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Case No: CO/3756/2022; AC-2022-LON-002828

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/10/2023

Before :

THE HONOURABLE MR JUSTICE SAINI

- -

Between :

THE KING **on the application of** **TOTTENHAM HOTSPUR LIMITED**	**Claimant**
- and -	
THE LONDON BOROUGH OF HARINGEY	**Defendant**
- and –	
LANDLEASE (HIGH ROAD WEST) LIMITED	**Interested Party**

- -
- -

Christopher Katkowski KC and **Freddie Humphreys** (instructed by **Richard Max & Co LLP**) for the **Claimant**
Daniel Kolinsky KC and **Andrew Parkinson** (instructed by **London Borough of Haringey**) for the **Defendant**
David Elvin KC and **Andrew Byass** (instructed by **Ashurst LLP**) for the **Interested Party**

Hearing date: 10 October 2023

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Approved Judgment

This judgment was handed down in the Royal Courts of Justice at 10.30am on 18 October 2023 and by release to the National Archives.

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MR JUSTICE SAINI

Mr Justice Saini :

This judgment is in 5 main parts as follows:

I. Overview

1. Tottenham Hotspur Limited ("the Claimant"), which owns and operates the well-known Premiership football club of that name, challenges the decision of the London Borough of Haringey ("the Council") of 31 August 2022 to grant planning permission (reference HGY/2021/3175) to the Interested Party ("the IP"). The permission under challenge concerns a major redevelopment of land west of High Road, Tottenham, London N17 ("the development" or "the scheme"). This land is to the north and south of White Hart Lane, and adjacent to the Tottenham Hotspur Stadium ("the stadium"). The development corresponds with the majority of the Policy NT5 (High Road West) site allocation in the Council's development plan. Policy NT5 seeks a master planned and comprehensive development, creating a large new residential neighbourhood, including affordable housing, with associated amenities and a new public square. The proposed development is within one of the most deprived areas of England. In granting the planning permission, the Council observed that the development would "…represent a significant step forward in progressing the Council's and the community's ambition to ensure that north Tottenham is a fairer, healthier place where all our residents can thrive".

2. The Claimant has permission to proceed with its judicial review claim, limited to two grounds identified in the order of Lewis LJ dated 6 June 2023. That order followed a refusal of permission on *the papers* by Lang J, and a further refusal at an oral renewal hearing before Lieven J. In summary, Ground 1 is a complaint that the Council failed to lawfully assess the totality of the heritage impacts of the development. Ground 2 is divided into two sub-grounds: (i) a complaint that the Council unlawfully relied upon the s.106 agreement (that is, an agreement under s.106 of the Town and Country Planning Act 1990) and planning conditions to determine that crowd control matters for the stadium would be appropriately addressed; and (ii) a complaint that the Council failed to lawfully apply the Agent of Change principle. In addition to opposing these grounds, both the Council and the IP argue that if any error is established relief should be refused or limited.

3. By way of broad outline, the relevant parts of the process leading to the relevant planning decision was as follows. There was an Officer's Report to the Planning Sub-Committee ("the OR") dated 13 July 2022. The OR identified the key reasons for recommending the scheme as follows:

> "Up to 2,929 high-quality, sustainable homes, including 60 affordable homes in the detailed and 35% affordable homes, by unit, increasing up to 40% by unit subject to grant funding and

> a minimum of 500 social rented homes (a 203 home uplift on the current Love Lane Estate Provision). Between 7,225 sqm (GIA) and 41,300 sqm (GIA) of commercial/ community floor space, including a new library and learning centre creating training, up-skilling and employment opportunities including a minimum net increase of 240 Full Time Equivalent jobs once operational and a further 93 FTE associated supply chain jobs. A new public park measuring at least 5,300 sqm and a new public square measuring at least 3,500 square metres alongside other landscaped public realm and pedestrian/cycle routes equating to at least 33,300 sqm whereby safety and security is prioritised through well overlooked, lit and CCTV covered public realm. Improved connectivity to White Hart Lane Station. The scheme is expected to deliver significant economic benefits during construction including 1,214 construction jobs, 1,202 construction supply chain jobs. The development is anticipated to generate up to £267.8 million of GVA (Gross Value Added) to the economy every year during construction and between £22.6 million and £110.6 million of GVA in perpetuity. The delivery of a new library and learning centre. Delivery of a new energy centre. Substantially enhanced biodiversity across the site. A significant contribution to the regeneration of the area."

4. The OR was in due course refined by an Addendum Report ("the AR") dated 21 July 2022. That led to the Committee's resolution to grant planning permission (as recorded in the minutes of the Committee meeting). There was also a Supplementary Officer's Report ("the SOR") dated 31 August 2022, which authorised the issue of the decision, with the accompanying s.106 agreement. The SOR made reference, and responded, to representations received from interested persons including the Claimant. I will refer further to the relevant detail of these documents when addressing each of the grounds below. The Council has served two witness statements from Robbie McNaugher ("Mr McNaugher"), who is the Head of Development Management and Planning Enforcement within the Council. He was directly involved in the production and review of the OR, the AR and the SOR.

