Neutral Citation Number: [2013] EWHC 55 (Admin)

Case No: CO/10467/2012

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 January 2013

Before :

MR JUSTICE LINDBLOM

- -

Between :

The Queen (on the application of TWS)	**Claimant**
- and -	
Manchester City Council	**Defendant**
- and -	
FC United Limited	**Interested Party**

- -
- -

Hugh Richards (instructed by Richard Buxton solicitors) for the **Claimant**
Richard Drabble QC (instructed by the Solicitor for Manchester City Council**)** for the **Defendant**
Sasha White (instructed by Cobbetts LLP) for the **Interested Party**

Hearing dates: 18 and 19 December 2012

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Judgment Approved by the court for handing down (subject to editorial corrections)

Mr Justice Lindblom:

Introduction

1. The central question in this claim for judicial review is whether the planning permission granted by Manchester City Council in July 2012 for the development of a football stadium at Moston is unlawful.

Background

2. In 2005 a new football club, FC United, was established in Manchester. Owned and run by its members as a non-profit organization, it is constituted as a community benefit society and regards itself as a "community-based" club. It plays in the Northern Premier League Division, but aims to go higher than that. Its membership has now grown to about 3,300. At present it is sharing Bury FC's ground at Gigg Lane. It has twice sought and obtained planning permission for a stadium of its own, and other facilities: first, in 2010, on land at Ten Acres Lane in Newton Heath, and then, after that project came to nothing, on the Ronald Johnson playing fields at Lightbowne Road in Moston. The site in Moston is owned by the City Council. Since 2005 it has been leased to Moston Juniors Football Club. But the City Council has agreed to the surrender of that lease and the granting of a new one, for 125 years, to FC United, provided that planning permission for the development is granted. The proposals were, however, strongly opposed by many local residents. The claimant is one of those residents, a member of the Residents United Residents Association ("RURA"), which made an objection to FC United's application; she also objected in her own right. On 6 July 2012, the City Council granted planning permission for the development of a sports stadium with capacity for about 5,000 spectators, a clubhouse, sports pitches, car parking and landscaping. The legal validity of that permission is now challenged by the claimant.

The claim

3. The claimant lodged her claim for judicial review on 28 September 2012. Now much refined, it raises two main complaints: first, that the City Council ought to have required FC United to prepare an environmental statement for its scheme, under the EIA directive and the domestic statutory provisions in the Town and Country Planning (Environmental Impact Assessment) Regulations 1999 (S.I. 1999/293) and their successors (in S.I. 2011/1824); and secondly, that the City Council erred in law by failing to restrict the use of the development more than it did in the conditions it put on the planning permission. Other grounds were also pleaded in the claim form, but, as I shall explain, they are no longer pursued as a basis for quashing the permission. I should add this. Much as the claimant might wish the City Council's decisions to be reversed on their merits, this is not something a judge can do on an application for judicial review. The court must remember that, and so must the parties.

4. In accordance with an order made by Hickinbottom J. on 6 November 2012, the case came before me at a rolled-up hearing of the application for permission to apply for judicial review and the claim itself if permission were granted. The claimant had been anonymized by Collins J.'s order of 1 October 2012. Neither the City Council nor FC United had opposed that order, and I saw no reason to disturb it.

The facts

The site

5. The Moston site extends to about 5.2 hectares, within an area of some 30 hectares of open space. It is laid out as grass football pitches, which are used by Moston Juniors Football Club. It is bounded on the north by Broadhurst Park and St. Mary's Church of England Primary School, on the east by residential properties including Sydney Jones Court on St. Mary's Road, on the south by the Broadhurst Clough open space, and on the west by Lightbowne Road and the Broadhurst Clough playing fields.

