would deprive itself of the power to give effect to an objection made to it in another capacity.
>
> However, Mr Ouseley had submitted for the respondent council that there was no such exception, no such special requirement and, for his part, he agreed with him. It could not be said that because this decision was not a requirement of urgent public safety, it could not be justified and must be so unreasonable that no reasonable authority could have come to it. The decision must be considered in the light of the existence of the objections being made at the local inquiry, but if those objections were considered it did not follow that the decision was perverse or unreasonable and, this decision taken, as Woolf J. had gone on to find, for economic reasons, was not unreasonable and he agreed with the learned judge's decision on that part of the case."

37 That decision is also supported by the decision of Woolf J. in *Allen v City of London* [1981] J.P.L. 685.

38 If it be the case that a Local Planning Authority can grant permission for a proposal when the Local Plan Inspector is seized of an objection or proposal in the plan related to it, even more so can the Local Planning Authority do it where the matter is not actually before the UDP Inspector.

39 Third, in order for a complaint about the way in which a policy or proposal has been dealt with in the plan-making process, to constitute a basis upon which the grant of planning permission for it can be challenged, it is the discretion in relation to that latter decision-making process which has to be attacked; it would have to be shown that there was a failure to consider the possible advantages of the proposal first going through the UDP process, or that the only rational decision would have been a refusal of planning permission on the grounds of prematurity. There is no statutory obligation to reach that conclusion; the only issue is whether that material factor was considered. But no such basis has been shown for saying that the Local Planning Authority's exercise of its s.70 functions was unlawful. It was well aware of the position; it considered the relationship to the UDP; it reached a reasonable view on it. It was a view which the UDP Inspector supported. This was made clear to the councillors and they accepted it.

40 Indeed the objectors to the proposal here have the advantage that the appraisal of the applications by the Local Planning Authority was undertaken against the policy framework in the existing UDP which is less favourable to the proposal than an altered policy might have been. If the matter were considered at a UDP Inquiry, existing policy could have no added weight or be a primary determinant of the outcome of the consideration of the UDP Inspector.

41 The suggestion that the club or authority wished to avoid public independent scrutiny ignores both the extensive public consultation on the application, the scoping report for the Environmental Statement and the Environmental Statement itself, the investigation of all matters by the officers, the publicly available officers' reports and the role of the Greater London Authority and the Secretary of State.

42 The Inspector was content with the Council's approach, so the approach to the UDP at least had independent scrutiny.

43 Fourth, in any event, it is far from clear that a proposal to the UDP by Arsenal FC would have aided the public. The London Borough of Islington would probably have decided at that stage that it could not support or oppose the proposal yet; see is response at the UDP. Local residents, as counter objectors, might well have had merely a limited say. The Inspector's conclusion could easily be: this is a possible exception. Had that been said, it is difficult to see how in any way the objectors would have been advantaged.

44 What would be the value of just saying, as a tail piece to the relevant policies, that a possible exception to them could be made for Arsenal FC? It is clear anyway that exceptions are possible to policies and there is very limited value in identifying one, even if the potential grant of permission makes it more likely. A debate before the UDP Inquiry would not have provided the analysis of the proposal necessary at the application stage because the application itself would not have been the subject matter of debate. This is merely a peg upon which to hang the argument that there should be a public inquiry and that there should have been some device to achieve it.

45 Moreover, fifth, there was no legal obligation on the Council to formulate a proposal. Until it reached its decision in December 2001, the proposal was clearly only Arsenal FC's. The recommendation to grant permission does not turn the proposal into a proposal of the Council's. An exception to policy arising on a resolution to grant planning permission on the application of a developer does not thereby become a policy or proposal of the Council. Arsenal FC could have objected to the omission from the UDP of *its* proposal but the absence of such an objection does not constitute a legal flaw on the part of the Council.

46 The suggestion that there should have been a modification proposed to the UDP to include Arsenal FC's proposal shows how late in the day it was. The earliest the proposal could have been regarded as the Council's was when it reached the decision which is now challenged because it was not included in the UDP. It is fanciful to treat it as an error of law on the Council's part to fail to promote a modification to debate the development which after detailed consideration it had decided to support. This argument is but a device to secure a public inquiry on the false assumption that major proposals which in some

form could go through a UDP Inquiry must go through some public inquiry process and that some contrivance must be found to achieve that.

47 I reject Mr McCracken's further argument that the Inspector was misinformed about when the proposals emerged and that his views should accordingly be discounted. It is difficult to know the exact moment when something can be described as having ''emerged'', but the public press notice of November 1999 to which the UDP Inspector refers was not an unreasonable point for him to take. The existence of informal discussions between Arsenal FC and Islington beforehand, whether out of courtesy or to test the water, does not mean that the Inspector was misinformed. Nor indeed would it alter the significance of the point he made for him to have known, if he did not, that there had been such prior private discussion.

48 I reject Mr McCracken's further contention that the benefits of the proposal should have been ignored as a matter of law because they had not been through the testing process of a UDP Inquiry. This is just another attempt to say that there should have been an inquiry; the inevitable consequence of such an approach would have been a refusal of planning permission because there would have been nothing to outweigh the UDP policies.

49 This illustrates the fundamental error of Mr McCracken's arguments. They all amount to this. The Local Planning Authority should not have granted planning permission without an inquiry. There is no such statutory obligation in relation to Pt 3 applications. None of the mechanisms for an inquiry applied, whether appeal against refusal or directed refusal by the Mayor of London, or call in. Mr McCracken's submissions amount to a simple and misconceived re-writing of the statutory duty in s.70. In the guise of requiring a statutory power to be exercised according to law, it amounts to an obligation to ignore a duty to determine applications having regard to all the material considerations. Provided, as it did here, that the Local Planning Authority does consider the status of the UDP, the progress of its review, the potential for the use of the UDP review process, the timetable implications for the latter and for the decision-making process on the application, no complaint can be made.

50 I turn to the role of the SPG produced by the Council. Mr McCracken's contention is that the SPG here (that is the planning brief) had been unlawfully produced and should have been ignored. Mr McCracken says that it is inconsistent with the UDP, which in respect of many parts is true. He says that it is therefore something which should not have been produced without it going through the UDP process. It would on that basis have had more public scrutiny. This is the second basis upon which he says there should have been an Inquiry.

51 Mr McCracken relied on the recent decision of the Court of Appeal in *R. (on the application of J A Pye (Oxford) Ltd) v Oxford City Council* [2001] EWHC 870 (Admin), CA, in which at para.32 Pill L.J. said:

> ''Local planning authorities should, however, bear in mind, and I would respectfully underline, Lord Scarman's comments in *Westminster*, reflected in para.3.17 of PPG12, the effect of which is that SPG must not be used as a device to avoid legitimate public scrutiny of local planning policies in

accordance with statutory procedures. It follows from the *Westminster* decision that what s.36 of the 1990 Act requires to be in a local plan must be in a local plan, and subject to the local plan review procedure. I consider this to be a continuing duty in the plan-led system and not one which applied only at the point of adoption, an expression used at one stage by the judge (para.67). The definition of supplementary planning guidance in PPG12, which has a statutory status by reason of reg.20(2) of the 1999 Regulations, supports that conclusion.''

52 Until the decision of the Court of Appeal had been received, Mr McCracken had also relied on the judgment of mine at first instance in that case [2001] EWHC 870 (Admin), and in particular paras 61 and 62. For reasons which will become apparent when I deal with the *Pye* case it is necessary to set out what I said at paras 61–67:

''61. I do not accept Mr Holgate's submission, assuming for present purposes that the contentious parts of the SPG are policies to which s.36(2) applies. I accept that the local plan as altered or as replaced must satisfy the requirements in s.36(2) to 36(11) as to its content. I also accept that a requirement that the plan shall contain the planning authority's policies, carries with it necessarily the negative requirement that planning policies must not be omitted from the plan.

62. Of course the statutory procedures for deposit draft, objections and independent consideration of those objections at an Inquiry, the independent Inspector's report on those objections, the consideration of his recommendations and the modification of the plan in consequence, indeed the adoption itself, all envisage that the plan at its various stages complied with the s.36(2) as to its contents, and that the planning authority did not have other policies kept away from that scrutiny. The existence of such policies other than in the plan, would be the subject matter of legitimate objection during the plan making process. Where the council adopts a local plan but fails to include in it all of the council's policies, there is a breach of the statutory requirement contained in s.36(2) and the plan is liable to be quashed under s.287 as in the *Westminster City Council* and *Kingsley* cases.

63. It is the local plan to which the statutory duties and remedies apply: breach of those duties leads to the plan being quashed, not some other policy documents.

64. However, the power to alter or replace a plan, coupled with the statutory provisions as to its content, cannot be transmuted into a negative obligation to produce nothing else. The duty is to include those policies in the plan. It is not a duty to forswear the production of policies in another document, whether on an interim basis or in parallel with the local plan, or instead of a replacement of alteration local plan.

65. Where a plan has been adopted and an authority promotes new policies without adopting a statutorily reviewed plan, it does not breach any duty as such; rather it merely has policies to which s.54A does not apply and to which the Secretary of State may decide to attach little weight. There would otherwise be an extraordinary fetter on the ability of a local authority to formulate or express its planning policies: it could not meet changed circumstances, a change of political complexion bearing on planning policy or new government policy other than by a review or alteration of its plan, however long that would take or however urgent the need. A planning authority could not even rely on consultation deposit or yet more advanced draft versions of its plan as policies for development control purposes. The statutory provisions simply do not support such a position.

66. Although a council might in certain circumstances act unlawfully in its approach to the exercise of its statutory discretion to produce a review, it is not alleged here that the City Council has acted unlawfully in the exercise of its power under s.39(1), although it seems to me that that is where a remedy would lie if it is contended at this stage that a local authority is seeking to develop policies in such a manner as to evade public scrutiny.

67. I do not consider that those conclusions are inconsistent with the decisions in the *Westminster City Council* and *Kingsley* cases. Those cases concern the content of plans at the point of adoption. They do not purport to deal with any discretion to produce a review plan or with a power of an authority to produce policies in advance of a review or indeed instead of a review; they do not preclude the production of policies in non local plan documents. The focus of those cases is the duty to include those policies in plans when they are produced.''

53 PPG12 discusses supplementary planning guidance. In para.3.15 it is said that SPG must be consistent with national and regional planning guidance as well as with the policies set out in the adopted plan. It has a role in supplementing plan policies and proposals. Paragraph 3.17 emphasises, however, that SPG must not be used to avoid subjecting to public scrutiny in accordance with the statutory procedures, policies and proposals which should be included in the plan. Plan policies should not attempt to delegate the criteria for decisions on planning applications to SPG or to Development Briefs.

54 I do not accept Mr McCracken's contention. It is important to understand what the SPG documents actually were. They were planning briefs, that is to say they were designed to assist in providing the framework for assessing these applications, their advantages and disadvantages, examining what were the important issues for the authority and for local residents, and setting criteria for their resolution. They were adopted after extensive public consultation. They were not the more detailed or supplementary policies to the UDP, which PPG12 considers. Nor indeed were they a set of substitute policies for those in the UDP. Rather they were a basis for examining a proposal against the UDP and UDP review policies.

55 In any event reliance on s.12, *Great Portland Estates* and *Pye* in the Court of Appeal or at first instance, which I have already set out, does not help Mr McCracken. His argument is that the obligation to put policies and proposals in the plan, and the negative requirement that they should not be omitted from the plan amounts to an obligation not to produce other policy documents; if that argument is good whilst a plan is in preparation, its logic makes it good if any one of the possible forms of review, topic or early review could be undertaken instead. It amounts, as Mr McCracken acknowledged, to an obligation to produce a plan or SPG within the terms of PPG12 and a prohibition on anything else.

56 Such an argument is simply misconceived. There is no such statutory prohibition. The statutory obligation on the Council is to put its policies or proposals in a plan if it has one. The plan can be challenged under statute on account of that omission. If the duty to produce a plan or the discretionary power to review a plan has not been fulfilled, judicial review lies to enforce that duty, rather than to prohibit the production of other documents such as planning briefs. I refer to what I said in *Pye* at paras 63–66.

57 I should also refer to para.67 in the light of what the Court of Appeal said in para.32 of its judgment. I do not consider that Mr McCracken's arguments here are advanced by that comment. He submitted that the comment by the Court of Appeal in para.32 together with its approach to the obligation to produce plans and not to evade that by the production of other documents reinforced his contention.

58 Although it is *obiter*, that comment holds that the sentence referred to in para.67 of my judgment was too narrow a view of both *Great Portland Estates* and of my own judgment in *Kingsley*. Elsewhere in my judgment I recognised a clear duty on the Council to put its policies and proposals in the plan and that that in effect applies through the plan-making process if the plan as adopted is to comply with the statutory obligations. My comment only deals with the specific point at which the breach of the duty leads to the quashing of a plan. Likewise, the judgment recognised that the power to review a plan is one which can be enforced by judicial review if it is being unlawfully evaded. The Court of Appeal's point in its comment in para.67 is clearly dealing with a local authority which is deliberately evading its responsibilities in a manner which would lead to judicial review of its failure to produce a plan; thus the continuing duty to review a plan is enforced. That point is made in the context of the sluggish approach of Oxford City Council to its local plan review.

59 I do not consider that the Court of Appeal with that one comment rejected the basic point which I had made over a number of earlier paragraphs. The statutory duty is to put the policies and proposals in the plan. If it does not have a plan, judicial review will lie to prevent evasion of that duty. Failure to put the policies and proposals in the plan will lead to its being quashed and to less weight being given to policies and proposals which have been omitted. That is the other real sanction.

60 Mr McCracken's submissions would involve such an extraordinary fetter on the local authority's ability to deal with changes in policy or new circumstances that I would have expected the Court of Appeal to have clearly stated that, if that was its view and to have disagreed with much more of my judgment, but it did

not. I accordingly see no support in what the Court of Appeal has said for the suggestion by Mr McCracken that a local planning authority is limited to producing a plan and supplementary planning guidance as defined by PPG12 coupled with a prohibition on producing anything else, regardless of what that something else might be called, or its role.

61 Moreover, Mr McCracken's submission is inconsistent with the point made by the Court of Appeal that a local authority can have draft policies and can give weight to those draft policies, even though they are inconsistent with the existing statutory policies. That is not said to be because those draft policies have initiated the statutory process of local plan review. Often the first draft plan is a non-statutory consultative document anyway. The Court of Appeal recognised that if the SPG had been called a draft local plan, account could be taken of it. The difference lay only in the terminology used to described the SPG. The same point applies here: if the planning brief had been called a planning brief and no reference had ever been made to supplementary planning guidance, Mr McCracken's argument would fall by the wayside. This illustrates the fallacy in his case: the lawfulness of the consideration of documents other than the statutory plan and non-statutory SPG within PPG12 is asserted by the Court of Appeal. If its production amounts to the evasion of the plan-making duty, judicial review lies. If the plan is adopted but policies are omitted, a statutory challenge lies. If the role of the emerging plan is ignored when an application is determined, the decision can be quashed. But planning documents other than SPG within PPG12 are not immaterial considerations, unlawfully produced and to be ignored on that account however pertinent and valuable the content.