5. There was no dispute between the parties in relation to the relevant legal principles to be applied in approaching planning decisions. I was referred to a number of cases including Mansell v Tonbridge & Malling BC [2018] JPL 176 at [42], St Modwen Developments Ltd v Secretary of State [2018] P.T.S.R. 746 at [69], R (Nicholson) v Allderdale DC [2015] EWHC 2510 (Admin) at [82]-[83], and R (Siraj) v Kirklees Metropolitan Borough Council [2011] JPL 571 at [16] and [19]. The legal test in any challenge to a decision of a local planning authority based on alleged defects in an officer's report is whether the report has materially misled Members on a matter bearing upon their decision. That is, but for the flawed advice, the Planning Committee's decision would or might have been different.

II. Ground 1: Heritage Impacts

6. By way of introduction, I need to explain that the Claimant is the holder of planning permissions in respect of parts of the overall site lying to the north and west (known as the *Goods Yard* and the *Depot*). These extant planning permissions include permission for three tall buildings on those parts of the site. The IP's application for planning permission included an application for six tall buildings, including the three that had already been granted under the Claimant's permissions. The IP's application, in respect of those parts of the application that were the same as the extant permissions, put the application on the basis of the same parameters as the then extant permissions (a further planning permission for the combined Goods Yard and Depot sites was granted after the decision under challenge was made). In other words, the scale of the three tall buildings that had already been permitted was the same in the IP's application.

7. Stripped to its essentials, the Claimant's complaint under Ground 1 is a simple one. It is said that the Council failed to consider the heritage impacts of the elements of the development proposed to be located in the *Goods Yard* and the *Depot* parts of the site. The foundation for this submission is the contention that the OR exclusively followed the advice provided in the Heritage Impact Assessment of 13 July 2022 ("HIA") and Heritage Impact Assessment (Addendum) of 21 July 2022 ("the HIA Addendum"), when assessing heritage impacts. That is said to have caused the Council to fall into error because the HIA and the HIA Addendum took account of development on the *Goods Yard* and *Depot* sites only as part of what was called a "baseline", and not as an impact of the development.

8. In support of this ground, Leading Counsel for the Claimant took me through the HIA and HIA Addendum in some detail. These assessments were prepared by Ms Narita Chakraborty (the Council's independent heritage consultant). Leading Counsel submitted that they (the HIA and the HIA Addendum) did not assess the heritage impact of the elements of the scheme that were located on the *Goods Yard* and *Depot* sites. The Claimant pleads that therefore there was no assessment by the Council of the impact of the totality of the development (including the proposed tall buildings and additional development on the *Goods Yard* and *Depot* sites), on the North Tottenham Conservation Area, or the listed buildings at 790 High Road, 797-799 High Road or 819-821 High Road. Those were impacts that the Defendant was required to assess in accordance with the Planning (Listed Buildings and Conservation Areas) Act 1990. In his oral and written submissions, Leading Counsel for the Claimant added some unpleaded additions to this list: 867-869 High Road and 7 White Hart Lane. I proceed on the basis that he can include these additions to his list.

9. This ground was attractively and robustly presented. However, I reject it for essentially the reasons given by the Council and the IP. I will first summarise my conclusions and will then turn at [13] below to my more detailed reasons by reference to the relevant documents and evidence. The starting point in the Council's analysis of heritage issues is the OR at paras.10.1-10.13 which advised on the legal approach to heritage issues including the need for the decision maker to attach *"considerable importance and weight"* to any heritage harm in the planning balance. Leading Counsel for the Claimant expressly agreed that this section correctly states the legal position. The OR at paras. 10.14-10.35 then contained an analysis of the impact of the

scheme on the significance of heritage assets (correctly identifying each relevant asset). These paragraphs need to be read in conjunction with the AR which updated them following representations from the Claimant. A principal aspect of that updating was to ensure that the impact of the Claimant's consented schemes on the *Goods Yard* and the *Depot* sites was properly considered. That is clear from the assessment in the AR in respect of No 34 White Hart Lane (also known as The Grange) and No 867-869 High Road (both Grade II listed). Indeed, Leading Counsel for the Claimant expressly accepted this (at least in relation to the Grange) when I raised the issue at the hearing (in this case there was an adjustment to the level of harm originally stated in the OR - see further immediately below).