The City Council's screening opinion

6. On 19 April 2011 FC United's planning consultants, Ludlam Associates, submitted to the City Council a request for a screening opinion, under regulation 5(1) of the EIA regulations. The letter in which they made the request said that the "new facility" would "[comprise] a stadium with a capacity of around 5,000 with 500 to 700 seats", that it would "[provide] covered areas with excellent acoustic criteria for match days (both internally for match day experience and externally to minimise nuisance to neighbours)", and that it would "[provide] a club house with community rooms", "[include] a full sized 3G artificial football pitch", and "[integration] of the existing full size grass pitch". Elaborating on the "characteristics of the development", Ludlam Associates said that although the area of the site fell "within the EIA threshold in terms of its overall size" the new development "would not give rise to any significant environmental impacts." They said that "[the] acoustic performance of the facility will be a vital ingredient to the design of the stadium, maximising the experience inside the ground, whilst minimising the disruption and interference for local residents." They emphasized that the site was not located in an "environmentally sensitive area". And they went on to say that, for the reasons they had set out, the development would "not give rise to any significant environmental effects" and therefore that they did not consider an EIA was required.

7. On 9 May 2011 the City Council issued its screening opinion. This stated that the development was considered to be an "urban development project" within paragraph 10b of Schedule 2 to the EIA regulations "by virtue of the size of the … site (5.2 hectares) and the type of proposed development". It was noted that an EIA was required for Schedule 2 development only when the particular project was judged likely to give rise to "significant environmental effects". It was acknowledged that developments exceeding the applicable threshold "should be considered on a case-by-case basis", taking account of the selection criteria in Schedule 3 to the regulations. The Government's advice in Circular 02/99 was mentioned. The screening opinion then addressed in turn "[the] proposed development", the "[characteristics] of the development", the "[location] of the [development]", and the "[characteristics] of [the] potential impact", before finally recording the City Council's conclusion.

8. In the description of the development the main elements of the proposals outlined in the request for a screening opinion were set out, including "[a] stadium with capacity of around 5,000 with 500 to 750 seats". Under the heading "Characteristics of the development" the City Council said that the details of the development provided to it "would appear to indicate a significant intensification of use and activity" at the site, and observed that "acoustic performance and minimising disruption to residents … will be a major component of the proposal".

9. Describing the location of the development, the screening opinion stated:

> "The proposed development will take place on recreational land currently used by Moston [Juniors] Football Club in close proximity to existing residential areas. The site does not lie within a conservation area and there are no listed buildings in the immediate vicinity. The site does not lie close to any designated SSSI or SBI areas and the site is not designated for public open space within the Unitary Development Plan for the City of Manchester.
>
> The proposed use of the site as a sports ground is in accordance with the current use by Moston Juniors Football Club, with the proposals constituting an extension of an existing recreational use with improved facilities for the local community.
>
> The information you have supplied the City Council indicates that the land is not in an environmentally sensitive location or that the site comprises high quality or scarce resources that would be affected by the proposed development.
>
> …".

10. A lengthy section of the screening opinion was devoted to the "[characteristics] of [the] potential impact" of the development. This began with a general statement about the likely effects of the development:

> "The proposed development is likely to give rise to some short and long term impacts although these are likely to be localised in nature. It should also be noted that no transfrontier impact is expected, the magnitude and complexity of the impact would be limited and confined to the local area, and the probability of the impact is predictable and localised and can be mitigated."

The screening opinion then referred to the "[short]-term impacts" of the development, "related to construction activity", which, it said, "will not give rise to significant environmental effects". It considered the effects of traffic associated with the development, noise generated by it, its visual impact, its ecological effects, and its "socio/economic impact":