62 The statutory provisions in ss.54A and 70 contemplate decisions which are not in accord with the development plan. There is no basis at all in any statutory plan-making duty for contending that a framework for the consideration of a specific application cannot be produced outside the plan making framework. Such an approach would be an utterly pointless inhibition to the coherent fulfilment of the duty to determine planning applications. Neither Parliament nor the Court of Appeal countenanced a restrictive approach which would have so inhibited public debate and rational decision making, pursuant to the obligation to determine an application having regard to all material considerations.

63 Accordingly, I take the view that a Local Planning Authority can produce a planning brief, whether or not it is called supplementary planning guidance and whether or not it is consistent with the statutory development plan. The weight it gives it is for the decision maker, whether planning authority or Secretary of State, who will so far as material be guided by PPG12. PPG12, it must be remembered, is not statute or law, but merely a material consideration.

64 This is not a case where the concern of the Court of Appeal in relation to the evasion of a duty applies. If it did so, it would lead to judicial review of the plan making decision and provide a good basis for quashing the planning permission. But one can get to that conclusion directly because one can quash a planning permission where the Local Planning Authority has failed to take into account the material consideration that the process or substance of decision making might be enhanced if the principles of a development had gone through the independent

scrutiny of the UDP process. That is the fundamental issue, but there is no warrant on the facts here for saying either that the local authority was seeking to evade its duty or had failed to consider the relationship of the UDP inquiry to the proposals when reaching its decision to grant planning permission.

65 The last issue in relation to SPG is whether that SPG should have been treated as of little or no weight. The basis for that argument was PPG12 and the references to no weight being given to SPG where it was inconsistent with the UDP. Such an approach is to ignore the function of this so-called SPG, which is quite different from that which PPG12 contemplates. PPG12 is not contemplating a bar on all other types of documents. If the SPG here had been called ''planning brief, preliminary framework for assessment'' (which is what it was), no such complaint could be made.

66 The Local Planning Authority were fully aware from the very contents of the planning briefs and from the Overview Report that the briefs were in a number of important respects inconsistent with the UDP. If they had been wholly consistent with the UDP, there would have been rather less purpose in them. The advice in PPG12 was wholly irrelevant to this issue and there was no need to draw that to the Local Planning Authority's attention. It would have been absurd if this considered document, upon which extensive public consultation had taken place, had not been given weight in deliberations and instead the Local Planning Authority had been obliged to say that its consideration of the application could not start in that way, however helpful it might have been to do so, that the consultation response on the SPG had to be ignored, and that it had to go instead straight to the equivalent of the overview and development specific reports.

67 There is a real danger in construing the PPG as if it were a statute and requiring application of it as if it were law. It cannot itself determine weight. The fact that a statutory instrument makes it a material consideration does not mean that it has become a subsidiary form of law. It is advice to be noted. Departure from it is to be justified with reasons where it applies, but it does not apply here on a purposive and broad reading of its contents. There has been no error of approach by the Local Planning Authority in relation to the planning brief and PPG12. The Council was in any event very well aware, as I discuss later, that the proposals did not accord with a number of UDP policies. The vice of some SPG is that it is used as a substitute for the statutory development plan. That was not the case here; it was used to guide a debate on what the Council fully appreciated would be an exception to the UDP in a number of respects.

68 The last point raised in relation to this first topic was that the nature of the issues required there to be an inquiry. However, the mere fact that a proposal is complex or, as here, unique for a borough, does not mean that an inquiry is necessary or that a decision not to hold one is unlawful. No statutory provision requires a Local Planning Authority to hold an inquiry. It is difficult to see how the statutory structure for decision making and appeals should rationally include some implied statutory obligation on an authority to hold an inquiry into a proposal which statute not merely does not require, but instead obliges the Local Planning Authority to determine. If the Secretary of State wishes to call a proposal in for an inquiry and for his own determination, he can do so. It

was referred to him as a departure application. He will look carefully at its relationship to the development plan and to the Council's interest as owner. He gave a reasoned decision as to why it would not be called in. If in Greater London the Mayor wants to direct a refusal which would lead to an inquiry, he can do so. He did not choose to do so here. It would be contrary to the statutory obligation in s.70 for a local planning authority to have to refuse an application which it supported, so that objectors could put their case to someone else. It is difficult to conceive of an implied statutory obligation to hold a non-statutory inquiry.

69 The fact that factual issues may have existed over the extent of, for example, the loss and the significance of the loss of private waste capacity does not generate any requirement for a public inquiry. Those are matters perfectly properly for consideration and weighing by the local authority.

70 As I have said, no Human Rights Act point was pursued here. There was wholly inadequate evidence of either claimant's human rights, whether under Art.8 or Art.1 of the First Protocol, being engaged. There merely was evidence that they were tenants and the following:

> "Both claimants made representations to LBI, and supported those of others, opposing the development. Edward Bedford lives close to the proposed new stadium. He has particular concerns about the effects of crowds, congestion, noise and pollution on his own and neighbour's homes. He is chairman of the Harvist Estate Residents and Tenants Association. He is a lifelong supporter of Arsenal as are many of the residents of the Harvist Estate. Elizabeth Clare lives on the Ring Cross Estate, next to which the new waste transfer station is to be built."

71 It is also quite clear from the decision in *R. (on the application of Adlard) v Secretary of State for the Environment, Transport and the Regions* [2002] EWCA Civ 737, paras 31, 32, 39 and 40, that major developments do not by their nature require an inquiry to be held in order for a local authority lawfully to grant planning permission for them. There was many an opportunity for written and a specific one for oral representation.

72 I do not regard any part of this multi-faceted argument that there should have been a public inquiry, whether statutory, non-statutory or as part of a UDP inquiry, as seriously arguable. Insofar as any part of it is arguable, it is wrong.

The Disclosure and Relevance of the DTZ Report

73 This report is described in the witness statement of Miss Ebanja, who is the Senior Corporate Adviser to Islington, having been interim Deputy Chief Executive at the relevant times. She describes in paras 3 and 4 of that statement how the DTZ report came into existence. DTZ were appointed to assist the Council in its negotiations with Arsenal FC on land issues. Part of their instructions meant that they had to examine, therefore, the cost estimates relevant to the deliverability of the development. DTZ advised her, both orally and in writing, from time to time. They produced a draft report in November 2000 with various other updates. She

said that DTZ, it was plain, had been given full access to Arsenal FC's business plan; that Arsenal FC's cost estimates and figures had been carefully scrutinised; and that DTZ had come to a view as to the robustness of what they had seen. In correspondence it was also said on behalf of Islington that that document was available to five officers only within the Council.

74 An application for cross-examination was contemplated in relation to this matter, but it was not pursued. It would have been necessary to show that there was a factual issue which it was for me to resolve, which I could not fairly resolve without cross-examination, for such an order to be made. Mr McCracken recognised that he could identify no such issue.

75 An application was contemplated for disclosure of the DTZ report, but it was not pursued. The purpose of its disclosure would have been to enable essentially unspecified questions to be asked to see if some ground of challenge arose. This was closely linked to the possible application to cross-examine witnesses which, rightly, was not pursued.

76 In the original grounds, and in the consolidated grounds, the ground of challenge relating to the DTZ report was that it was unfair for the document not to have been disclosed to objectors. Mr McCracken before me developed a further argument, which I now deal with, relating to the Local Government Act 1972. Section 100D deals with the disclosure of background papers. It provides so far as relevant:

> "(1) Subject, in the case of s.100C(1), to subs.(2) below, if and so long as copies of the whole or part of a report for a meeting of a principal council are required, by s.100B(1) or 100C(1) above to be open to inspection by members of the public—
>
> (a) those copies shall each include a copy of a list, compiled by the proper officer, of the background papers for the report or the part of the report, and
>
> (b) at least one copy of each of the documents included in that list shall also be open to inspection at the offices of the council.
>
> . . ..
>
> (4) Nothing in this section—
>
> (a) requires any document which discloses exempt information to be included in the list referred to in subs.(1) above; . . ..
>
> . . ..
>
> (5) For the purposes of this section the background papers for a report are those documents relating to the subject matter of the report which—
>
> (a) disclose any facts or matters on which, in the opinion of the proper officer, the report or an important part of the report is based, and
>
> (b) have, in his opinion, been relied on to a material extent in preparing the report,
>
> but do not include any published works."

77 Schedule 12A of the 1972 Act provides in Pt I, para.7, an exemption in relation to that duty. The exemption covers:

> ''information relating to the financial or business affairs of any particular person (other than the authority).''

78 But there is a qualification to that exemption set out in para.7 of Pt II of Sch.12A:

> ''Information falling within any paragraph of Pt I above is not exempt information by virtue of that paragraph if it relates to proposed development for which the Local Planning Authority can grant itself planning permission pursuant to reg.3 of the Town and Country Planning General Regulations 1992 (SI 1992/1492).''

79 Regulation 3 of the Town and Country Planning (General) Regulations 1992 provides:

> ''Subject to reg.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 s.77 of the 1990 Act for determination by him.''

80 Mr McCracken submitted that the DTZ report was a document which should have been listed in the agenda for the meeting of December 10, 2001 and copies provided. As a matter of fact it was not listed as a background document in any agenda report. Mr Robin Purchas Q.C., for Islington, submitted that the document did not fall within the scope of s.100D (5), because, I should infer, the officer had concluded that it was not a background document. No judicial review ground was raised to challenge that judgment which, he said, I should infer had been made. The matter cannot now be dealt with directly in the evidence. That is by itself a sufficient answer to the claim raised by Mr McCracken because, following the directions of Richards J. in relation to revised consolidated grounds, no further grounds could be raised. No such grounds having been raised, it is a matter which could be dealt with in that short way. Had it been dealt with by evidence following grounds properly raised, I am not sure that Mr Purchas would have been correct in his submission in relation to action 100D, because of the references made to the document in para.5.1 of the Overview Report.

81 However, it is quite clear from the witness statement of Miss Ebanja that the DTZ report was shot through with the confidential information of third parties, and fell within Sch.12A, Pt I, para.7. It is perfectly obvious that it was assessed as confidential on a reasonable basis. Accordingly, s.100D(4)(a) operated so as to preclude the non-inclusion of that document in the list of background documents constituting a breach of duty.

82 I do not accept Mr McCracken's convoluted argument that the effect of Sch.12A, Pt II, para.7, together with reg.3 of the 1992 General Regulations, meant that Pt I, para.7, was disapplied. I note that the exemption in Pt I, para.7, is inapplicable to a local planning authority. The simple question is this: was this development for which the Local Planning Authority can grant itself permission pursuant to reg.3? The answer to that is: No. It was neither an application by an interested planning authority to develop any of its land, nor an application by an interested planning authority to develop any land, nor an application by an interested authority made with any other person. Regulation 4 is of no application or assistance.

83 Mr McCracken, as I understood it, submits in effect that it has to be supposed that the application for these purposes is made by an interested planning authority. If it were, it could grant itself permission because the larger part of Ashburton Grove and parts of Lough Road are its land (although it follows from that that part of those sites are not Council owned). There is no warrant for such a supposition. If such a supposition were made, all applications to develop a site which included any local authority land would fall within reg.3. But it is difficult, if one is making that supposition, to see why that would not also have to be made in respect of an application for development of any land, because on Mr McCracken's argument, it must be assumed to be an application by an interested planning authority. This would make a nonsense of the qualification to the exemption, and the exception to non-disclosure would in fact become a rule of disclosure.

84 The same answer follows if the test for whether something falls within para.7 of Pt II to Sch.12A was whether the application *could* be made by a local planning authority, which is another way of putting the same point. Nor is there a legislative justification for such an approach. The aim is to prevent a developer acting jointly with a local authority which can grant planning permission for the development, being able to avoid relevant financial scrutiny. The exemption does not apply to an authority's affairs anyway.

85 In any event, here the desire to examine the DTZ report was not to ensure that the local authority had enough money for its land, nor to see whether there was a planning implication which might arise from the funding gap in terms of the ability of the local authority to obtain the planning benefits. Those are all dealt with by the s.106 Agreement. What the objector wanted disclosure of was information peculiar to Arsenal FC's financial and funding position which supports my view that Mr McCracken was misreading this section, in a search for material about an applicant which it would be very unusual for the public to see in the normal way.

86 The alternative submission drew on common law fairness. It was said that this required the disclosure of the document by the Local Planning Authority to objectors. Mr McCracken relied on a number of authorities. He referred to the decision of the House of Lords in *R. v Secretary of State for the Home Department Ex p. Doody* [1994] 1 A.C. 531, 560, where it was said:

"(5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result, or after it is taken, with a view to procuring its modification; or both.

(6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."

87 He also referred to the decision of Browne J. in *Hibernian Property Co v Secretary of State for the Environment* (1974) 27 P. & C.R. 197, 208, subsequently applied by the Court of Appeal in *R. v Secretary of State for the Environment Ex p. Slot* [1998] J.P.L. 692, 700–701. From it he drew the principles that the parties to an appeal or other proceedings must have a fair opportunity for correcting or contradicting any relevant statement prejudicial to their view, that a decision maker must not take into consideration extrinsic information from one party which a party with an opposing view has no opportunity of contradicting, and that a decision maker must not hear evidence or receive representations from one side behind the back of another.

88 There are a number of other authorities, not surprisingly, to the same effect. He placed particular reliance upon the decision in *McMichael v United Kingdom* (1995) 20 E.H.R.R. 205, at para.80. This was a case that was said to be important because the information of which Mr McMichael had been deprived, was said to be sensitive information relating to social work and care reports on his children. Mr McCracken pointed out the significance to this proposal of enabling development and said that economic benefits were being used to interfere with objectors' ECHR rights—a point which he had barely pursued and quickly abandoned. The development had been seen as a regenerating development but, if it could not be developed, the permission could be seen as having a blighting effect. The proposal might never be developed or, if developed, might not be finished. The deliverability of the proposal had been seen as a major benefit by Mr Hepher in his submissions in support of it. There was a funding gap of which he complained in other contexts, which supported Mr McCracken's concerns. Mr McCracken said that this might also mean that funds for transport works and for implementation of the measures required to achieve the high non-car modal split could be at risk, altering the basis of the approval by Islington. The planning authority should not have had this information without it being available to objectors.

89 I do not accept Mr McCracken's arguments. For the reasons which I have already given, I do not accept that the two claimants have shown that their human rights are in any way engaged here. There was very little evidence about them at all. Apart from the fact that they had a tenancy, one near the new proposed ground and the other near the new proposed waste recycling centre, there was no evidence whatsoever as to any effect which the proposals

might have on any right which they enjoyed. There was no more evidence than that they had certain concerns. That is wholly inadequate.