10. The material parts of the AR which amended the OR in this regard read as follows (replicating the underlining and spellings as presented in the AR):

> "Paragraph 10.23 should read
>
> …
>
> No. 34 White Hart Lane (Listed Grade II). The nearest proposed plots to the building are the I plots. The ES concludes that the proposal would have a minor beneficial impact as a result of the demolition of nos 24-30 White Hart Lane and public realm improvements within its setting. The Conservation Officer notes that the demolition of No. 24 – 30 White Hart Lane and the introduction of new buildings of an increased hight would result in medium to high level of less than substantial harm to the setting of the listed building. <u>In addition, the tall buildings as part of the extant permissions at Goods Yard would also result in harm. The cumulative harm to the Grange would be considered high</u>"

> "Paragraph 10.25 should read:
>
> Nos. 867-869 High Road (Listed Grade II). Due scale of the proposed new buildings within the setting of the heritage asset, the proposal would result in a medium level of less than substantial harm to the setting of the asset. <u>The scale of some of the proposed new buildings is reflective of the buildings that have the benefit of planning permission pursuant to Goods Yard and Depot consents</u>".

11. The overall assessment of the level of harm was that the scheme would result in medium to high level of less than substantial heritage harm. This was expressed in the OR at para.10.36 and that assessment of overall harm remained appropriate to describe the impact of the scheme (taking account of the analysis in the AR). This is clear from the fact that the AR did not amend the OR at para.10.36 and is also consistent with the references in the AR to *"the potential"* of the scheme to result in *"an upper level of less than substantial harm"*. It was concluded that the public

benefits of the proposal outweighed the identified heritage harm, notwithstanding the considerable weight to be attached to this; and therefore the "tilted balance" set out in paragraph 11 of the National Planning Policy Framework ("the NPPF") applied. I note that the Claimant makes no criticism of how the Council weighed public benefits as part of the heritage assessment or how the AR dealt with the "tilted balance".

12. The Claimant's arguments under Ground 1 proceed on the artificial basis that the heritage analysis in the OR was Ms Chakraborty's. I do not accept this threshold point. The heritage analyses undertaken by Ms Chakraborty were a contributing source document on which the Officer drew when expressing his planning analysis. The actual position is that the Officer's analysis drew on a number of sources which included the developer's analysis in the Environmental Statement ("ES") (which assessed the impact of the <u>entire</u> application including the parts which tracked the Claimant's extant permissions), Ms Chakraborty's commentary and his own assessment. This is apparent from the OR itself. On any fair reading of the OR and AR, it is clear that the Council was assessing the entire proposal (including the consented schemes). I will now address matters in more detail, by reference to the specific paragraphs of the material documents.

13. I begin by noting para. 3.3 of the OR (which explains the role of parameters plans) and para. 3.6 (which explains that the masterplan layout includes the consented schemes at the *Depot* and *Goods Yard*). The consented schemes are described in the OR at paras. 3.32 and 3.33 (in relation to planning history). This is also explicitly discussed in the OR at para. 4.11, in the context of discussing compliance with the policy requirement for comprehensive development; and at paras. 4.42 and 4.44 of the OR in the assessment of the acceptability of the development. The relationship of the parameter plans with the existing consents was also explained at paras. 6.49 and 6.97 of the OR (in the context of discussing tall buildings policy).

14. The heritage assessment in the OR started by drawing on the ES: see the OR at para.10.18-10.20. This makes it clear that the assessment is of the impact of the maximum parameters (all towers) and that the Officer's assessment drew on the ES in assessing the impacts associated with the maximum parameters. The asset-by-asset assessment at OR paras.10.21-10.35 is the Officer's assessment based on evaluation of the ES and taking account of the independent assessment undertaken by Ms Chakraborty. In each paragraph, it is clear that the Officer is explicitly drawing on and evaluating the ES and expressing his *own* assessment of the impact (in most but not all cases he agreed with Ms Chakraborty's assessment).

15. I would add that the position is put beyond doubt by the AR at page 9 which addresses each of the heritage assets and provides conclusions, where relevant, to levels of harm. The OR and AR must be fairly read together. The Claimant's case is in essence that some of the analysis in the Officer's evaluation took account of all of the proposal but other parts did not. This would have made no sense.

16. The Claimant's case is also undermined by the clear statements in the annexe to the AR at page 17, which records the Claimant's Solicitor's complaints that the heritage impacts were affected by "inconsistency and omissions". These were omissions said to have been carried forward from the HIA, referred to in the Solicitor's letter of 20 July 2022. These alleged omissions included, amongst other matters, the harm of the *Goods Yard* and *Depot* consented schemes. In that part of the AR, the Officer

responded to those complaints with the following text: "The Officer report including this addendum provides an accurate assessment of the heritage impacts of the proposed development. The harm identified to them has been described in the report and balanced against the public benefits of the scheme when making a recommendation. Officers consider that the duties under Planning (Listed Buildings and Conservation Areas) Act 1990 have been discharged and therefore members can make a lawful decision on the application".