> "The impact on traffic [in] the area by the current proposal would be covered within a Transport Assessment and Green Travel Plan required for submission with the planning application. This will include a very detailed assessment of the traffic and car parking impact of the development on the surrounding area. It is acknowledged that the development will create additional vehicular movements and car parking within this area, however this will be controlled through carefully considered management by the Football Club. A detailed assessment of these issues will be completed as part of the planning application process and therefore it is not considered that any impact would be such to warrant the submission of an EIA, as this is likely to be of local significance only.
>
> It is considered the development will lead to some additional noise as this would be a more intensive recreational use than currently operated on site. This will mainly be from the general comings and goings around the site when a match is held at the facility. There will be noise generated from within the main stadium arising from crowd noise and amplification music [sic], and from the two adjacent multi use pitches. Although recognised as an issue, this is likely to be of a localised nature and not widespread. Acoustic mitigation measures will be applied around the site and the club house building will be acoustically insulated to ensure a limited breakout of noise. Noise and disturbance will be considered through the application and a fully detailed noise assessment will be required with the submission of the planning application. Therefore, it is not considered that any impact would be such as to warrant the submission of an EIA.
>
> The development would have a visual impact on the area, most notably through the erection of a stadium of height and mass. Notwithstanding this, it is not considered that the proposal would require an EIA on the grounds of visual impact. As the proposal involves a 5,000 capacity stadium, the size of the built form will not be significant. Visual impact would be limited to the surrounding area. … Given the context of the site and the relationship to the nearest residential

> properties, it is not considered that any impact would be such as to warrant the submission of an EIA.
>
> Due to the site being used as a sports ground for a number of years, with small scale buildings, football pitches and boundary fencing, there has been little potential for local flora and fauna to colonise the site. There may be an ecological value to the site from the possible habitation of different species, however these can be protected by the introduction of new planting that will encourage future habitation. These issues can be addressed through the planning application and[,] therefore, it is not anticipated that the proposal would require an EIA on ecological grounds, as the impact is not likely to be significant.
>
> In addition to the areas used by Moston Juniors, the site is currently used by the general public for dog walking, recreation and access to nearby open spaces and parks. It is acknowledged that this will result in a socio/economic impact from the development, however a PPG17 statement will be required with the submission of the planning application and this impact can be assessed at this stage. Therefore, it is not anticipated that the proposal would require an EIA on these grounds, as the impact is not likely to be significant."

The conclusions expressed in those paragraphs are followed with these observations about the likely effects of the development:

> "In addition to the above, no transfrontier impact is expected, the magnitude and complexity of the impact would be limited and confined to the local area, and is predictable. The probability of the impact is predictable and localized and can be mitigated in terms of appropriate conditions."

The screening opinion then stated:

> "You have indicated in your letter dated April 2011 that any planning application will be supported by a number of documents as required by the local authority in order to address and consider amongst other things any environmental considerations. The local planning authority is willing to discuss the range and type of documents it would expect to accompany any submitted planning application in order to identify any mitigation measures that may be required."

11. In the "Conclusion" to the screening opinion the City Council said this:

> "The proposed development is considered to constitute a Schedule 2 10b) 'Urban Development Projects' scheme. However, following consideration of the proposed development it would not take place in an environmentally sensitive location or, following appraisal against the EIA guidance selection criteria within Schedule 3, give rise to significant environmental effects.
>
> Taking into account the submitted information and the EIA guidance thresholds it is Manchester City Council's formal opinion that an EIA is not required to support the proposed development.
>
> …".

12. In her witness statement of 27 November 2012 the City Council's Head of Planning, Ms Julie Roscoe, describes what was done when the development was screened (in paragraphs 9 to 14). In paragraphs 10 and 11 she says this:

> "10. The [claimant] asserts that the [City] Council's screening opinion is unlawful because it failed to take into account the magnitude of effects arising from up to 50 matches per year at full capacity … . The officers determining the application knew of the likely frequency of use as a result of the Ten Acres Lane application and knew of the full capacity of the stadium from both the Ten Acres Lane application and the request for screening … . The frequency of use and full capacity of the stadium was taken into account in forming the view of the

> magnitude of the effect of the development and in concluding that there was no likely significant effect on the environment. … .
>
> 11. The [claimant] asserts that the [City] Council's screening opinion is unlawful because it failed to consider the use of the proposed development by users other than [FC United]. … However, the [City] Council did take community use into account in coming to its screening opinion. The development is described [as] "a new facility for FC United and community use" in the screening opinion which also acknowledges that the proposal is "an extension of an existing recreational use with improved facilities for the local community".