90 However, the question of what is fair depends on the context and circumstances. So far as the Council is concerned, the existence of the DTZ report was clear from para.5.1 of the Overview Report, as well as its conclusion and implications. It was produced, as Miss Ebanja makes clear, to deal with land values as between the Council and Arsenal FC and for those purposes DTZ had contact with Arsenal FC. Financing was also relevant to the issue as to whether Arsenal FC were providing too little for the transportation package and by way of affordable housing. Islington wanted as much as it could obtain and Arsenal FC was looking to reduce the funding gap between the value of the enabling development, the cost of development of the land, and what it and the institutions could raise and fund respectively. The GLA also examined carefully the extent of funding of commercial elements and planning benefits to ensure that there was no undue profit from those going to support the stadium rather than going to provide more planning benefits.

91 Although the DTZ analysis was referred to in the Overview Report, no request was made for it on behalf of the claimant until June 14, 2002. An earlier request in April 2002 was made on behalf of ISCA, who have ceased to be claimants in these proceedings.

92 The planning issues in relation to which the fairness or unfairness of non-disclosure has to be judged are the likelihood of the grant of planning permission itself causing blight, and the prospect of the package of benefits being delivered. But I was not shown any document in which, bearing in mind the conclusion of the Overview Report, concern was raised by either of these two claimants as to the potential for blight through the grant of planning permission. It was merely referred to briefly as a possible argument in the second witness statement of their solicitor, but essentially that was by way of submission after the event. If there were a grant of planning permission, but the proposal were not built, the objectors would be nearly as pleased as if the proposal were not permitted at all. This sort of point can be made in respect of any large complex development. It is very odd to suppose that Islington would refuse planning permission for what was a desirable development, with the benefits which it could bring, because it could not be certain that ultimately it would be started. There was no evidence that there would be any blighting effect were it not to go ahead; the claimants made no such point to the Council. The UDP would continue to provide policies for other developments.

93 Mr McCracken's point could not be, and was not, that the development might start but not finish. It could not be his point because the very sequence of development told against it. The development of the new stadium could not proceed without the expensive removal of the existing uses on the Ashburton Grove site and the creation of a new waste recycling centre at Lough Road. This substantial expenditure could not rationally be committed without Arsenal FC being satisfied that it could then proceed with the new Ashburton Grove stadium, the very aim of the project. Once the stadium had been built, it would only be in its

financial interest to bring about the agreed redevelopment of the existing stadium because that, too, would yield financial benefit.

94 The second planning issue raised in Mr Dunkley's witness statement to which the unfairness of non-disclosure related, and again raised more by way of submission after the event, was whether the package of benefits would be delivered. That depends upon a view being taken in relation to the effectiveness of the s.106 Agreement, and the degree to which the requirements are indeed variable according to the financial position of Arsenal FC. To the extent that they are variable according to its financial position, this is a point which could have been made in response to both the planning application and the s.106 Agreement reports. But I have not had my attention drawn to any such representations or assertions that that is what the claimants wished to say.

95 Moreover, as I later explain, the s.106 Agreement is reasonably regarded as satisfactory by Islington and the GLA in relation to the extent of affordable housing, after examination of the financial situation and the requirements of that Agreement are now fixed. The public transport requirements are fixed and the degree of financial leeway is less than the claimants contended. There was public consultation on the content of the s.106 Agreement.

96 There is no true parallel with *Doody* and *McMichael*. In both those cases the decision maker had, but one of the parties before him did not have, material of vital importance to the essence of the case, in the absence of which one of the parties' case could not be fairly presented.

97 Here the councillors were not better off than the objectors. They, too, did not have the DTZ report because it contained references to Arsenal FC's confidential business plan. Only five officers saw the November 2001 report, one of several advices and reviews, oral and written, which DTZ provided. I infer, precisely because of its confidential references and Arsenal FC's desire to limit the risk of its becoming public property, that the number of people who had access to it were limited. The planning issues to which the DTZ report gave rise were sufficiently clear for comment on those issues to have been made by the claimants (or indeed by anybody). It is difficult to see that this document can equate in significance to the absent reasons and missing report in *Doody* and *McMichael* respectively.

98 Further, I do not accept that councillors should be deemed to know what a handful of officers know and thus should be regarded as being in a different position from the objectors. In this context that point is artificial, especially as the number of officers was specifically limited and councillors were intentionally not provided with the document. The reliance by Mr McCracken on *Bushell v Secretary of State for the Environment* [1981] A.C. 75 is misplaced. It would be quite wrong to attribute knowledge to the councillors in order artificially to create an unfairness which does not, in reality, exist.

99 Moreover, fairness in the planning process is not confined to a consideration of the interests of the objectors. It also needs to respect the confidentiality of the applicant because it is to its figures rather than to DTZ's general appraisal that the claimants' point is addressed. It has the gist of the appraisal. It is this actual appraisal, and within that Arsenal FC's figures, that the claimants want. This is

emphasised by their constant references to a £50 million funding gap drawn from an e-mail in which that is referred to. But it would be unfair to Arsenal FC for the Local Planning Authority to be made to reveal what was handed to its advisers in confidence in the clear expectation that it would have a very carefully restricted circulation.

100 A planning authority needs to be able to examine matters in a confidential manner with applicants, as was done here, and for that purpose to use independent consultants to whom disclosure of the relevant information is made in confidence. This is the same process that the GLA went through. If a local planning authority cannot do that, it will be hindered in its negotiations with developers over the content of publicly beneficial packages such as the extent of affordable housing and other legitimate benefits related to the value of the development and its funding. The public interest would be harmed.

101 It is quite clear that the information is confidential and disclosure of it would be in breach of confidence. There is nothing unfair in the non-disclosure of that document, with the gist of the DTZ appraisal being available.

102 Finally, I consider that s.100D(4)(a) provides for a local planning authority to be able to comply with its duties of openness without a breach of confidence. A specific statutory provision provides for non-disclosure of this document and is applicable in this context. Even if (which I doubt) there is scope for a common law duty of fairness to supplant rather than supplement that regime, that regime is a very powerful indicator as to the content of the common law duty of fairness. There is nothing arguably procedurally unfair here in the non-disclosure of that document.

Unfairness at the Council meeting

103 It was also said that there was unfairness procedurally at the Council meeting of December 10, 2001, which it is convenient to pick up here. It is said that the conduct of that meeting was unfair. The contention was that the local residents should have had the last word rather than Mr Hepher, Arsenal FC's planning consultant. If that had happened, it was said that the residents could have rebutted factual errors which he made. If the developer lost, he could appeal against the refusal of planning permission; but no such procedure was available to local residents. The time allowed to local residents was too short and many could not speak. Councillor Leigh, the ward councillor for Ashburton Grove, had to speak in a different section of the debate. The summary report was presented too late and in too few a number for it fairly to be dealt with. I deal with that later. I observe merely at this stage that some 300–400 copies were available at the meeting.

104 It needs to be borne in mind that this was not some run-of-the-mill public meeting. This was a Council meeting at which the public were permitted to speak. There was no entitlement on either side of the debate to speak. The meeting was conducted in accordance with standing orders and it was in accordance with those that the public were to be permitted to speak. The duration of their speaking and the order in which they spoke is a matter for the legitimate dis-

cretion of the chairman applying standing orders. Three minutes was a reasonable time for each of the people who spoke, other than the developer. That is what the standing orders envisage. The meeting lasted from 19.32 hours to 00.15 hours. It was divided into three sections for the three applications. 50 members of the public spoke, but it is obvious, if a meeting in relation to a matter as controversial as this is to be conducted within any sensible limits, that not everybody can speak for long or as long as they want to.

105 Councillor Leigh did not speak in the section she wanted, but she was able to speak. Both the claimants in these proceedings spoke. It is legitimate for the developer to go last in relation to each section, but that is a matter for the discretion of the chairman. If it was thought unfair to do that because the developer could appeal if unsuccessful, it might equally be said that it would have been unfair had the local residents gone last because they can take judicial proceedings, as they did, going first and last and taking two of three allocated days. The point is misconceived. It was obviously a fair meeting.

Unfairness and the late supply of information

106 The next matter raised was the late supply of information. It was said that very significant information was supplied at the last minute or not supplied at all, so that objectors were unable to make the full, proper and meaningful representations which they were entitled to make. Mr McCracken drew upon the judgment of Ognall J. in *R. v Rochdale MBC Ex p. Brown* [1997] Env. L.R. 100. In that case Ognall J. cited from the judgment of McCullough J. in *R. v London Borough of Camden Ex p. Cran* (1995) 94 L.G.R. 8:

> ''The process of consultation must be effective. Looked at as a whole it must be fair. This requires that consultation must take place while the proposals are still a formative stage. Those consulted must be provided with information that is accurate and sufficient to enable them to make a meaningful response. They must be given adequate time in which to do so. They had adequate time for the response to be considered. The consulting party must consider the response with a receptive mind and in a contentious manner when reaching its decision.''

107 In each of those cases a very substantial amount of material was produced in such a way that the opportunity to make adequate representations did not exist. In the *Cran* case a volume of material was also accompanied by a very crowded agenda in relation to which it was said that councillors had inadequate opportunity to absorb the material.

108 The documents that were said not to be available, and in respect of which complaint was made, are described by Mr Dunkley in his witness statement. They are: a document dated October 29, 2001 called ''Matchday Pedestrian Crossing Capacity—Holloway Road'' provided by Arsenal FC's Transportation Consultant; a response to Highbury Community Association by the same Consultant, dated October 5, 2001; a letter from Arsenal FC's planning consultants with

enclosures dated November 15, 2001; a detailed report from Arsenal FC's acoustic consultants; a bundle of documents that have been described as "the November Bundle"; and it was also said that an Environmental Statement appendix entitled "Further Information regarding extended stays in stadia resulting from post-match entertainment" have never been provided.

109 Miss Cluett, the Council's Planning lawyer, responds to this in her second witness statement at para.47:

> "Neither of the claimants, nor any other person on their behalf, ever sought or requested to inspect the documents. Specific documents were made available on request where appropriate.
>
> All documents required to be made available pursuant to reg.20 of the 1999 Regulations were made so available.
>
> As indicated in my first witness statement, during the Council's scrutiny of the proposals, detailed debate and analysis quite properly took place, some of which involved correspondence and memoranda. These documents did not form part of the Environmental Information required to be available for public inspection, but formed part of officers working files.
>
> At the request of Islington Stadium Communities Alliance, and in its wish to be open and transparent in the context of the legal challenge raised, parts of Council officers' internal working files were made available for inspection on request, as soon as the file documents could be collated in good order."

110 Mr Harrington states in his second witness statement that he believed that the November bundle was available before December 7, 2001. He attributes some of the difficulties which may have been experienced to the access which the public had to the files, which meant that they were not always in proper order. He received a letter from Mr Scott of ISCA on November 21, 2001 complaining about that. He says that he checked that all the supplementary material received by the Council, which would cover most of the material that has been referred to by Mr Dunkley, including the November bundle, was on public display. This issue was again raised by the review group on December 6, 2001. He checked the next day and the information was still there. There is therefore a clear factual issue underlying this ground of challenge.

111 Even if Mr Dunkley were right in relation to the factual position, in the light of the absence of any representations from the claimants seeking those documents and in the light of the extensive material publicly available well beforehand, those positions could not possibly be considered to be equivalent to the obstacles placed in the way of the public in *Brown* or *Cran*. The public (including the claimants) had ample opportunity to comment on the applications. The comment made in relation to consultation in *R. v North Devon Health Authority Ex p. Coughlan* [2000] Q.B. 213, 258–259 (para.108), is relevant here:

> "It has to be remembered that consultation is not litigation: the consulting authority is not required to publicise every submission it receives or (absent some statutory obligation) to disclose all its advice. Its obligation is to let those who have a potential interest in the subject matter know in clear terms what the proposal is and exactly why it is under positive consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response. The obligation, although it may be quite onerous, goes no further than this."

112 Even if it were necessary for every piece of information from a developer to the Council to be put on public display, it is very important to bear in mind the practical reality of the effect of the desire of many to see these files. There was no common law unfairness here. Mr Dunkley's evidence does not deal with the claimants' involvement in, or interest in, or endeavours to obtain, the material or what they would have done with it if they had obtained it.

Unfairness and the Officers' Reports

113 I turn now to the many criticisms made of the officers' reports. The relevant reports are comprised in two substantial volumes: an Overview Report with appendices and Development Specific Reports. They were supported by a guide to the report. They were available to councillors and to the public ten days before the committee meeting of December 10. No breach of any statutory duty or standing order is alleged in relation to them. I do not accept the criticisms that they were confused reports, or that they were difficult to find their way around, or that they were poorly structured and difficult to follow, or that in consequence ten days was too little time for councillors to absorb them or for the public fairly to comment on them. This is not a case comparable, as I have said, to either *Cran* or *Brown*.

114 To some extent this is a matter of impression, but my firm impression, having had the opportunity to read those reports at some length, is that they are clear, well structured and straightforward, given the length and complexity of the subject matter. They follow a standard structure of a description of proposal, the setting out of policies, and the consultation response overall and then topic-related evaluation. The consideration of them is aided by the Overview Report with its indices and its coloured pagination to aid swift identification of relevant parts.

115 As an illustration of the difficulties, Councillor Leigh complained that she could not find where the height of the stadium, which was said to be an important concern, was set out. I found it where I expected to find it. It was early on in the description of the relevant proposal, that is the stadium. It is also to be found elsewhere. I accept that Councillor Leigh could not find it, and found the subject matter too complex to absorb in ten days. But I do not consider that that demonstrates the legal error contended for.

116 It is important to see all these submissions in the context of the discussion of this proposal over time and the extent of public involvement in these widely publicised proposals. I have already referred to the extent of that consultation. There

is nothing in the period of time which the public had to comment on the officers' reports which is unfair. After all, that is not the focus of public consultation. The focus of public consultation is the planning brief, the scoping opinion, the Environmental Statement and, above all, the applications themselves. The report is essentially a report for councillors, to enable them to consider all matters, including the public consultation responses themselves.

117 In any event, there was ample time for a very large number of people to prepare what they wished to say at the Council meeting. There is no evidence that the claimants had too little time. The various officer reports did in fact receive widespread dissemination. Ten days before the meeting the documents were sent out. People, including the claimants, commented orally upon them at the meeting and could, if they wished, have written in in relation to them. There was adequate time for conscientious councillors to absorb the material set out in those reports. They did not come to them out of the blue. They knew that the proposals existed. The matter had been already the subject of widespread public consultation.

118 Mr McCracken related that submission to his contention that a summary report, produced on the day of the meeting, was unfair and misleading and yet, because of the length and complexity of the full reports, he said it would, in reality, have been the basis of decision. He again referred to *Cran* in this context. He relied upon the evidence of Councillor Leigh.