17. Mr McNaugher was involved in the production and review of the OR. He explains that the author of the report was James Daw assisted by Philip Elliott. Mr McNaugher's role was to approve the OR and he was also involved in the production and review of the AR. Consistently with the language of the OR, he says that the heritage assessment in the OR draws on the following sources to inform the assessment of heritage impacts. First, the heritage assessment undertaken by Montagu Evans on behalf of the IP (the ES - which is based on an assessment of the maximum parameters). Second, Ms Chakraborty's work. Third, the planning officer's own assessment of impacts. Mr McNaugher explains that the Council received comments on the analysis in the OR. These comments included the critique made by Solicitors on behalf of the Claimant in the letter of 20 July 2022. That letter (to which I have already made reference) at paras. 3.4-3.6 contended that the harm to heritage assets had been understated. It referred to Ms Chakraborty's approach to the baseline and contended that the impact of the *Goods Yard* and *Depot* permissions had been left out of account. Mr McNaugher says that, as part of the process of preparing the AR, he and Mr Daw specifically considered whether the impacts described in the OR sufficiently reflected the impacts of the maximum parameters (including the consented *Goods Yard* and *Depot* schemes). He explains (again, consistently with the contemporaneous documents before me) that several additions and changes were made to ensure that the analysis was robust based on the impact of what was being consented to in these maximum parameters. He refers to amendments to No 34 White Hart Lane and Nos 867-869 High Road. I have referred to these amendments above at [10].

18. Mr McNaugher also addresses the complaint that the impact of the consented schemes on the following heritage assets was left out of account, namely:-

    a. The North Tottenham Conservation Area
    b. Listed building at 790 High Road (which is known as Dial House)
    c. 797-799 High Road
    d. 819-821 High Road.

19. He explains that he was satisfied that the analysis about the relationship of the scheme with the Tottenham Conservation Area in the OR as amended by the AR reflected the impact of the maximum parameters including the consented schemes. He says that he did not consider that specific amendments were needed to the AR in respect of No 790 High Road, 797-799 High Road and 819-821 High Road, as the impact on these assets from the proposed scheme was already fairly reflected in the reports.

20. Complaint is made about the admission and relevance of the second witness statement of Mr McNaugher. Had the Council's case depended on this witness statement to explain some clear error or omission in the OR or the AR, there might have been some force in this complaint. In fact, I find that Mr McNaugher's evidence is wholly

consistent with a fair reading of the OR and AR and is amply supported by contemporaneous documents. I do not accept the criticism that his evidence is some form of ex post facto rationalisation. Ultimately, however, the points he makes can be fully made without reference to his witness statement since they arise from the terms of the OR and AR and matters of obvious inference.

21. It is significant that the Claimant does not identify any impact from the consented schemes on the listed buildings which it says were left out of account. As I have noted above, the submissions made commenting on heritage issues in the OR are made in the Claimant's Solicitor's letter dated 20 July 2022. It refers to 34 White Hart Lane (The Grange) but does not advance any other argument that the consented schemes impacted on individual listed buildings. The specific heritage points raised in this letter were addressed in the AR. I understand that the Claimant did not make any comments about heritage assets in its oral submissions to the Committee.

22. There was in fact nothing in the decisions granting planning permission for the consented schemes which suggested that they would have any harmful impact on listed buildings (other than No 34 White Hart Lane (The Grange) – which, as I have noted, Leading Counsel for the Claimant agreed has been addressed properly). The key parts of the consented decisions are as follows:--

    (i) The Inspector's decision dated 28 June 2019 in respect of the consented *Goods Yard* scheme proceeds on the basis that there are no adverse impacts of that scheme on any listed building (other than No 34 White Hart Lane (The Grange)).
    (ii) The Council's grant of planning permission for the *Depot* site proceeded on the basis that there were no adverse impacts on any listed buildings (and there was a beneficial impact on 867-869 High Road).

23. The position therefore is that on any fair reading of the OR and AR, it is clear that the Council was assessing the entire proposal (including the consented schemes). The conclusion on the impact on individual listed buildings reflected the impact of the whole scheme (and was consistent with the substantive analysis when the extant planning permissions were granted).

24. As to the North Tottenham Conservation Area, the overall conclusion was that there was a high level of less than substantial harm. This reflected the Officer's judgment as to the impact of the whole of the scheme for which planning permission was sought. The judgment in the OR was formed on that basis. Moreover, it was reinforced in the publication of the AR when the need to ensure that the assessment properly reflected the whole of the scheme was specifically in mind. See the AR at para. 10.26.

25. The Claimant's forensic complaints are based on a mischaracterisation of the heritage analysis in the OR and the AR. An inappropriate level of emphasis is placed upon part of para. 10.36 of the OR and the comment in the AR that the conservation officer and expert are the same person. Fairly read in context, para. 10.36 of the OR indicates that the assessment of impacts was of the maximum parameters (i.e., the totality of the scheme). As above, that is consistent with how the OR is to be read, and specifically with the updating of the analysis in respect of No 34 White Hart Lane in the AR.