13. In the officers' report on the Ten Acres Lane application, which went to the City Council's Planning and Highways Committee on 25 November 2010, the proposals had been described (on page 2) as being "to provide a new home for FC United football club for approximately 30-50 days a year" and "a community facility for over 300 days a year". In the section of that report that dealt with "Noise and Disturbance" it had been noted that "in any one season (August to May) … FC United only have approximately 30-50 games that may be held at the stadium and therefore the use is fairly infrequent".

The application for planning permission

14. On 7 July 2011 Ludlam Associates submitted FC United's application for planning permission. In the application form, in the description of the development in box 3, the proposed stadium was stated to have a capacity of "circa [5,000]", and in box 10 the total number of car parking spaces proposed was stated to be 160. Nothing was said about the number of days on which the stadium would be used each year. In box 20, "Hours of Opening", it was indicated that the "hours of opening for each non-residential use proposed" was "Not Known".

15. In the Planning Statement submitted in support of the application it was stated (on page 10) that "[the] proposal is to provide a new home for FC United Football Club for approximately 30-50 days a year; however, it will provide a community facility for over 300 days a year …"; (on page 52) that FC United was "willing to accept conditions" committing it to managing traffic and car parking in and around the site, and, among other things, and that it would guarantee that "a maximum of 40% of supporters" would travel to the stadium by car "as their main mode of transport", the aim being that "a maximum of 2,000 vehicles would be generated by the stadium on match days"; and (ibid.), under the heading "Noise and Disturbance":

> "… A full noise assessment report has also been submitted with this application. It is acknowledged that this development will lead to additional noise from this site, as the proposal is for a football stadium use with associated community practice pitches. This will mainly be from the general coming and goings around the site when a match is held at the facility and from crowd noise and the ground tannoy. Although this is recognised as an issue, this is likely to be of a localised nature and not widespread. It has been confirmed that in any one season (August to May), FC United only have approximately 30-50 games that may be held at the stadium and therefore the use is fairly infrequent. Generally, football matches are held on Saturday/Sunday afternoons or on … week evenings between 7pm and 10 pm. Therefore, there should not be significant disturbance very early in the morning or late at night during unsociable hours."

The "noise assessment report" referred to there was the first of three produced by FC United's acoustic consultants, AEC, and was dated 16 May 2011. Under the heading "Residential Amenity", the Planning Statement acknowledged (on page 52) that the development would "have some impact on the nearby residential properties, particularly those on St. Mary's Road closest to the site". It said that this consideration had "been one of the most important

influences on the design of [the] proposals". The site was already being used as football pitches for Moston Juniors FC. But to ensure that "the amount of development and activity on the site" would not have "an adverse effect on the amenity of residents" three things had been done (page 53). First, the "layout and design of the proposals, directing development and activity towards the northern and eastern parts of the site, and away from St. Mary's Road [would] reduce any impact on these properties". Secondly, access for vehicles and the provision of parking would be "directed to Lightbowne Road and off-site parking facilities within walking distance" and "[match] day activity [would] be monitored and managed by FC United to ensure residents are not inconvenienced". And thirdly:

> "The noise impact of the use has also been carefully analysed and measures put in place to ensure this remains within acceptable levels, which will be monitored by conditions. FC United are committed to being good neighbours and will engage in regular consultation and monitoring of their activities with local residents to ensure that is achieved."

In the section of the Planning Statement (ibid.) headed "Match Management/Crime Impact" it stated that FC United had "experience of match management having played at Bury FC's ground since 2005, to similar sized crowds and in a predominantly residential area", which had "demonstrated their ability to effectively minimise any adverse impact on neighbouring residents".

16. In the Design and Access Statement (on page 8) the intention that the site would be "used as a football stadium for approximately 30-50 days a year, but will be a community facility for over 300 days a year" was repeated.