119 I reject that submission. The principles in *Cran*, when applied here, do not show that there was any defect in the main reports. They were inevitably complex. Members were warned that they would be coming so they could prepare themselves, and they were given longer than normal to absorb them, for a lengthy meeting of nearly five hours devoted to just that one agenda item. This was but one item on a crowded agenda with lots of material which there was no time to absorb.

120 I also reject the application of the principles in *Cran* to the summary report. The basis of that submission was that the main reports were so complex that councillors inevitably would look to the summary reports. I see no factual basis for drawing any such conclusion so far as the generality of councillors is concerned.

121 The summary report contains an executive summary drawn from the main report. It is the summary required by reg.21 of the Town and Country Planning (Environmental Impact Assessment) Regulations 1999 in respect of the grant of planning permission for development subject to an Environmental Statement. This covers the main reasons and considerations on which the decision was based, and a description of the main measures to mitigate the major adverse impacts. It is not illegitimate to describe that as a summary, although it is not a summary of the content of the main reports.

122 In that context, however, as a summary in relation to reg.21, no complaint is made of that report. It is true that the summary report does not deal with the development plan. It does not list disadvantages. It does not deal with a number of points about which criticism was later made by the claimants: for example, waste handling capacity, which was raised by others at the Council meeting.

But the true answer to that point is that the summary report and the consideration by the Council is not unlawful for that reason. The summary report did not have to deal with all those matters. It was not, and did not purport to be, a substitute for the main reports. It was only available on the day of the meeting and could not, therefore have been, a substitute for reading the full reports. Miss Leigh's complaint is that she did not see one at the meeting, but many copies were provided, 300–400. Her task was to grapple with the meeting reports. This is not remotely comparable to the circumstances in *Cran*. It is quite inadequate just to point out that certain parts unfavourable to the development were not in that summary. It is an overall useful summary because it is the one required by statute to be provided and I see no reason why, in order to assist people, it should not have been produced, and made widely available at the meeting on the day.

123 There was a complaint that the summary report was not available in time for local residents to comment on it, but that allegation misses several points. First, it was not the basis for consideration by councillors. Second, there is a very limited role for public comment on such reports because they are not the focus of consultation. Third, it was an aid to the public in dealing with complex issues, constituted by a statutorily required document, if planning permission were granted. Fourth, it was in any event already available as the executive summary in the main reports, and indeed also in the guide to the Arsenal reports which was produced with the main reports, if anybody had wished to comment on its substance. Fifth, There was no obligation whatsoever to make it available. The fact that at a crowded meeting not everyone received a copy is not a matter of legal error; 300–400 were distributed.

124 It is entirely reasonable for the summary report not to deal with the UDP, given the extent to which it is analysed in the Overview Report and in the application specific reports.

Errors in the Officers' Reports

125 Mr McCracken relied on a range of specific omissions and errors in the reports. It is important to recognise that these were reports to the Council. Councillors will also have knowledge derived from other occasions when the issues are considered: from the planning brief, the Environmental Statement and public debate (including debate at the meeting).

126 In order for a judicial review challenge to succeed on the basis of defects in the reports, it would have to be shown that the omission was significant and not made good, or that the matter was presented in a significantly misleading way and was not made good. Courts are, rightly, very cautious about reading officers' reports other than in a broad and common sense way. They are not contracts or statutes; they do not call for refined, let alone legalistic, analysis. With that in mind, I turn to the submissions actually made by way of specific criticism.

127 First, it was said that there was no reference to whether the development would accord with the UDP. The importance of that derives from s.54A of the 1990 Act. The appropriate approach to such a question is to be found in *City of Edinburgh Council v Secretary of State for Scotland* [1997] 1 W.L.R. 1447, 1459–1460:

> "Counsel for the Secretary of State suggested in the course of his submissions that in the practical application of the section, two distinct stages should be identified. In the first the decision-maker should decide whether the development plan should or should not be accorded its statutory priority; and in the second, if he decides that it should not be given that priority it should be put aside and attention concentrated upon the material factors which remain for consideration. But in my view it is undesirable to devise any universal prescription for the method to be adopted by the decision-maker, provided always of course that he does not act outwith his powers. Different cases will invite different methods in the detail of the approach to be taken and it should be left to the good sense of the decision-maker, acting within his powers, to decide how to go about the task before him in the particular circumstances of each case. In the particular circumstances of the present case the ground on which the reporter decided to make an exception to the development plan was the existence of more recent policy statements which he considered had overtaken the policy in the plan. In such a case as that it may well be appropriate to adopt the two-stage approach suggested by counsel. But even there that should not be taken to be the only proper course. In many cases it would be perfectly proper for the decision-maker to assemble all the relevant material including the provisions of the development plan and proceed at once to the process of assessment, paying of course all due regard to the priority of the latter, but reaching his decision after a general study of all the material before him. The precise procedure followed by any decision-maker is so much a matter of personal preference or inclination in light of the nature and detail of the particular case that neither universal prescription nor even general guidance are useful or appropriate."

128 I recognise that there is no use of the specific statutory words of s.54A. But the message that the development does not comply with the UDP is clear and unmistakable, as was the need for other factors to outweigh that non-compliance. It is unnecessary to provide all the references in that respect; the matter can be seen sufficiently clearly from para.7.1 in the Overview Report and paras 7.1.8 and 7.1.9:

> Unitary Development Plan
>
> "7.1 Islington's Unitary Development Plan ('UDP') was adopted in 1994. It is the Council's development plan. Section 54A of the Town and Country Planning Act requires that planning applications shall be determined in accordance with the Plan, unless material considerations indicate otherwise.
>
> . . ..

Departures from Adopted UDP Policies

7.1.8 Arsenal's proposals raise a number of fundamental policy issues. These are a number of general policies where arguably it could be said that the proposals do not comply and there are assessed in this report and Reports B, C and D. However, officers consider that they depart from the specific adopted (*i.e.* 1994) UDP policies outlined in the table below.

. . ..

Departures from Proposed UDP Policies

7.1.9 Government advice makes clear that where there is both an adopted plan and an emerging plan (as in this case), the decision whether an application is a departure must be considered against the adopted plan. Nevertheless, given the decision to assess AFC's proposals against the UDP as proposed to be adopted, officers wish to draw attention to those proposed policies which they consider the proposals would depart from. These are set out below.

. . .."

129 Although the UDP in para.7.1.8 is the plan directly engaged by s.54A, both the UDP and the draft UDP review references are followed by a list of policies which would not be complied with. Paragraph 7.1.10 deals with making decisions on departure applications:

Making Decisions on Departure Applications

"7.1.10 The fact that the applications depart from the Plan does not mean that the Council could not make exceptions and resolve to grant planning permission for the proposals. However, before doing so, Members would need to satisfy themselves that other material planning considerations justified such a decision. If Members do resolve to grant planning permission, the departure applications would need to be referred to the Secretary of State for his consideration."

130 These were referred to the Secretary of State as such.

131 As an instance (and there are others), the policy evaluation highlights the departures. For example, para.17.11 of the Overview Report on employment states:

"Ashburton Grove Area

The stadium, Queensland Road and Northern Triangle proposals would change the use of the whole of the Queensland Road/Ashburton Grove Industrial Warehousing Area into a mixed commercial/residential area. This would represent a wholesale departure from UDP Policy E11. Proposals for this area also do not accord with UDP Policy E4 or the advice in the SPG on Business to Residential in that they would result in the loss of B1 (office/light industrial) floor space. Proposals for these development

> parcels, together with Drayton Park, are also not in accordance with UDP Policies E8 and E11 in that they would result in the loss of B2 (general industrial) and B8 (storage and distribution) uses.''

132 The individual reports also set out policies and appraise them. For example, the Ashburton Grove Report (Report B), between pp.88 and 90, deals with the breach of UDP policy and concludes in para.40.1.8–40.1.9:

> ''40.1.8 My conclusion is that the application fails to meet a number of the policy tests of the SPG and the UDP and to that extent I am in agreement with ISCA and the other objectors.
>
> 40.1.9 The applicants have, however, put forward a number of reasons, based on policy, as to why the failures are not significant in the circumstances of these cases. The first of these is that existing businesses are relocated.''

133 It concludes that it would be a breach, but it would not be significant. I interject that Mr McCracken said that it was an error of law for the UDP appraisal to come after the SPG or planning brief appraisal. I regard that as a trivial point.

134 One can also see the point in relation to height on p.108 of the Ashburton Grove Report:

> ''47.2.4 Four parts of this application break the UDP rule: the stadium itself, part of the northern Queensland Road blocks, the block to Benwell Road and the building at the northern triangle. I discuss these in turn but it is quite clear that each amounts to a departure from the UDP.
>
> . . ..
>
> 47.2.18 I am therefore satisfied that an exception to the Council's tall buildings policy is acceptable and, equally important, approval would not set a precedent for further tall buildings.''

135 It is unnecessary to go through further citations in relation to other policies because those are the parts which might be said to have the greatest degree of non-compliance with UDP policies.

136 There is a clear direction given in relation to the approach to and degree of non-compliance. It is non-formulaic, but the approach is plain. It was made clear finally (if there was any doubt hitherto) by what was said by officers at the meeting of December 10, 2001:

> ''Following discussions at the Arsenal Review Group meeting on December 6, I would like to emphasise that the identified departures from policy in the proposed unitary development plan, which is set out in table A6 in the Overview Report, are in addition to the identified departures from the policies in the adopted UDP, so the two tables should be read together as an indication of where the proposals depart from both the adopted unitary development plan and the proposed revised unitary development plan.

> These are large and complex proposals relating to three sites. Officers have carefully considered them, both in terms of the proposals for each site and their overall cumulative effect. The proposals depart from a number of policies in both the adopted UDP and the proposed, revised UDP, as outlined in tables A5 and A6, as I have just referred to.
>
> Section 54A of the Town and Country Planning Act requires that planning applications shall be determined in accordance with the unitary development plan unless material considerations indicate otherwise. Hav[ing] considered all other material considerations, including the comments made from interested third parties, officers consider that there are material considerations that outweigh policy breaches.''

137 Next it was said that there was irrationality and a misdirection in para.59.2 on p.129 of Report B, where it was said:

> ''The objectors raise a large number of concerns but a number of their issues have kept coming time and time again. These are included in the Executive Summary at the head of the Report. This makes explicit the issues. What I should make clear here, however, is that whilst the scale of comment can be material consideration, this is not a referendum, not a simple count of numbers in favour or against. The Development Plan has primacy here.''

138 It was said to be irrational to describe the Development Plan as having primacy when the Council officers were putting forward a proposal contrary to it, or else that the reports had misdirected members as to the degree of compliance of the proposals with the UDP. They did no such thing, in my judgment.

139 In context, the putting of the Development Plan first was emphasised because the officer was seeking to counter any question that this was an issue to be resolved by means of a head count, given the large number of residents on both side of the debate. It was a perfectly proper comment in that context. It is clear in context that it is not suggesting that the proposal complied with the UDP. Such a conclusion would be a perverse reading of the reports as a whole. It is clear also that the reports are not inviting rejection of the proposal; it is clearly therefore seen as an exceptional development. This submission involved a level of textual criticism beyond what can properly be levelled at such a document.

140 Nor is it irrational for Policy E8 in particular to be in the UDP, strengthened by modification in the UDP review through the removal of the word ''normally'' so that exceptions to it would be even less likely, whilst simultaneously proceeding with the ultimately favourable analysis of a proposal contrary to it. This is not irrational, first, because the Council would not know until the decision in December 2001, or indeed the grant of permission in May 2002, that planning permission would be granted. It is necessary to have a policy in force in case such exceptional development were not to be permitted or, if permitted, were perhaps not to be implemented, and other proposals or variations came along.

141 Second, it is necessary in any event to have a policy in force against which an exceptional proposal can be judged. As I have said in another context, it scarcely advances the claimants' position to contend for a policy structure which on their logic could be generally permissive of this development, arrived at through a review of the merits of that policy, rather than to have an assessment carried out in a context in which the policy merit of E8 is a given fact and against which the proposal has to be justified as an exception.

142 The third ground of criticism raised by Mr McCracken was that officers' views expressed in e-mails were not views that figured in the reports to Committee. The underlying theme was that councillors had been misled by the tone of the reports into thinking that the case for the development was clear and that the issues had been further resolved than in fact the officers thought they were. Mr McCracken gave six instances. First, he pointed to the e-mail dated April 30, 2001, to which I have already referred, and which shows the advice given in relation to the role of the UDP inquiry. That e-mail goes to the reasonableness of the approach adopted to the UDP inquiry. This is in substance set out in the reports and the approach was a reasonable one to follow.

143 Second, Mr McCracken referred to an officer comment that the planning proposals were marginal. In an e-mail of November 15, 2001 it is said:

> "Graham is also deeply concerned that it is yet another erosion of planning policy that will make what is already a marginal scheme (in planning terms) that much more marginal."

144 Mr McCracken issued a forensic challenge to his opponents to show where in the main reports any officer had said that the proposal was marginal. The challenge in those terms could not be met. The word does not appear in that way in the reports. But the challenge was amply disposed of by the description of the balance of policy, impacts and benefits as set out, for example, in the Overview Report at para.17.24.3:

> "The proposals do represent clear departures from the UDP (Policies E4, E8 and E13A). However, there are potential economic benefits associated with the proposals which, when considered along with the other benefits of the proposals, officers consider justify permitting the proposals."

145 It was also rebutted by the passage from the transcript of the Council meeting on December 10, 2001 which is set out above.

146 Mr McCracken's argument needs to be tested against whether the reports are significantly misleading in relation to the views of officers. Manifestly the reports are not, and I say so having had the opportunity of reading these reports. Besides, it is to the Overview Reports and to the debate, that it is legitimate to look for the officers' final and considered view, rather than to prior e-mails passing internally in the course of a debate on a specific issue.

147 Mr McCracken's third point under this head was that there was no reference in the officers' report to a £50 million funding gap. The source for that point is the two e-mails dated November 15, 2001 in which it is said:

> "I believe that you are aware of much of the nuances and issues surrounding this application. In particular the current position whereby there is probably a £50 million funding gap based on the level of financing that can [be] secured for the new stadium and associated developments.
>
> AFC frequently express their view that the gap can be reduced by minimising s.106 requirements. Indeed it can be, but not to any significant level, unless one is prepared to reduce the 'biggies' which are affordable housing and transport.
>
> Can we please meet at 3.30 to discuss this. It has to be resolved in the next two days. Are Arsenal really going to potentially let this all unravel for want of an additional £2 million towards transport? (notwithstanding David Cooper's continuing mantra about the £50 million 'gap')."

148 The first e-mail discusses ways in which the funding gap might be reduced. Mr McCracken reinforces his contentions as to the significance of the omission by reference to the delay cost. He says that the timetable for development on p.7 of the Overview Report, with a new stadium operational by August 2004, was obviously impossible even in January 2002 because of the 33-month timetable as of that date. Failure to meet that opening date would add a cost of £20 million on Arsenal FC's own figures for a delay of one year, for which no funding had been identified. The gap was also increased by a further £2 million for the cost of various packages.