26. Heritage impacts were lawfully identified and were judged to be outweighed by the substantial public benefits which the scheme would deliver. Ground 1 is dismissed.

Section 31(2A) of the Senior Courts Act 1981

27. Had I found an error in the form argued under Ground 1, I would have refused relief under s.31(2A) of the Senior Courts Act 1981. On the material before me, I am satisfied that this is a planning decision for a scheme which will deliver significant benefits to the locality. The Council's judgment was that it accorded with the development plan as a whole, and that the tilted balance under paragraph 11 of the NPPF applied such that the question for it was whether the harm overall caused by the scheme could be said to significantly and demonstrably outweigh the benefits. The extent of the public benefits was such that the decision would have been substantively the same even absent the claimed error. The planning assessment of public benefits is clear. There is a clear development plan support for this development and the regenerative impacts of the scheme are of overwhelming significance in the planning balance.

28. The impacts which Ground 1 contends were left out of account are those which would exist whether or not planning permission were granted. The effect of the extant *Goods Yard* and *Depot* schemes have already been found to be acceptable in planning terms and in the public interest. Even if the level of heritage impacts were to be set out differently, it is in my judgment clear on the totality of the material before me that the public benefit balance of regenerating this area would have outweighed them (given the consistent planning judgments expressed to that effect). In coming to this conclusion, I have had regard to the considerable importance and weight that the law attaches to harm to heritage assets and strong presumptions against allowing harm to occur.

Ground 2: Crowd Safety

29. This ground is concerned with the Council's approach to the safety of crowds attending the stadium. The relevant factual context is as follows. The stadium has a capacity of around 70,000 people. Crowd control is plainly a matter of substantial importance. In outline, the Claimant says that the Officers had misled the Members in the OR as to the requirements that would be placed on the Claimant in respect of crowd control; and that additional burdens would be placed on it which were different to those stated to the Members. The Council says that crowd control could be satisfactorily managed within the scheme and that provision could be made for at least equivalent crowd control and safety to the current situation. In part, the proposal involves the use of private land, namely the land that either is or would ultimately be held by the IP. The use of that private land by those seeking to go to the stadium (and by the Claimant's crowd management) would in turn involve the IP granting the Claimant a licence in order to use that private land.

30. Leading Counsel for the Claimant advanced two sub-grounds. First, that the s.106 agreement and conditions failed to secure the measures assessed as being necessary to provide for the safe movement of crowds (I will call this Ground 2A). Secondly, he

argued that the conclusion that the Agent of Change Principle was satisfied was unlawful (I will call this Ground 2B).

III. Ground 2A: s.106 and conditions

31. Before summarising the Claimant's submission under this sub-ground in more detail, I will set out some of the material background. Issues relating to crowd control were the subject of: (1) the IP's Crowd Flow Study; (2) a review by an independent crowd flow expert appointed by the Council (Dr Dickie); and (3) objections from the Claimant. The conclusions of the Crowd Flow Study and the independent review were set out for Members in the OR at paras. 6.33–6.38, as amended by the AR, and were subject to conditions 4, 44 and 64 (addressed in more detail below). Both the IP's Crowd Flow Study and the Council's independent review concluded that the crowd control measures to be provided both during and after construction would provide at least equivalent provision for stadium crowds queuing for White Hart Lane Station; and that post-construction the situation for stadium crowds will be improved, including due to there being greater flexibility in how queues can be arranged in the proposed Moselle Square and through the provision of a less constrained and more direct route for spectators.

32. The mechanisms for securing these matters were set out for Members in the OR and the AR. So, in section 2 of the OR, Members were informed that there would be a mechanism to "allow THFC access across public space in order to manage crowd flow on applicable event days, subject to various terms of access and agreement between the parties". In the OR at para. 6.38 (as amended by the AR), it was further explained that "…detailed layout of the site and an interim crowd flow management strategy (i.e. queue areas and geometry, contraflow lane and access to residences) during construction will be secured at reserved matters stage along with an event management plan. This will include further crowd management studies and be subject to Safety Advisory Group (SAG) review and engagement with relevant stakeholders. These will be secured by planning condition." Members were also provided with the proposed draft condition for crowd control. The AR also responded to late objections from the Claimant and explained that Officers were satisfied that it was lawful for the Council to utilise conditions and planning obligations to address crowd control matters. It was explained that the "legal agreement will provide an appropriate mechanism(s) to secure the necessary access rights to enable crowds to move through … the site". In response to the objection that it was necessary to provide "legal binding rights of access across the construction site", it was further explained to Members that "rights of access will be granted on reasonable terms".