The Transport Assessment report

17. The Transport Assessment report prepared for FC United by its transport consultants in July 2011 described the proposed development in section 4. In paragraph 4.15 it said that sufficient car parking "in addition to that provided on site" would be available to meet the demand for it "on the 28 or so occasions per year that the Club will play at home". In paragraph 4.20 the consultants stated that the "conference and event facilities for between 250 and 400 people" in the "stadium complex" would be used either "outside match days or … by supporters prior to or after a game", and that there would "therefore be no instances where matches and either conferences or other organised events coincide".

The City Council's handling of the application

18. The Head of Planning explains in her witness statement (in paragraphs 16 to 29) what the City Council did after it received FC United's application.

19. On 7 July 2011 the City Council sent letters to local residents notifying them of the submission of the application and inviting their representations.

20. On 16 August 2011 the City Council received from RURA a report that had been prepared by Azymuth Acoustics, dated 11 August 2011. In their report Azymuth Acoustics reviewed the work that AEC had done by that stage, as described in their report of 16 May 2011. They disagreed with AEC's analysis and recommendations in several respects. As to the use of the stadium, in the concluding section of their report (on page 7), they referred to the estimated receptor levels at Sydney Jones Court and the housing on St Mary's Road and the predicted

levels of noise in those locations. And they recommended "a receptor limit of 47 dB LAeq, 15 min at the nearest residences due to noise from the stadium during evening periods", which they said "would likely be significantly exceeded … during well attended matches". Therefore, they said, their assessment "would challenge the AEC conclusion that "noise levels will meet the proposed limits and at worst will not exceed ambient noise levels"". As to the noise predicted from the use of the proposed "floodlit pitches", Azymuth Acoustics took a rating level of 57dB (16dB above the measured evening background noise level at Location B of 41dB L_{A90}) and noted that in this situation BS 4142:1997 would suggest that "complaints are likely".

21. On 25 August 2011 one of the City Council's environmental health officers, its Environmental Protection Specialist, discussed the proposals with AEC and asked for more work to be done on some aspects of the noise assessment.

22. On 5 September 2011 the claimant objected to the proposals, raising her concerns about the effects the development and its use would have on her and others' living conditions.

23. On 9 September 2011 the defendant reviewed its screening opinion of 9 May 2011 in the light of the application for planning permission, and concluded that its decision not to require an environmental statement should stand.

24. On 14 September 2011 the City Council's Environmental Protection Specialist met AEC and Ludlam Associates to discuss the points about the noise assessment that he had raised on 25 August 2011.

25. On 20 September 2011 one of the City Council's planning officers wrote to Ludlam Associates, seeking "further clarification or information" on a number of matters, including details of the fence that was to be put up as an acoustic barrier behind the Sydney Jones Court Residential Care Home, the frequency of use of the proposed stadium, and the "timing of [the] use of [the] 3G floodlit pitch."

26. On 23 September 2011 a revised noise assessment was produced by AEC, and this was submitted to the City Council on 26 September 2011.

27. On 29 September 2011 the City Council's planning and environmental health officers met to discuss the revised noise assessment. They agreed that a list of outstanding matters should be drawn up by the Environmental Protection Specialist.

28. On 3 October 2011 the Environmental Protection Specialist wrote to the planning officer, seeking clarity on several points.

29. On 5 October 2011 the application for planning permission was amended by the inclusion of a proposal for an acoustic fence to the rear of Sydney Jones Court. On the same day AEC produced a further report, revising the version dated 23 September 2011, which itself was a revision of the one dated 16 May 2011. The City Council duly notified local residents of the changes to the proposals and allowed more time for representations to be made.