149 I do not consider that the e-mails demonstrate the existence of a material factor of which the Council were unaware, or of an unaddressed concern. There is a comment in relation to these e-mails by Miss Cluett, which is true here as elsewhere, to be found in her first witness statement dated May 27, 2002:

> "8. Officers were concerned to ensure that the planning evaluation was robust. They were also concerned to ensure that negotiations in respect of proposed planning obligations should deliver the most comprehensive obligations that could be properly sought from the developers, and obligations that would be compatible with the viability and deliverability of the project. The emails should also be read in the context of the Council's attempts to seek further concessions from the developer, which process required the Council to press its case as robustly as it could be argued. All outstanding concerns were resolved to the satisfaction of officers."

150 In her second witness statement dated July 8, 2002 she says:

"23. As indicated in my first witness statement, the contents of the emails to which the claimants refer were not, in my view, material considerations which it was necessary or helpful to report to members. Rather, what was material to members was the advice of officers arrived at after those deliberations had taken place and after any issues of concern had been raised and satisfactorily resolved. In all instances the final views of officers were accurately reported to members and all relevant considerations were before them when they made their decisions. Given the detailed and extensive scrutiny of the proposals, much of which took place at meetings and via e-mail exchanges, it would be wholly unworkable if members were required to examine each and every detail of the entirely proper debate between applicants and officers, and every element of negotiations about planning obligations. It is officers' definitive views at the end of the evaluation and negotiation process which are important and relevant."

151 DTZ had examined the financial position, had reached a view in relation to it and had put it forward. The funding position was dealt with in the Overview Report as follows:

Inter-dependence

"5.1 The overall development of the three sites is inter-dependent. Building a stadium at Ashburton Grove is dependent on building replacement facilities for displaced services at Lough Road, and both these elements are dependent on money generated from the sale of land for housing at Highbury, Ashburton Grove and Lough Road. Indeed, in submitting its June 2001 applications, AFC make clear that it has sought to ensure that in combination, the proposals will provide sufficient resources to contain the financial losses of the scheme to a level which the club is prepared and able to fund so that development will be achieved.

5.1.1 In other words, the proposed housing and other commercial uses at all three sites is, in financial terms, 'enabling development' in that funds secured from the sale of these development parcels would generate money which would be used to help fund other elements of the proposals. The Council's property consultants (DTZ) and the Mayor (GLA, TFL and LDA), after undertaking separate analysis of AFC's business case, agree that AFC needs to develop all three sites to ensure that the overall proposed development is deliverable and capable of being funded."

152 It is true that those paragraphs do not refer to £50 million or to any other figure. It is important to see the references to the funding gap and the figure of £50 million in the context of negotiations between Islington and Arsenal FC over land, and between Islington, the GLA and Arsenal FC over transportation and affordable housing which would naturally tempt an overstated position from Arsenal FC for negotiating purposes. In relation to that Miss Cluett continued at para.23 of her second witness statement:

> "The e-mails should also be read in the context of negotiations to ensure that the proposed s.106 Agreement should deliver the most comprehensive obligations that could be properly sought from AFC and that would be compatible with the viability and deliverability of the project. The e-mails were written within the context of the Council's attempts to seek further concessions from AFC, which process required the Council to present its case as robustly as could be argued even if, in the course of negotiations, a modified final stance on some aspects was eventually adopted."

153 Both Islington and the GLA were satisfied in terms of the benefits, having gone through the analysis. It is not sensible to suppose that officers were of the view that there was a gap between costs on the one hand and enabling development, Arsenal FC's own resources and the money which it could raise on the other hand, such that the development had no probability of being built. There is no planning matter to which that risk could go in terms of the buildings being left half complete in view of the inter-dependent sequence of development which I have already described. The only possible relevance of that point is blight and deliverability of planning benefits, which I have dealt with already.

154 It is also said that the true funding gap it revealed might also show that the authority had got less than it should have. There is a contradiction between that argument and the blight argument. Only one of those can be good. It is important also to remember that in November 2001, the s.106 Agreement package had yet to be finalised. The Council had expert input in relation to those matters and could judge later, as indeed could the GLA who had its own views, whether it was satisfied with what it was getting by way of package before granting permission.

155 The fourth point raised under this head concerns noise. Mr McCracken referred to the following extracts from e-mails. The first, dated November 1, 2001, reads:

> "If the EA had provided evidence that in the locality of the new stadium Sundays and bank holidays are no quieter than other days of the week (unlikely) there may have been a case to support use of the stadium on these days. However because the EA is so lightweight there is no such information or consideration of the impacts of use of the stadium on Sundays and bank holidays. Therefore we have insufficient information to be able to properly assess the impacts of use of the stadium on Sundays and bank holidays and therefore our advice is to refuse this request. If AFC come back with a proper EA study of the impacts of use of the stadium on Sundays and bank holidays for sports, pop concerts or other uses we can then reassess the issues and come to an informed decision.
>
> Again the EA does not address the issue of hours of operation for major non-sporting events/pop concerts etc, and little information is provided regarding noise impacts both from the stadium or crowds leaving late at night, etc. Therefore we have insufficient information to be able to properly

assess the impacts of use of the stadium late at night and therefore our advice is to refuse this request. If AFC come back with a proper EA study of the impacts of use of the stadium late at night for non-sports major events, pop concerts etc we can then re-assess the issues and come to an informed decision.''

156 In an e-mail dated November 7, 2001 it is said:

> ''The noise and vibration impacts of use of the stadium on Sundays, bank holidays and in the late evening has not been adequately addressed in the ES accompanying the application. My view is that we should follow the advice of para.51 of the DETR guidance note 'Environmental Assessment—a guide to procedures: Nov 1999' (copy attached) which states that:
>
> 'if the developer fails to provide enough information to complete the Environmental Statement, the application can only be determined by refusal'
>
> Pointing the above out to AFC may motivate them to actually do something about the defects with the ES and provide us with the information we need to assess the impacts of use of the stadium on Sundays, bank holidays and in the late evening.''

157 Finally, in an e-mail dated November 12, 2001 it is said:

> ''My view is we should not be preparing noise conditions for consent for the stadium whilst there are still major problems with the noise and vibration elements of the ES. We have repeatedly asked for extra information and AFC have chosen not to provide it. We therefore can not properly assess the noise and vibration impacts of the stadium (or WRC) development or draft meaningful conditions, and should therefore recommend refusal of planning permission. (see para.51 of the attached DETR guide to EIA procedures)''

158 The concerns related to bank holidays, Sundays, late nights and noise from non-sports events. There is criticism in the e-mails of the Environmental Statement for not addressing those issues. A conclusion is drawn that the Environmental Statement is deficient and that conditions are inadequate to deal with the position. In this context I am considering the question of whether the officers had views which were not properly represented to the Council in a way which meant that the Council was significantly misled.

159 That criticism cannot stand in the light of the evidence of Mr Fiumicelli in his first witness statement dated May 27, 2002, in paras 6–15, which I summarise as showing that there were discussions after the e-mails between the developer's consultant and the London Borough of Islington's own specialised acoustic consultant. Further information was provided which satisfied the consultant and

which led to the matter being dealt with, to the satisfaction of Mr Fiumicelli, by a combination of conditions and the noise protocol.

160 There are extensive conditions in relation to these matters, as can be seen in relation to Ashburton Grove in conditions 17–21, 24 and 26. They provide for extensive controls for music and other non-sporting events, sporting events and other measures in relation to the time of matches. The noise protocol forms part of the s.106 Agreement and deals with the PA system and the control of major non-sporting events in very considerable detail. The approach which was adopted in the main reports, for example the Ashburton Grove Report at pp.126–7, wholly reflects that. Mr Fiumicelli makes clear the extent of the noise controls in relation to this and other aspects of noise, for example video screens, crowd noise and the design of the stadium. This complaint is misconceived.

161 The fifth matter under this head related to contaminated land surveys. Once again Mr McCracken founded his submissions on an e-mail dated November 27, 2001 in which it is said:

> "I am therefore cautious of referring to the need for surveys in the conditions in case we are criticised for not requiring these up front. Perhaps we could just ask for protective schemes to be agreed—or if we really do need to ask for surveys, call them 'further detailed surveys'."

162 It is said that the content of that e-mail was not drawn to the attention of councillors and the fact that a survey in relation to contaminated land was necessary was a great concern to the local residents.

163 Mr McCracken pointed to the conditions in relation to contaminated land, which were amended in relation to Lough Road, where the requirement for surveys which originally had been in the draft conditions had subsequently been deleted so that there was no longer a requirement for surveys, but instead a requirement for a scheme of remedial works.

164 Condition LR61, as originally drafted, said that land contamination investigation should be carried out for each portion of the application site and a scheme of remedial works agreed before commencement of the relevant portion of works. It was amended to delete the reference to investigation and went straight to a requirement for a detailed scheme of remedial works to be approved and implemented at the various relevant stages.

165 Mr McCracken contrasted this with the references in the Environmental Statement expressing uncertainty over the location and type of different heavy metals and hydro-carbons, and to the problems of control over those during site ground preparation.

166 I was referred by Mr Purchas to other parts of the Environmental Statement Technical Annex on land contamination and hydro-geology, which dealt with the low level of risks and the type of measures, removal or "encapsulation" to be undertaken.

167 There was, it was said by Mr McCracken, a pre-occupation with site workers rather than with residents. In the light of the somewhat emotional comments

which accompanied this submission, I point out that workers are more directly involved in the contaminated land while they work because they are closer to it and working on it. They are usually seen as those at greater risk. So if what is done protects them, what is done also protects those who live further away.

168 There are extensive conditions in relation to contaminated land remediation. In relation to Ashburton Grove they are numbered 56 and 95–96, and there are ones in similar terms for Lough Road and Highbury. The scheme for remedial works will show what surveys, if any, are necessary. The problem with this sort of site is that, until the works are started, it is not known, as the Environmental Statement makes clear, where all the problems are. The very fact of carrying out a survey would itself need a scheme of working in order that protective measures be instituted because of the disturbance that is created. It is perfectly sensible to require a scheme. There is no basis for saying that something was concealed because the reference to a survey has been omitted. The scheme would obviously include the necessary site investigation as the detail of the works required to be developed, unfolds with protective and remedial measures. As Mr Harrington in his witness statement dated July 8, 2002 says:

> "30. While the ES variously identifies that further investigations are required prior to remediation (this point being made in the witness statement of John Dunkley), I do not consider that it was necessary for the planning conditions to explicitly require such investigations. Officers were simply concerned with the end result, and not the process necessary to achieve it. This is consistent with UDP Policy ENV16 of the 2000 UDP. . .."

169 It may be regrettable but a certain defensiveness in drafting conditions may be forgivable, and a desire to avoid offering hostages to the fortunes of litigation understandable, when judicial review had already been envisaged by Mr Richard Buxton who is a well known and doughty environmental solicitor. Miss Cluett explains the position in her second witness statement at para.25:

> "In my e-mail of November 27, 2001 I advised of my concern that conditions on contamination should not require surveys, in case such conditions should give the erroneous impression that such surveys ought to have been provided at the Environmental Assessment stage. Following my e-mail, I was advised that all necessary initial assessments had been carried out by AFC in their Environmental Statement to the general satisfaction of the planning officers. (This view was reported to Members at para.28.16 of the Overview Report.) AFC's assessment of Contamination issues together with the Council's own evaluation, was summarised in Appendix A5 of the Overview Report. In the light of that advice from officers, I took the view that the advice in my e-mail had been over cautious, and the 1999 Regulations had been met."

170 There cannot sensibly be said to have been any material consideration omitted. The officer's e-mails do not betray a different view from that which was set out in the officer's report.

171 The sixth point raised in this context related to Drayton Park. Drayton Park Station was of significance because it was thought by Islington to offer potential for additional rail capacity to reduce the demand on the three Piccadilly Line stations, and on Arsenal Station especially. Arsenal FC and LUL were more cautious. The capacity of those stations was linked to crowd control and to the operation of Holloway Road itself. The modal split aimed at a maximum of 20 per cent spectators by car, and preferably less. Again, Mr McCracken for this point relied on an e-mail dated November 5, 2001 disclosed on the public register after the decision, in which it was said:

> "The situation at Holloway Road and other neighbouring underground stations could be somewhat easier if AFC were to accept the need for a major role for Drayton Park with regular services around major events. This station could be very important with respect to relieving pressure on the southbound Piccadilly Line and also provide for Northbound movements beyond Finsbury Park. Negotiations are continuing with the club but as yet there is no agreement with respect to funding for improvements at Drayton Park Station."

172 Mr McCracken also referred to what was said by Gibb's, Islington's transportation consultants, in a memo dated November 14, 2001:

> "SDG have finally accepted that post-match southbound services from Drayton Park have a useful role to play, and can help to reduce the high level of demand for LUL stations.
>
> . . ..
>
> . . .. A full development of Drayton Park would provide as much as 10 per cent additional capacity and provide operational benefits to LUL. LUL could suffer by association if it claims that it can make the SDG demand scenario work. If the SDG demand forecasts prove to be an underestimate and system is seriously overloaded, many will perceive only that LUL said that their station could cope.
>
> SDG argue against Drayton Park that in the northbound direction spectators may not be able/ allowed to get on trains because they would be packed with commuters . . .."

173 Mr McCracken contrasted this with the Overview Report, Appendix 4, p.13 in which it is said:

> "3.22. . . . It is [the] officer's opinion that due to the station's proximity to the proposed stadium, Drayton Park could have a pivotal role in reducing spectator usage of other underground and surface rail stations . . ..
>
> . . ..

> 3.24. . . . Such provision would provide as much as 25 per cent of the required rail/ underground capacity required by the stadium in the post match hour if the club's levels of crowd retention are accepted.''

174 This was a new point and, in the light of Richards J.'s order that consolidated grounds be provided by June 28, I was reluctant to consider it. However, Mr Purchas answered it adequately by pointing out the two different percentages to which Mr McCracken had drawn attention. As they were percentages of different matters, they could be reconciled adequately. The reference to 10 per cent was a reference to capacity. The reference to 25 per cent was a reference to the percentage of demand with which capacity of 10 per cent additionally could cope. 10 per cent was additional available rail/tube transportation capacity; 25 per cent was a percentage of demand for the use of that capacity. Islington's consultant's view was properly reported.

175 The second point made by Mr McCracken in relation to Drayton Park and the omission of what was said to be significantly different views held by the officers from the report, related to para.4.14 of Appendix 4 to the Overview Report. This specifically draws to the Council's attention the fact that Gibb's and SDG (Arsenal FC's transportation consultants) did not agree on whether Arsenal FC can retain 25 per cent of its crowd in the local area after the matches so as to reduce the peak post-match pressure on Holloway Road and the Piccadilly Line. But it was precisely Gibb's concern that Arsenal FC could not do this, which led it to seek more of a role for Drayton Park and finance from Arsenal FC for improvements to Drayton Park Station. This has been obtained. The reference to a requirement for 25 per cent underground and rail capacity was a reference, as I have already identified, to a demand which included the use of Drayton Park. There have also been measures to reduce the demand for travel with a priority scheme for local residents to buy season tickets.