33. Members agreed to delegate authority to complete an appropriate s.106 agreement. The SOR further addressed the issue of the crowd control obligations, again in response to the Claimant's representations, and stated: *"4.4 As THFC are not a party to the S106, it cannot enforce any obligations resting on the applicant. The S106 provides for a commercial agreement to be reached between the applicant and THFC through a licence agreement. An absolute obligation to provide access cannot be provided, otherwise the applicant would be at risk of being unable to comply with their S106 obligation if THFC do not agree to the terms of a licence. Therefore a reasonable endeavours clause is considered to be appropriate. If the applicant is found not to have behaved reasonably in negotiating a licence the Council could take*

enforcement action. THFC and Lendlease will have the ability to directly enforce the license terms against each other under contract law." Conditions, 4, 44 and 64 were in due course imposed. I turn against that background to the arguments for the Claimant under this sub-ground. It was said that the Council rightly proceeded on the basis that in order to permit the development it was necessary, by way of a combination of planning conditions and a s.106 planning obligation, to secure appropriate crowd flow arrangements to and from the stadium. The overall assessment in the OR at para.10.42 was that there would be a *"New public route between Tottenham Hotspur's Stadium and White Hart Lane Station, which will provide at least the equivalent queuing provision as the existing but could increase the overall space dedicated to managing crowd flows safely"*. That was one of the identified planning benefits. The AR advised that access rights would be granted on "reasonable terms". Leading Counsel for the Claimant argued that between them the conditions and the s.106 agreement do not do what the Members were told they would achieve. He took me to Schedule 13 of the s.106 agreement which he submitted does not contain a generalised reasonable endeavours clause but a specific one at clause 7.2 as follows: *"The Developer will use all reasonable endeavours as from the date of this Agreement to enter into the Access Licence or Temporary Access Licence (as the case may be) with THFC to be in place from the date it first acquires a legal interest in the Access Land by (a) offering THFC the opportunity to meet twice every month for a period of at least six months prior to the commencement of Plot D; (b) negotiating an Access Licence on the Licence Specified Terms (and for the avoidance of doubt the Developer may, but shall not be required to, agree to any access terms beyond those in the Licence Specified Terms)."*

34. It was argued for the Claimant that the "reasonable endeavours" that the IP is required to use are thereby limited to the steps contained in 7.2(a) and (b). The Licence Specified Terms include a requirement that the Claimant pays a Licence Fee per event but places no cap on what this might be; and that the Claimant provides an indemnity to the IP, again with no limit placed on this. Both these requirements are said to be new to the Claimant's operation of its stadium. It was also underlined on behalf of the Claimant that the "reasonable endeavours" relate to the IP's obligation to enter into the Access Licence on the Licence Specified Terms (they do not relate to the reasonableness of the terms themselves) and the IP is not required to enter into an agreement beyond what is set out in the Licence Specified Terms. It was submitted that the IP could specify any licence fee, no matter how exorbitant, and be deemed to have complied with its obligations under clause 7.2. It was also said that the Dispute Resolution clause in the s.106 agreement does not ameliorate this. That is because a failure to enter into an Access Licence with the Claimant, or the IP exploiting the way the s.106 planning obligation is drafted, are not matters caught by that provision.

35. I reject this sub-ground. The Council lawfully decided that the combination of schedule 13 of the s.106 agreement and relevant conditions was sufficient to ensure that satisfactory crowd safety conditions would be achieved during the construction programme and thereafter.

36. I was referred to a number of conditions but I consider Condition 64 is the most relevant. It provides as follows:

> "Crowd control (PRE COMMENCEMENT)

> Prior to the commencement of any Phase south of White Hart Lane (excluding Plot A) an Interim Crowd Flow Management Plan will be submitted to and approved by the Council. Such Plan (to include queue configurations, locations and hoarding / barrier design) will confirm that the interim access and space for visitors to the stadium across the development is no less than the situation as at the date of grant of this planning permission in terms of minimum queue widths, minimum areas for queuing and general queue safety such as tripping hazards and ensuring queue configurations and locations meet the necessary requirements for crowd safety and set out the provisions for engagement between the applicant, the Safety Advisory Group, the Metropolitan Police, the Council's Building Control officers and Tottenham Hotspur Football Club. Prior to the commencement of the last Reserved Matter(s) application for any Phase south of White Hart Lane a Final Crowd Flow Management Plan will be submitted to and approved by the Council. Such Plan (to include queue configurations and locations) will confirm the final access and space for visitors to the stadium across the development is no less than the situation as at the date of grant of this planning permission in terms of minimum queue widths, minimum areas for queuing and general queue safety such as tripping hazards and ensuring queue configurations and locations meet the necessary requirements for crowd safety. Both the Interim Crowd Flow Management Plan and the Final Crowd Flow Management Plan will be consulted upon with the Safety Advisory Group, the Metropolitan Police, the Council's Building Control officers and Tottenham Hotspur Football Club. All measures in the approved plans shall be implemented for the life of the Development.
>
> REASON: In the interests of ensuring the interim and detailed crowd flow scenarios are workable".