176 Related to that is the assertion that councillors failed to consider as a material consideration the likelihood that an 80:20 non-car to car modal split would be achieved.

177 The assertion that the local authority failed to consider the likelihood of that modal split being achieved is without foundation. The Overview Report in para.26.13.1 and 26.13.2 makes it clear that the main mechanism for the achievement of that modal split would be the event day controlled parking zone, EDCPZ. The prospect of the achievement of that zone was considered. Public transport improvements would assist, but were not the main basis for the achievement of that level of non-car usage.

178 The matter was also considered at length in Appendix 4, at paras 1.7 and 1.8 especially, and indeed in subsequent paragraphs. There is no question of any misconception that the modal split depended on public transport provision. It was dependent upon controlling the use of the car by controlling the availability of parking spaces within reasonable walking distance of the stadium. Public transport was intended to deal with the consequences of success in that respect.

179 I do not consider that Mr McCracken's fourth head of criticism of the Officers' Reports that all these very important matters—which undoubtedly they were—should not have been in an appendix to the report is a sound one. These are detailed matters and can sensibly be placed there without breaching any legal requirements as to fairness or as to the ability on the part of councillors to consider matters. Councillors Leigh and Hitchens obviously disagree about the ease with which the documents could be assimilated. As I have said, her difficulties evidence no point of law.

180 Mr McCracken sought to illustrate his point by comparing Appendix 4, para.3.18, stating that improvements at Holloway Road could not be guaranteed before the opening of the stadium, with para.26.13.9 of the Overview Report. But there is nothing misleading in those paragraphs because the fall-back position of additional buses being required from Arsenal FC is set out in para.3.18. It is also a fall-back obligation in Sch.1 to the s.106 Agreement.

181 He further illustrated his point by contrasting the improvements to Drayton Part and WAGN's attitude, as described in Appendix 4 of the Overview Report, paras 3.19 and 3.20, with the Overview Report, para.26.13.10, emphasising the key role of Drayton Park. But the conditional nature of the improvements has already been referred to. Appendix 4 deals with the assessment of capacity in the passages to which I have already referred.

182 Nor do I see anything misleading in the contrast between para.1.22 of Appendix 4 on the prospects of 75 per cent completion of the EDCPZ delivering 20 per cent modal split to car, and para.26.13.2 of the Overview Report. They are expressed in very similar terms.

183 The complaint that the view of LUL on the potential of Drayton Park had not been put in the report does not give rise to a point of law. Drayton Park is neither its station nor on its lines, and there is no obligation to refer to its view. The view of Gibb's and of London Transport was set out in the report and in Appendix 4.

184 It is convenient also at this stage to pick up as fifth head of criticism the allegation that a material consideration was ignored in relation to the loss of the private waste-handling capacity from the Ashburton Grove site. The North London Waste Authority facility at Ashburton Grove was to be replaced with a more modern WRC at Lough Road. But there were two businesses at Ashburton Grove, Brewsters and McGovern, which provided private waste-handling facilities. The relocation and potential loss of the businesses *as enterprises* was discussed, it was accepted, but not the question of where any shortfall in waste-handling facilities might be met, nor at what environmental cost.

185 Mr McCracken relied on this point although it had been raised not by the first or second claimant, nor indeed by the GLA, nor the NLWA, but by Mr Scott, whose organisation is no longer a claimant, at the 10th December meeting. Mr Scott criticised the response of the developers in relation to the location of other sites within three miles of Ashburton Grove. Mr Hepher, Arsenal FC's planning consultant, had responded at the meeting that the three sites to which he had made previous reference were all licensed and that, as much of the material came from outside the area, it could also be disposed of outside the area. Sites in Tottenham may have been in mind.

186 There was no specific conclusion by the Council as to where the reduced private waste-handling capacity might be made good. The loss of the business was noted in the report on Ashburton Grove at pp.81 and 84 in Brewsters' and McGovern's own representations. Paragraph 13.7.2 of the Overview Report dealt with both the risk of the losses of business if there were no relocations and with the waste handling implications:

> "NLWA intend that the proposed WRC would be licensed to take commercial waste. However, they expect that municipal waste would consume all or nearly all of the expected licensed capacity (1,100 tonnes per day). AFC has yet to identify suitable alternative sites for the private sector waste management and skip hire operations currently based at Ashburton Grove (Brewsters and McGoverns). Officers acknowledge that the loss to the Borough of these facilities would reduce overall waste transfer capacity and disadvantage some small businesses. However, AFC has submitted a plan as part of the November 2001 revisions which demonstrates that there are seven private waste facilities/skip hire businesses within approximately three miles of the Ashburton Grove site. Whilst this would inconvenience some businesses that use the existing facilities and lead in some cases to longer journeys, it would appear that reasonable alternative provision is currently available."

187 The s.106 Agreement, Sch.1, s.3, contains obligations on Arsenal FC in relation to the relocation of businesses which would assist in, but plainly do not and cannot guarantee, relocation.

188 It is clear that the Council could not be sure and knew it could not be sure that there would be a specific convenient relocation of the waste handling facility, or a suitable place found for the lost capacity. It is impossible to say that the Council ignored that point in the light of para.13.7.2.

189 However, the debate continued long after the meeting was closed, in the witness statements before this court. Mr Dunkley, in his first witness statement, at p.171, dealt with the issue with a mixture of fact and argument, seeking to show that there had been a factual misapprehension on the part of the Council. Mr Hepher, in his second witness statement (Vol.1, p.310, para.2.32) disagreed, and he gave further evidence on the source of arisings and the availability of other facilities. Mr Dunkley responded to this in a second witness statement (Vol.1, p.1337), saying that Mr Hepher's evidence to the councillors was misleading and grossly inaccurate, to which Mr Purchas for the Council, and Mr David Elvin Q.C. for Arsenal FC, say that what Mr Hepher said was correct in relation to licensed sites. It is not for me to resolve this factual issue, I am glad to say.

190 There is a potential loss of private waste handling capacity which may cause local businesses a degree of disruption if they have to travel further. London Borough of Islington were aware of that and took it into account with the Overview Report. They may or may not have been assuaged by Mr Hepher, and they may or may not have been more concerned by what Mr Scott had to say. There may have been some councillors on either side of the debate who may have been in their

turn either more or less assuaged and taken a view in relation to that matter when reaching their overall conclusion. But the evidence does not support the conclusion that the Council was unaware that there was a risk of a loss of private waste handling capacity.

191 I note also that Mr Harrington in his second witness statement, at paras 35 and 36, denies that there was any misleading of the members and explains his understanding of the information previously supplied by Mr Hepher in relation to other licensed sites, which is rather more extensive than the short comment made by Mr Hepher at the Council meeting, and was material available to support the comment made in the Overview Report.

192 Finally, the complaint made of an error in relation to physical measures to control crowds can be seen to be false by reference to what the reports actually say. The impact of crowds from the football matches is dealt with very clearly in paras 26.13 and 14 of the Overview Report, and in the appendix dealing with transportation at paras 4.14–4.15. The criticism as to the detail of that in the summary report is quite unfounded.

The Environmental Statement

193 This was a development which required an Environmental Statement. That was never in doubt. Mr McCracken contended that there were such deficiencies in the Environmental Statement that it could not be regarded as an Environmental Statement for the purposes of the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 (SI 1999/293). The relevant provisions are as follows. Regulation 3(2) provides:

> ''The relevant planning authority or the Secretary of State or an inspector shall not grant planning permission pursuant to an application to which this regulation applies unless they have first taken the environmental information into consideration, and they shall state in their decision that they have done so.''

194 ''Environmental information'' by reg.2(1) means the Environmental Statement including any further information and any representations made by anybody required to be invited to make representations, and any representations duly made by any other person about the environmental effects of the development.

Part IV of the Regulations deals with the preparation of Environmental Statements and scoping opinions. A scoping opinion was sought here and was formally given after extensive public consultation. The purpose of it is to enable the planning authority and the developer, with the benefit of public assistance, to identify those issues which it is necessary for an Environmental Statement to address.

195 Regulation 13(1) deals with the procedure for submitting an Environmental Statement to the planning authority. But it is notable for the language which it uses:

> "When an applicant making an EIA application submits to the relevant planning authority a statement which he refers to as an Environmental Statement . . .."

196 Similar language can be seen in reg.19(1), which sets out the means whereby further information is to be obtained. Regulation 19(2) is also relevant. They provide:

> "19 Further information and evidence respecting Environmental Statements
>
> (1) Where the relevant planning authority, the Secretary of State or an inspector is dealing with an application or appeal in relation to which the applicant or appellant has submitted a statement which he refers to as an Environmental Statement for the purposes of these Regulations, and is of the opinion that the statement should contain additional information in order to be an Environmental Statement, they or he shall notify the applicant or appellant in writing accordingly, and the applicant or appellant shall provide that additional information; and such information provided by the applicant or appellant is referred to in these Regulations as 'further information'.
>
> (2) Paragraphs (3) to (9) shall apply in relation to further information, except in so far as the further information is provided for the purposes of an inquiry held under the Act and the request for that information made pursuant to para.(1) stated that it was to be provided for such purposes."

197 An Environmental Statement is defined in reg.2(1) as follows:

> "'Environmental Statement' means a statement—
>
> (a) that includes such of the information referred to in Pt I of Sch.4 as is reasonably required to assess the environmental effects of the development and which the applicant can, having regard in particular to current knowledge and methods of assessment, reasonably be required to compile, but
>
> (b) that includes at least the information referred to in Pt II of Sch.4."

198 Schedule 4 of Pt I deals with the information which is to be included in Environmental Statements. Schedule 4, Pt I, paras 4 and 5 are of most note here. They provide:

> "4. A description of the likely significant effects of the development on the environment which should cover the direct effects and any indirect, secondary, cumulative, short, medium and long-term, permanent and temporary, positive and negative effects of the development, resulting from:
>
> (a) the existence of the development;
>
> (b) the use of natural resources;

(c) the emission of pollutants, the creation of nuisances and the elimination of waste,

and the description by the applicant of the forecasting methods used to assess the effects on the environment.

5. A description of the measures envisaged to prevent, reduce and where possible offset any significant adverse effects on the environment.''

199 The Environmental Statement, therefore, is not just a document to which the developer refers as an Environmental Statement; it is that document plus the other information which the Local Planning Authority thinks that it should have in order for the document to be an Environmental Statement. Accordingly, it is the Local Planning Authority which judges whether the documents together provide what Sch.4 requires by way of a description or analysis of the likely significant effects: see, for example *R. v Rochdale MBC Ex p. Milne* [2001] Env. L.R. 406, paras 104–106 (Sullivan J.), and *R. (on the application of Barker) v Bromley LBC* [2001] EWCA Civ 1766, [2002] P.L.C.R. 8, paras 32, 33 and 65.

200 It is quite clear from the material before this court that Islington did conclude that the documents which it received enabled it to say that it had before it an Environmental Statement. The Mayor of London was also satisfied with the Environmental Statement.

201 I have already identified, in short form, the process whereby the Environmental Statement was produced, the IEMA review of the statement and the consultations which took place upon it.

202 Paragraphs 28.15 and 28.16, and Appendix 5, of the Overview Report set out the Council's overall view of the Environmental Statement, the fact of and the nature of the disagreements between the Council and the developer over some of its contents, and in the Appendix detail its views in relation to significant effects.

203 Whilst one should not be over-impressed by the volume or weight of documents—and even very lengthy documents can omit significant factors—I confess to approaching Mr McCracken's submissions with a degree of doubt as to whether the deficiencies to which he drew attention could be such as to mean that Islington could not reasonably regard the material as constituting an Environmental Statement. It is inevitable that those who are opposed to the development will disagree with, and criticise, the appraisal, and find topics which matter to them or which can be said to matter, which have been omitted or to some minds inadequately dealt with. Some or all of the criticism may have force on the planning merits. But that does not come close to showing that there is an error of law on the Local Planning Authority's part in treating the document as an Environmental Statement or that there was a breach of duty in reg.3(2) on the local authority's part in granting planning permission on the basis of that Environmental Statement.

204 The first complaint related to the fact that there was no assessment in the Environmental Statement of the impact of an 80:20 modal split to car. The Environmental Statement approached the impact of traffic, of crowds on Tube and rail, and on the pavements through the areas of concern to local residents,

on the basis that there would be an 88:12 percentage modal split, non-car to car modes. It did not assess it on the basis of 80:20, that is to say a larger number of cars with fewer public transport or walk modes. There is no doubt that the Council did consider transport impact on an 80:20 modal split basis.

205 Mr McCracken says that the Council must always have thought that an 80:20 assessment was required because it was the scenario viewed as likely by the decision maker. An e-mail of October 19, 2001 discussed this issue and the risk that not having an 80:20 Environmental Statement assessment could lead to the quashing of any planning permission. It is convenient here to set out extracts from the e-mails which deal with other points in relation to the 80:20 split upon which Mr McCracken relies. The relevant part of the first, dated October 19, 2001 reads:

> **"Environmental Statement**
>
> Agreed there is a risk that if approval is recommended on the basis that it is likely/ highly likely that 80:20 will be achieved, the ES will be challenged as having failed to assess the impact of 80:20 (it assesses the impact of 88:12).
>
> Agreed that on the basis that the risk is accepted, LBI could accept the current ES and proceed to determine the application using the above formula for assessing traffic modal split issues, without a further supplement to assess the impacts of 80:20.
>
> Agreed that the risk of proceeding without an ES supplement on the 80:20 impacts would be reduced if it was considered by SW that the 88:12 was likely to be achieved albeit not immediately and without prejudicing the CPZ consultation exercise or prejudging committee'sdecision on the CPZ (this is because the ES Regs require the 'likely' env effects be assessed, not the 'worst case' env effects. However, the Regulations also require the 'short, medium and long term effects' to be assessed, and it may be that the effects of 88:12 are only likely to occur in the long term.)
>
> **Timetable**
>
> The upshot is that if AFC are not prepared to provide a supplement to the ES to assess the effects of other likely mode splits, LBI need not insist on this, but this gives rise to a risk of any decision being quashed on the basis of a flawed ES. This is a risk LBI could decide to take."

206 The relevant extracts of the e-mail dated February 18, 2002 read:

> "However, to summarise my concern and assist our thinking about the acceptability of 'reasonable endeavours' in relation to achieving the 80:20 modal split, I have tried to do an audit trail as to how we reached the 'best endeavours' obligation which Graham H and I thought we were recommending to ctee. My recollection is as follows:
>
> We originally prepared the s.106 on the basis that the Stadium would not open until Holloway tube improvements and Match Day Parking Zone were in place. This was based on Leading Counsel's advice, and was the only fire-

proof way of securing the traffic restraint measures we all want and without which the 80:20 cannot be achieved. This is important because any more car use than 20 per cent pushes the traffic impacts to an unacceptable level. This is important because any more car use than 20 per cent pushes the traffic impacts to an unacceptable level. We reluctantly agreed to modify this for commercial reasons to assist AFC funding—and replaced it with the 'best endeavours' clause.

. . ..

At no stage has the possibility that 80:20 cannot be achieved, nor the impacts of failing to achieve this, been assessed. This is why it is so important (in order to defend the planning evaluation) that AFC go beyond the normal 'reasonable endeavours' in relation to achieving the threshold of acceptability in relation to the modal split . . .."

207 Mr McCracken's point is not answered by showing the reasonableness of the Local Planning Authority's view that an 80:20 split would occur as from the date of opening of the stadium, which I conclude the local authority have considered and assessed. The complaint is not that there was no assessment of a modal split with a yet higher percentage than 20 coming by car. The complaint is about the Environmental Statement.

208 Miss Cluett in her second witness statement referred to the October e-mail. She said:

"26. As stated in my first witness statement:

- 'In my e-mail of October 19, 2001 headed "AFC Traffic Issues" I summarised the common ground which had been identified between Arsenal Football Club ("AFC") and the Council following a telephone conference with Leading Counsel. I had concerns, at that stage, whether sufficient information had been made available to evaluate the traffic impacts of the proposals.
- I was particularly concerned that AFC's assessment of traffic impacts had assessed those impacts on the basis that only 12 per cent of visitors to the stadium would travel by car, whereas the Council's traffic consultants were concerned that a higher proportion of visitors to the stadium might travel by car (20 per cent), at least initially, with more travelling by sustainable models in the long term.
- A further evaluation was carried out by both AFC and the Council's traffic engineers and consultants. The Council's Head of Planning and Transportation, Graham Loveland, explains in his witness statement how that evaluation was carried out and what conclusions were reached. Following that Review, the Council's Head of Planning and Transportation took the view (which I considered reasonable) that the environmental assessment carried out was sufficiently robust to satisfy all statutory requirements, and to identify all significant impacts.

> • In the light of the analysis carried out by the Council and explained in the witness statement of Graham Loveland, I was satisfied that my concerns had been met.'
>
> 27. The e-mail exchange referred to represents a part of the consideration and not the final view reached by officers after proper scrutiny. I would in particular confirm that in the light of the further examination that I supported the view of officers that the environmental impact assessment provided in this respect, was sufficient information to identify the key environmental impacts for their consideration.''

209 The thinking was also set out by Mr Loveland in his first witness statement. He says at para.14:

> ''Council officers considered whether an assessment based on the 80:20 mode split should also be carried out. However, having considered the matter further with AFC and its consultants I was satisfied that the environmental assessment did in fact identify the likely environmental impacts.''

210 He explains in para.15:

> ''In reaching this judgment I had regard to the fact that a 20 per cent mode share for car travel to the proposed new stadium would equate to 5000 cars, this being equal to the numbers of vehicles currently driving to the existing stadium. Given that an Event Day Parking Scheme (albeit incomplete) would be operational by the time of Stadium opening, vehicles seeking access to the Stadium would be expected to be more widely dispersed, than with the limited Match Day Parking Scheme currently in operation.''

211 Appendix 4 of the Overview Report, in paras 1.6 and 1.24, draws attention to the basis of the Environmental Statement and to the way in which the s.106 Agreement would require Arsenal FC to work towards a modal split of 88:12 compared to 80:20. In effect, Islington argues that SDG have assessed the worst case in terms of non-car modes, *i.e.* 88 per cent. So that aspect has been covered in terms of pedestrian impact and bus and tube travel. The s.106 Agreement, as the EDCPZ is extended and public transport improvements are implemented, will reduce the car split in the longer term to 12 per cent. In effect, therefore, it would be said that a likely effect in the short to medium term, namely the extra 8 per cent car split, has not been assessed. However, the Council was entitled to take the view which, as I understand it, it did, that the anticipated medium term continuance of the same level of traffic in the same area, equivalent to 20 per cent split to car, but with a greater degree of dispersion, could not a ''likely significant effect'' of the development and that the Environmental Statement did cover therefore the likely significant effects. An absence of significant change is not a significant effect which requires assessment. That in effect is an

aspect which has been assessed as the baseline or existing condition. I cannot regard that as irrational.

212 This stance had been flagged up in the officer's report and was obvious from the Environmental Statement; and I have been shown no complaint by the claimants in relation to it (I emphasise by the claimants) before the resolution to grant permission or the grant itself. It may be of some relevance in judging the significance of Mr McCracken's point that that is what has happened. The comments made by officers in relation to likely significant effects are consistent with Appendix 5 of the Overview Report dealing with comments on pedestrian effects, crowd movements and public transport, which are significant.

213 The second aspect complained of was that there was no assessment in the Environmental Statement of the loss of waste handling capacity through the relocation or demise of Brewsters and McGovern at Ashburton Grove. This argument depends on a view being taken as to the significance of that aspect. A view was taken. It is expressed by Mr Harrington in his second witness statement at para.34:

> "Whilst the potential loss of waste handling capacity in the area was not specifically addressed, I should add here that my main concern, and that of other officers, related to the capacity for waste handling of the public facilities run by the North London Waste Authority and the Council. Further, with respect to the private waste companies (as with all other directly affected private businesses that provide a useful service to other businesses and the public) the Council was concerned to ensure that appropriate relocation arrangements were put in place. In this context, I consider the information that was provided in the ES to be reasonably sufficient to enable the Council and others to come to a view on the loss of these private businesses. It is relevant that neither the North London Waste Authority nor the Greater London Authority raised concerns about the potential loss to the area of the waste management capacity provided by these firms. Similarly, the Islington Chamber of Commerce did not raise concerns on behalf of businesses within the Borough."

214 This demonstrates that this aspect was considered but not considered to be a significant effect; that conclusion cannot be said to be unreasonable.

215 The third aspect complained of related to noise. Mr McCracken relied on Mr Fiumicelli's e-mails, to which I have already made reference, in relation to Sunday, bank holiday and late night operation of the stadium, and also in relation to the air handling equipment noise which Mr McCracken said had the potential to be a continual nuisance to residents [Vol.2, pp.111–112]. There was indeed a further e-mail on November 7, 2001. I have already dealt with this in part in relation to whether a material consideration had been ignored. However, what is apparent from Mr Fiumicelli's witness statements is that the e-mails, as Miss Cluett said in her second witness statement (the extract from which I have already cited), represented no more than internal discussions and not a final view.

216 The final view on the likely significant effects is not in those e-mails but is set out in the Overview Report which led to the range of conditions, including those dealing with air-handling equipment at Lough Road. It is not necessary for me to set those out, but I identify them by number: LR2, 3, 4 and 28.

217 This is reflected in the evidence of Mr Fiumicelli as well as in the evidence of other officers involved. I draw attention specifically to (but it is unnecessary to set them out) paras 8 and 14 of Mr Fiumicelli's first witness statement, and para.8 of his second. These deal with discussions that took place between consultants, and the further information provided, which enabled him, with the advice of expert consultants acting for the Council, to be satisfied that conditions would deal with those issues. The new information is identified in para.28.10 of the Overview Report.

218 The fourth aspect was contaminated land. It is quite clear from the material to which I have already referred, including the Environmental Statement itself, that this was not seen as a likely significant effect and the requirement for a scheme of working, which in reality may include a survey as the work proceeds, was considered sufficient to protect health or amenity.

219 Moreover, I do not consider that it can be said that it was thought surveys were necessary in order to reach that assessment, but that necessity was concealed revealing a view that there was a disguised but likely significant effect. The foundation for Mr McCracken's suspicions is flimsy. The e-mail merely shows a desire to avoid offering an unnecessary hostage to fortune.

220 The fifth aspect concerns dust at Lough Road and methods for dealing with it. This was said to be a significant concern to residents arising from the unknown method of preparation of the site. It is difficult to see the justification for the legal criticism in the light of the coverage of this aspect in the Environmental Statement main report, para.10.14 and 10.15, which deal with construction, and 10.20, which deals with the operation of the WRC.

221 That is but a sample of material which I have seen. It is quite clear from the Council's and Arsenal FC's skeleton arguments that that is not comprehensive. Mitigation is also referred to. I have also seen a part of the Land Contamination and Hydro-Geology Technical Appendix, at para.7.3. Odour in operation is dealt with at paras 10.22 10.23 of the Environmental Statement main report. Mitigation is covered. It cannot rationally be said that this material was so obviously insufficient that the Environmental Statement was no Environmental Statement at all.

222 Conditions are imposed which cover dust in construction (LR9), odour (LR10), construction and contamination, and also relevant to dust is condition LR61(a) and (b).

223 The way in which the significance of dust and noise are described in Appendix 5 to the Overview Report, together with the comments made by Islington in relation to them, also bear noting.

224 The absence of analysis of alternatives beyond the M25 was effectively abandoned as a criticism because Mr McCracken recognised that he had no basis for saying that Islington could not rationally decline to require that to be studied: fans' home addresses dispersed all around the M25 and beyond. In any event,

the Regulations are quite clear. What needs to be covered in the Environmental Statement are the alternatives which the developer has considered. This the Environmental Statement did. The Regulations do not require alternatives which have not been considered by the developer to be covered, even though the Local Planning Authority might consider that they ought to have been considered.

225 It is also said that there that there was a missing document forming part of the Environmental Statement which was never available publicly. Mr Dunkley deals with this in para.67 of his first witness statement. He says that the document entitled, ''Further Information Regarding 'Extended Stays' in Stadia Resulting from Post-Match Entertainment'' was never received and remained missing in paper copies of the Environmental Statement and on the CD Roms. He said that the error was acknowledged by Mr Hepher.

226 Islington says that this was not part of the Environmental Statement; it was merely additional material which Arsenal FC, through SDG, had passed to Islington in early October 2001 and which Arsenal FC had not treated either as part of the Environmental Statement. Mr Spencer of SDG describes this in para.35 of his affidavit (Vol.1, p.328).

227 I see no reason to doubt Mr Dunkley when he says that it was not with the Environmental Statement documents, but I cannot sensibly resolve what may be a dispute of fact as to its availability on a point arising in that way. I find it difficult to see how its absence could mean that the Environmental Statement was not an Environmental Statement, which was the only way it was put in relation to Mr McCracken's submissions on the Environmental Statement. There is some dispute about it in terms of its availability to the public, but a lack of availability to the public does not alter the fact that if it was available to the Council, as it was, the Environmental Statement was not in that respect deficient. As I say, the only point raised was that the absence of it meant that the Environmental Statement was not an Environmental Statement.

228 It is also clear that the Local Planning Authority had the document and were able to take it into account as a relevant factor.

The section 106 Agreement

229 A range of issues was raised under this head. First, it was said that there was an absence of public consultation on it. It was said that the public had no opportunity to comment on it and that that was unfair. Mr McCracken relied on the decision in *R. (on the application of Lichfield Securities) v Lichfield District Council* [2001] EWCA Civ 303, [2001] P.L.C.R. 519. At para.12 Sedley L.J. said:

> ''It is fundamental to s.106 that it must be used only for legitimate planning purposes. A variety of people may have an interest in these—not only a potential financial beneficiary such as LSL but, for example, local people who want to be sure that their community is going to benefit appropriately from a development. It is only in the run-up to the entry into the s.106 Obli-

> gation that these interests can have any worthwhile say, for they have no right of appeal if the authority's eventual resolution adopts an unsatisfactory agreement.''

230 It is unnecessary to deal with Islington's submission that the decision in *Lichfield* is irrelevant because it concerned fairness as between two developers rather than fairness towards resident objectors, save to observe that the comment of Sedley L.J. appears to be wider than that.

231 The problem with Mr McCracken's submission is that it is factually incorrect. The heads of terms for the s.106 Agreement were set out in Appendix 7 to the Overview Report and could be commented on by the public both at the Council meeting and at any time subsequently. This was a publicly and widely available report. The public consultation in relation to the s.106 Agreement is described by Miss Cluett in her second witness statement at para.22:

> ''The Overview Report was made available on request by a Press Notice which appeared in the local paper and which invited interested parties to contact the committee clerk for copies of the Reports. It was available on the Council's web-site, from the Planning Enquiries office, and was sent to all Review Group members including the first claimant. The Report to February 2002 Planning Committee reporting the main settled terms was also available on request. While there is no requirement to consult on the detailed terms, nevertheless on February 14, 2002 the Planning Committee Report was sent under cover of an explanatory letter to Members of the Review Group, including the first claimant. A copy of the covering letter and circulation list is exhibited at 'DC4'. The Report to February 19, Planning Committee was also available on the Council's web-site. Comments on the s.106 Agreement were made by interested parties, including individuals and Members of the Review Group, and Members at the Planning Committee meeting. These were noted and, where appropriate, the final form was amended to reflect them. It is therefore wrong to suggest that there has been no opportunity for the claimants and other interested parties to comment on the s.106 Agreement.''

232 The circulation list for the report to Committee in February 2002 included the first claimant. No complaint can justifiably be made of any omission to consult on what for these purposes appear to be the non-controversial changes on April 23, 2002. The claimants had plenty of time to say whatever it was they wanted to say.

Unlawfulness of the Involvement of an Expert

233 The complaint originally raised in the grounds by Mr McCracken was that Sch.1 to the s.106 Agreement contained a number of obligations on Arsenal FC to do things in accord with various plans, but no provision for the production of such plans or for the resolving of disputes. That point was expressly abandoned

by Mr McCracken before me as incorrect. But he developed a new point which does not appear in the grounds. This was that the mechanism for the resolution of the issues involved the use of an independent expert and accordingly the task of resolving issues or approving plans had been passed by Islington to him, something which Islington had no power to do. Clauses 3.5 and 5.1 of the s.106 Agreement impose an obligation on Arsenal FC to carry out the terms of Sch.1 which contain clauses dealing with the Stadium Travel Plan, to take the chief example relied on, in particular cll.9.1–10.1. They read:

> "9.1 All reasonable endeavours shall be used to work with LBI to work towards achieving the modal split target.
>
> 9.2 The stadium shall only be used in accordance with the stadium travel plan and the approved stadium travel plan shall be complied with.
>
> 9.3 The monitoring programme shall be implemented and funded.
>
> 9.4 All reasonable endeavours shall be used to ensure that upon commencement of use of the stadium for a major event no more than 20 per cent of all visitors attending a major event shall travel to the locality of the stadium by private car and measures intended to achieve this figure in the event that this figure is not met shall be secured.
>
> 9.5 Until completion of the proposed Holloway Road underground station improvement works on the occasion of a major event sufficient travel capacity shall be provided to ensure that no more than 20 per cent of all visitors attending a major event shall travel to the Locality of the stadium by private car including for example the provision of an additional sufficient number of coaches and buses.
>
> 10. Retention of visitor measures
>
> 10.1 The retention of visitor measures shall be complied with in accordance with the stadium travel plan."