37. This is a detailed crowd control condition which applies prior to the commencement of any relevant phase of development and covers the interim and final crowd flow management positions. It embeds detailed consultation with both the Claimant and key security stakeholders. The specified reason for imposing the condition was *"in the interests of ensuring the interim and detailed crowd flow scenarios <u>are workable</u>"* (my emphasis). It is explicit that it concerns the granting of actual (not theoretical) access to those visitors to the stadium who will cross the IP's development.

38. On the evidence before me, it is clear that in satisfying itself that it was appropriate to grant planning permission, the Council reviewed the material on crowd safety submitted by the IP and the criticisms of it put forward by the Claimant; and it sought expert advice from an independent expert. It concluded that the central issues relating to crowd safety could be resolved through the various mechanisms secured under the

s.106 agreement and through the conditions (most importantly Condition 64). In my judgment, the Council was not legally required to impose absolute obligations on the IP, as the Claimant had argued. Rather, it lawfully provided an overall mechanism whereby the key stakeholders would work together acting reasonably and consulting key stakeholders, including the police.

39. I have noted in my summary above that Members were made aware that the Claimant considered that absolute obligations were required. Further, its criticisms of the (then draft) s.106 obligations were before Members. They were aware that rights of access would be granted *"on reasonable terms"* and therefore that the obligations were not absolute. The SOR expressly recorded (in response to the criticisms made by the Claimant's Solicitors of the mechanism to address crowd control issues) that the Council considered that the terms set out in the s.106 agreement were adequate to provide a framework to agree more detailed matters through a licence and pursuant to conditions. The agreement and conditions, going hand in hand, were assessed to be an appropriate way of dealing with that matter.

40. The Claimant contends that the conditions were not an adequate safeguard because they could be approved even if access is not secured on reasonable terms. As I understand their case, this is the foundation of its argument that the conditions and the s.106 agreement do not do what the Members were told they would. I reject this as wholly unreal. In my judgment, the combined effect of the s.106 agreement and Condition 64 ensures that safeguards exist which will enable arrangements for crowd safety to be in place (and be capable of being implemented) at each stage of the construction. If satisfactory arrangements have not been secured under the s.106 agreement, the Council would be entitled to refuse to grant approval under Condition 64 on the grounds that the arrangements are not workable (given that the primary purpose of Condition 64 is to ensure before each relevant phase that there will be satisfactory and <u>workable</u> arrangements for crowd flow).

41. The Council does not assert that the Dispute Resolution clause can directly resolve any dispute between the Claimant and the IP. The s.106 agreement and conditions are designed to enable the Claimant and the IP to cooperate and work together to ensure that users of the stadium can satisfactorily access it at all stages of the construction programme. If there were to be an *impasse* because the Claimant cannot agree terms with the IP then this would affect whether the Council could lawfully approve conditions for crowd safety arrangements. The Council would be open to challenge if it were to approve arrangements which appeared satisfactory on paper but were not workable because no actual access had been granted. Further, the IP would have a right of appeal to the planning inspectorate if approval was not given. I accept that the Claimant would not have such a remedy but it could bring a judicial review if no arrangements were in place and an approval of conditions was granted. Without expressing any final conclusions as to the scope of Condition 64, I find it hard to see how approval could be given in relation to it if licence terms or some form of access and crowd safety regime had not been agreed with the Claimant. Indeed, I did not understand Leading Counsel for the Council to disagree with this point when I put it to him. Leading Counsel for the IP took the same position but he did tentatively suggest that a form of licence for the public might be a solution if access terms could not be reached with the Claimant.

42. The Council is right in my judgment to submit that neither party has the "whip hand", but the combination of the s.106 agreement and conditions provide a workable framework which does not have an unreasonable impact on the Claimant. Both parties have negotiating power and it was appropriate for the Council to leave it to them as responsible commercial actors to come to a licence resolution. Indeed, that would seem to be a more responsible course than dictating or prescribing terms to those who are best placed to identify commercial terms and who both would wish to ensure safe access and crowd control in relation to match and other event days. It is an appropriate and justifiable course for a planning authority to proceed on the basis that socially and commercially responsible actors such as the Claimant and the IP will behave reasonably in seeking to ensure access arrangements and crowd safety. As to the negotiating power enjoyed by the Claimant I note that under the terms of Condition 64, the IP cannot even start the first phase of development work south of White Hart Lane (except for Plot A) without satisfying the Council that actual (not theoretical) access will be provided as part of a package of crowd safety. That gives the IP a strong incentive to come to the table with speed and to act reasonably. There is nothing in the material before me to indicate that they have in fact acted unreasonably.