234 The modal split target, which is referred to in cl.9.1, is the 88:12 split. The stadium travel plan is dealt with in Sch.11 to the s.106 Agreement. It sets out the purpose of the STP and the obligations to take measures to ensure that the purpose is fulfilled. The measures are described. The flavour of the point upon which Mr McCracken relies can be seen from this extract from the stadium travel plan requirement in Sch.11:

> "Purpose: To identify measures to be taken by AFC to achieve the modal split target for major events and to ensure that retention of visitor measures are effective.
>
> Measures: AFC shall liaise with all relevant bodies, including LBI (planning and transportation functions), transport for London, London Underground Ltd, relevant train operating companies, the Metropolitan Police and British Transport Police to ensure that the purposes of the stadium travel plan are achieved and implement such reasonable measures as may be required to achieve those purposes following consultation with the Liaison Committee.

> In addition to the funding of an Event Day Parking Scheme (as set out in cl.11), such measures may include:
>
> (a) an approved 'Car Part Management Agreement' for the stadium car park;
>
> . . .."

235 Schedule 12 to the s.106 Agreement deals with monitoring in the same vein. Clause 8.1 of the s.106 Agreement provides for the role of the single expert. It reads:

> "Save for matters of construction (which shall be matters for the Courts) any dispute or disagreement arising under this Agreement including questions of value or any question of reasonableness may be referred at the instance of any party for determination by a single expert whose decision shall be final and binding on the parties PROVIDED THAT nothing in this clause shall fetter LBI in exercising its discretion in carrying out its functions."

236 Thus, submits Mr McCracken, it is the single expert, not Islington, who ultimately would decide whether Arsenal FC were making "all reasonable endeavours" to achieve the 88:12 modal split target contained in cl.9.1 of Sch.12, or the immediate 80:20 requirement in cl.9.4.

237 It is undoubtedly true that the single expert would ultimately have that role; but I cannot see why that provision for dispute resolution is unlawful. There is no doubt but that those matters are capable of giving rise to dispute. It is lawful to postpone the resolution of those issues until after planning permission has been granted and until after dispute has arisen as the process of negotiation subsequently continues. It is unnecessary for all those matters to be resolved in order to decide whether or not to grant planning permission. Some dispute resolution is necessary because if it were merely a matter for Islington to decide, there might be no agreement at all, or less strict restrictions with a less happy outcome. It is for the planning authority to decide if it wants to deal with matters in that way. Once it has decided that it does not want to deal with matters in that way, a dispute resolution provision is necessary. Where a planning authority is in dispute over the reasonableness of requirement, I see nothing unlawful in an expert resolving that matter. This is not a question of the exercise of a statutory discretion being devolved. It is in the exercise of the statutory power of the decision maker to grant or refuse planning permission and in relation to that decision it is a material consideration that there is an agreement in existence with this dispute resolution procedure within it. There has been the exercise rather than the abdication or unlawful delegation of power. It is difficult to see how the decision as to what it is reasonable to require, where there is a dispute, can be regarded as itself the exercise of a specific statutory discretion any more than the position would be with any other arbitration or dispute resolution provision. In any event, the proviso to cl.8.1 recoups any power which it might be said that the Local Plan-

ning Authority has unlawfully devolved or passed away so as to fetter its discretion. That submission by Mr McCracken is untenable.

Reasonable Endeavours

238 Mr McCracken criticised this aspect, particularly in relation to s.9 of Sch.1 dealing with the stadium travel plan, from two related angles. First, he said that the planning officer had altered the terms recommended in February 2002 from those recommended in December 2001, when it was ''best endeavours'' which were required. Accordingly, the December resolution was passed on a basis which was later falsified.

239 Second, he submitted that the concept of reasonable endeavours was weaker than best endeavours and enabled account to be taken of the financial position of Arsenal FC, which made its financial position, the DTZ Report and the funding gap relevant in planning terms.

240 As to the first point, Mr McCracken relied again on e-mails. There was one dated February 18, 2002 in which this issue was discussed, and which is set out above in this judgment. The Overview Report Appendix A7 at p.6 sets out the heads of terms for the December 2001 meeting. It proposed the use of ''best endeavours'' to secure the 80:20 modal split and the use of ''all reasonable endeavours'' to improve on that towards 88:12. In the s.106 Agreement, as approved, ''all reasonable endeavours'' are required to be used in relation to both aspects. This specific change was highlighted in the Report to committee for February 19, 2002 and the reason given:

> ''The heads of terms (No.9) required AFC to use 'best endeavours' to ensure that no more than 20 per cent of all visitors coming to a major event at a new stadium travel to it by car. AFC is not willing to commit to this and the Director of Law and Public Services has advised that it would be unreasonable to insist that the club uses 'best endeavours' and that 'all reasonable endeavours' is acceptable.''

241 The basis for the acceptability of this change was spelt out more fully in Miss Cluett's second witness statement at paras 18.2–18.3:

> ''18.2 In fact it became apparent that the key mechanism for achieving the 80:20 mode split lay with the Council: that is the Council could implement an event day parking zone. AFC had agreed to fully fund this as a planning obligation. I subsequently took the view that it would be unreasonable for the Council to insist on a 'best endeavours' covenant. This view was reported to members in a report seeking authority for the terms of the s.106 Agreement to Planning Committee of February 19, 2002.

> 18.3 The views expressed during the consideration of the applications by officers referred to by the claimants did not represent the final view of officers. The Report accurately reflected the final view of officers arrived at after careful and proper deliberation, as fully explained in my first witness statement.''

242 In essence this explanation does not alter the basis of the December 2001 resolution because it is quite clear from para.26.13.1 of the Overview Report and Appendix 4, paras 1.7–1.8, to which I have already referred, that the EDCPZ was the main basis for reaching the view that an 80:20 split was probably achievable from the outset of the operation of the new stadium. In any event, even if there had been a change, it is clear that the Local Planning Authority was aware of the fact of change and of its basis. It was a perfectly proper basis upon which to make the change as well.

243 As to the second and related aspect, Mr McCracken referred to the difference between ''best endeavours'' and ''reasonable endeavours'' in terms of the relevance of the financial implications arising from Arsenal FC's financial position. Mr McCracken relied on the decision of the Court of Appeal in *IBM (UK) Limited v Rockware Glass Ltd* [1980] F.S.R. 335. In relation to ''best endeavours'', Buckley L.J. said at p.343:

> ''In my judgment the test must be: what would an owner of the property with which we are concerned in this case, who was anxious to obtain planning permission, do to achieve that end? The formula which has been suggested and which would commend itself to me is that the plaintiffs as convenators are bound to take all those steps in their power which are capable of producing the desired results, namely the obtaining of planning permission, being steps which a prudent, determined and reasonable owner, acting in his own interests and desiring to achieve that result, would take, and I would favour making a declaration in answer to question 2 in those terms.''

244 Mr McCracken contrasted this with the approach to ''reasonable endeavours'' adopted by the Court of Appeal in *Phillips Petroleum Co UK Ltd v Enron Europe Ltd* [1997] C.L.C. 329 at pp.339 and 342 in the judgment of Kennedy L.J.:

> ''In *P & O Property Holdings Ltd v Norwich Union* (1994) P. & C.R. 261 a developer and head lessor had each contracted to use 'reasonable endeavours to obtain' lettings of units in a shopping centre. The head lessor contended that in the circumstances the developer should have been prepared to pay to a tenant a reverse premium if a hypothetical reasonable landlord would regard such a premium as good estate management in current conditions, but the House of Lords, upholding the decision of the Court of Appeal, rejected that contention. In the Court of Appeal Steyn L.J. said at p.16A of the transcript:

> 'The concepts of (a) ''reasonable endeavours'' obligation placed on both parties, and (b) the judgment of the ''reasonable landlord'' are inherently in tension. As a matter of ordinary commonsense they convey different ideas. The ''reasonable endeavours'' obligation necessarily imports the idea that the endeavours of the parties may fail to result in a letting, but neither is necessarily in breach. The judgment and approach of the parties may be at odds, but measured against a yardstick of reasonableness neither may be in breach of the ''reasonable endeavours'' obligation. The reality is that the position of each party may be reasonably defendable. On the other hand, the standard of the ''reasonable landlord'' results in a single vindicated position.'
>
> Similarly, in the House of Lords Lord Browne-Wilkinson trenchantly rejected the submission that by agreeing to use reasonable endeavours the parties intended to impose an objective standard as to what terms it would be reasonable to agree to obtain a letting. Mr Kentridge submits that precisely the same line of reasoning can be applied to the case with which we are concerned.
>
> . . ..
>
> When the critical words in art.2.2 are read in their contractual setting, and with regard to the ensuing fall-back provision, I find it impossible to say that they impose on the buyer a contractual obligation to disregard the financial effect on him, and indeed everything else other than technical or operational practicality, when deciding how to discharge his obligations to use reasonable endeavours to agree to a commissioning date prior to September 25, 1996.''

245 I accept that there is a real distinction between ''best endeavours'' and ''reasonable endeavours'', but it is not as stark in principle nor as stark in its relation to the provisions of the s.106 Agreement as Mr McCracken suggests. I do not consider that cost is irrelevant to the use of ''best endeavours'', as set out in the *IBM* case; nor is ''all reasonable endeavours'' simply an empty phrase. First, it is ''*all* reasonable endeavours''; in para.9.4 of Sch.12 the obligation is to ''ensure'' that 20 per cent car mode, which is the key provision, is met, and this is stronger than the provision in cl.9.1 which is ''to work towards'' 12 per cent. Second, the fall-back obligation in cl.9.5, which until Holloway Road Station is improved, requires Arsenal FC to provide sufficient public transport travel capability probably by bus or coach in order to achieve the 20 per cent is not qualified. Nor, third, is it irrelevant that Sch.11, which deals with the Stadium Travel Plan, does require the implementation of such reasonable measures as may be required to achieve the purposes of the Stadium Travel Plan. As both *IBM* and *Phillips Petroleum* show, the contractual setting matters. This also has to be read in the context of the monitoring requirements in Sch.10. Fourth, I accept that the financial considerations of Arsenal FC will be a relevant factor in judging reasonableness, but I do not consider that this analysis shows any falling away by Islington from the approach adopted in December 2001 at the

resolution stage so as to negate its then thinking. Nor does it show that financial considerations loom so large in the achievement of the planning aims that the councillors ought to have required more information or that the public ought to have been provided with more as to Arsenal FC's financial position in order to reach a sensible conclusion on such planning issues to which those aspects may relate.

246 There was a specific criticism of cl.7.2 of the s.106 Agreement as constituting an unlawful fetter on the Local Authority's discretion. Clause 7.2 reads:

> "For the avoidance of doubt after the stadium shall have opened nothing shall thereafter prevent the stadium from operating at its full capacity of 60,000 spectators for a major event for football and operating as a stadium permanently providing only that a safety certificate issued pursuant to the Football Licensing Act 1989 (as may be replaced or amended) is in full force and effect."

247 The effect of the agreement by the Council not to use such powers as it might have, other than safety powers to restrict numbers, is said to preclude a restriction on the capacity of the stadium as a means of ensuring that the modal split to car does not exceed 20 per cent or reach 12 per cent. It is difficult to see what other discretion is in reality fettered. The 60,000 seating capacity still requires the operation of the Stadium Travel Plan. The clause is obviously included because at one time Islington officers, with the advice of their then leading counsel, were contemplating using a restriction on seating capacity as a means of enforcing a modal split of 20 per cent—a restriction on capacity naturally feared and resisted by Arsenal FC. This possible restriction ceased to be relevant once Islington realised, as set out in the Overview Report, that the key control was the extension of the EDCPZ. That controls car usage. The aim of the 20 per cent restriction was to restrict the numbers of cars to the number of cars now attending Highbury with its much smaller capacity. Islington accepted that ground capacity was not a useful tool of control in relation to car numbers. The key control for that is controlling car demand and the availability of parking space. That is an entirely reasonable view for the London Borough of Islington to take. There is no fetter on Islington's discretion. The provision is there for the avoidance of doubt lest there be a resurgence of the idea now accepted as mistaken. Mr McCracken said that no lawful basis had been shown for the Council not to act in accordance with the advice given by leading counsel that the restriction on stadium capacity should be retained for that purpose. There is no obligation in law to follow the advice of leading counsel. An ample planning reason was provided as to why that counsel's view did not effectively address the planning issue which the Council and its consultants had to address.

248 A further criticism by Mr McCracken was that the s.106 Agreement did not prevent both new and old stadia being used at the same time. The heads of terms for the s.106 Agreement in the Overview Report, Appendix 7, item 37, said:

"Future Use

- A new stadium at Ashburton Grove shall have opened before commencement of development pursuant to the Highbury consent.
- Once a new stadium at Ashburton Grove opens, (other than for a limited trial period to be agreed) Highbury shall not be used as a sports stadium."

249 In the s.106 Agreement the obligation appears in Sch.1, cl.38.2 as follows:

> "The stadium at the Highbury Site shall not without LBI's prior consent which it may give at its absolute discretion taking all material circumstances into account be used as a sports stadium after the date that the Stadium is open for permanent use of which date AFC and HHL shall give LBI seven days previous notice in writing."

250 This is said by Mr McCracken to be somewhat wider than and again different from what was envisaged in December 2001. This change was not identified in the report to Committee for February 19, 2002. Rather no change was envisaged. In Report D, para.18.1, it was stated that the s.106 Agreement would mean that the use of the existing stadium would cease. It was also said that the implications of both being in use at the same time had not been assessed in the Environmental Statement.

251 The reality is that the heads of terms in the report envisage, and the s.106 Agreement does not preclude, the use of Highbury stadium for sport once the new stadium is open. They are not in conflict. But the language in the actual Agreement reflect the aim which originally was loosely expressed in the Heads of Terms; indeed the language of the actual Agreement gives a greater degree of control to Islington, and does so without providing a role for the intervention of the single expert. It was always envisaged by the heads of terms that there could be teething problems once the new stadium had opened, which might mean that it could not be used; or that if it opened mid-season, perhaps with its opening being triggered by minor community use, Arsenal FC might wish to wait until the end of the season before transferring to it. That thinking is still what is reflected in the s.106 Agreement, but in language which gives the Local Planning Authority greater control. Miss Cluett sets these matters out clearly in her second witness statement at para.17. As she says, it is inconceivable that in reality there would be two stadia operating.

252 The last criticism made by Mr McCracken was that the s.106 Agreement contained no provision for contaminated land to be investigated. There is nothing in this point which I have not already considered in relation to other aspects of contaminated land.

COMMENTARY

C1 See Commentary to *R. (on the application of Adriano) v Surrey County Council* [2002] EWHC 2471 (Admin), below.