43. Leading Counsel for the IP was right to submit that the Claimant's submissions under this ground amount to a hypercritical approach as deprecated in Mansell. When read fairly and as a whole, it is plain that the OR and the AR made clear to Members that securing at least equivalent queuing conditions as presently exist would require rights of access to be granted to the Claimant, such rights to be granted on reasonable terms. The advice to Members enabled them to reach a planning judgment whether the proposed arrangements for securing crowd control for the Claimant's operations were reasonably capable of being provided.

44. In my judgment, the Council acted lawfully in putting in place a mechanism which encouraged the Claimant and the IP to cooperate together in relation to access and crowd control. Members were not misled. Ground 2A is dismissed.

IV. Ground 2B: The Agent of Change Principle

45. The Agent of Change Principle ("the Principle"), as expressed in the NPPF provides as follows:

> "187. Planning policies and decisions should ensure that new development can be integrated effectively with existing businesses and community facilities (such as ... sports clubs). Existing businesses and facilities should not have unreasonable restrictions placed on them as a result of development permitted after they were established. Where the operation of an existing business or community facility could have a significant adverse effect on new development (including changes of use) in its vicinity, the applicant (or 'agent of change') should be required to provide suitable mitigation before the development has been completed."

46. In summary, the Claimant's complaint under this sub-ground is that the Council at no point actually carried out an assessment of the impacts upon it that would arise from the new crowd flow arrangements. Accordingly, it is argued that the Council failed to have regard to a material consideration (the Principle) or unlawfully interpreted what the policy requires. The Claimant submits that the Principle was not addressed in the OR and was first addressed in the AR which stated: "*The Council's approach to assessing the impact on Crowdflow satisfies the agent of change principle by ensuring that the existing queuing area will be available during and after the construction of the development. There are also significant mitigations in the Conditions and Planning Obligations to ensure there are no adverse effects on the existing stadium operations*."

47. The Claimant argues that the consideration of whether there would be unreasonable restrictions is not simply a question of queuing area. There were other potential impacts that should have been considered, including: the impact of the changes on its ability to control its environment in accordance with its "Zone Ex" responsibilities (this concerns safe management of crowds coming to and leaving the stadium); the cost to the Claimant of employing extra security staff, additional signage and / or barriers, or loss of revenue caused by increased queuing or disruption on event days; the potential impact on the operation of the stadium in the event that the proposed access is never provided pursuant to the s.106 agreement or the operation of the stadium is in any way limited due to crowd safety issues arising from the new arrangements; and the payment of an unspecified fee per event, and a requirement for indemnities and public liability insurance across third party land.

48. I reject this sub-ground. The judgment of the Council was that the planning permission would not impose unreasonable restrictions on the Claimant's operations. Rather, it secured an appropriate mechanism to ensure that the stadium's operations would be sustainable when all parties worked together and acted reasonably whilst consulting key stakeholders. That was plainly a lawful approach to adopt and Members had sufficient information upon which to make that judgment, and to delegate the final decision to officers.

49. As to the sub-points which I have summarised at [47] above:

    (1) The arrangements for queuing were secured by condition. Part of what will be assessed when the detail is worked out is to ensure that the arrangements are satisfactory in all material respects and workable. There is no evidential basis for proceeding on the assumption that there would be unreasonable impacts on the Claimant. The thrust of the arrangements was to ensure that the access to and from the stadium would be satisfactory.
    (2) No evidence on cost was put before the Council. The planning permission sought to ensure that reasonable arrangements were secured. The Council was not required to guarantee (by the Principle or otherwise) that such arrangements were at no additional cost to the Claimant.
    (3) The Council properly proceeded on the basis that reasonable access would be granted. If it were not, then the approvals under the relevant conditions would not be granted because arrangements would not be workable.
    (4) The fee is blank in the specimen licence agreement and is a matter for discussion between the parties. However, if the Claimant has a reasonable

basis for asserting that unreasonable fees are being demanded by the IP, then any failure to reach agreement would impact on whether approvals would be granted under the conditions (because proposed arrangements would not be workable: see Ground 2A above). That would also apply to additional unjustifiable expenses sought to be imposed on the Claimant.

50. In my judgment, the Council was lawfully satisfied that the planning permission created a framework which would ensure that the access to the stadium (which was a key planning consideration) would be satisfactorily achieved without unreasonable impact on the Claimant. I also find that it was lawfully satisfied that the combination of the s.106 agreement and the conditions would adequately safeguard its interests and that the grant of consent was therefore compatible with the Principle. The Principle does not demand that there be no impact upon existing businesses caused by a new development but requires a judgment as to whether they will be subjected to "unreasonable restrictions". There is no proper basis to impugn, in public law terms, the Council's judgment in this regard.

V. Conclusion

51. The claim is dismissed.