AEC's final Noise Assessment report

30. The final Noise Assessment report prepared by AEC, which is dated 5 October 2011, began with an explanation of the work they had done. In section 1 of the report they referred to their discussions with the planning and environmental health officers of the City Council, and the

four "potential issues" that had been identified, namely "[noise] from use of the stadium (crowd activity) and the PA system", "[noise] from use of the developed floodlit Astro turf pitch, which can be split into three, "[noise] from the externally mounted equipment (plant) including that serving the clubhouse", and "[noise] from late night use of the function room in the clubhouse" (paragraph 1.2). They went on to describe the work they had done. They said that "[in] order to assess the potential noise impact of the developed site on the nearest noise sensitive properties" they had "proposed monitoring at the most noise sensitive periods during which the above activities could occur" (paragraph 1.3). They said that "[noise] levels due to existing activities on site at the nearest residential properties have been measured on a weekday evening and a Saturday afternoon, and background noise levels were measured on an early Sunday night/early Sunday morning", and that "[in] addition, noise levels at the existing Bury FC stadium during an FC United football match have also been measured, to help inform the proposed development" (paragraph 1.4). And they explained that "[to] assess the potential noise impact of the development, noise from the activities on the developed site have been compared to the existing noise levels and any relevant criteria stipulated in existing standards, and where deemed necessary, suitable mitigation measures have been provided" (paragraph 1.5).

31. The location of the site was described in section 2 of the report, where it was noted that there did not appear to be any "particularly noise sensitive buildings, in the immediate vicinity, to the north of the proposed site" (paragraph 2.2); that "[to] the southeast of the site is St. Mary's Road, a busy through road, beyond which is a housing estate, a railway line and New Moston", and "[to] the south and southwest of the site are the existing pitches (the largest of which is to be developed into the Astroturf pitch(es)) and residential properties on Sydney Jones Court" (paragraph 2.3); that "[the] front façade of the nearest houses on St Mary's Road to the stadium are around 48m … from the East Stand (home end) at the eastern end of the proposed main pitch, around 100m from the proposed Clubhouse, and around 75m from the nearest proposed floodlit Astroturf pitch" (paragraph 2.4); and that "[the] nearest residential properties to the proposed floodlit Astroturf pitch(es) would be the rear façades of the sheltered houses on Sydney Jones Court which are approximately 15m from the edge of the nearest part of the existing community pitches, 15m from the nearest floodlit Astroturf pitch … and around 75m to the South Stand of the Stadium and Clubhouse" (paragraph 2.5). AEC referred to the "Proposed Usage" of the development in paragraph 2.7 of the report:

> "… [The] site will comprise a Main Stadium and pitch, with a club house, and an Astroturf Pitch (which can be split into three pitches) along with continued usage of the existing 2 grass pitches. … It is expected that the developed centre would want to operate at the following times:
>
> | | |
> |---|---|
> | Stadium Pitch | 1200-1800h Saturday/Sunday
(Up to 20 times a year) |
> | Stadium Pitch | 1800-2200h Midweek
(Up to 10 times a year) |
> | Floodlit Astroturf Pitch
Behind Sydney Jones Court | 0900-2200h All week
(with any restrictions deemed necessary) |
> | Clubhouse | 0900-0000h All week". |

32. In section 3 AEC described the relevant noise criteria, which had been discussed with the City Council's environmental health officers. Although it had been agreed that no specific standards applied to the noise likely to be created by the uses proposed, several standards were seen as relevant (paragraph 3.2). Two passages in PPG 24 "Planning and Noise" were referred to: paragraph 1, which said that the purpose of the guidance was to "provides advice on how the planning system can be used to minimise the adverse impact of noise without placing

unreasonable restrictions on development or adding unduly to the costs and administrative burdens of business …", and paragraph 22 in Annex 3, which referred to noise from recreational and sporting activities:

> "For these activities (which include open air pop concerts), the local planning authority will have to take account of how frequently the noise will be generated and how disturbing it will be, and balance the enjoyment of the participants against nuisance to other people. Partially open buildings such as stadia may not be in frequent use. Depending on local circumstances and public opinion, local planning authorities may consider it reasonable to permit higher noise emission levels than they would from industrial development, subject to a limit on hours of use, and the control of noise emissions (including public address systems) during unsocial hours. …".

Paragraph 3.21, in the section of the report summarizing AEC's suggested noise guidance levels for the stadium and AstroTurf pitches, indicated for "Noise from [the] Stadium", as a basis for the appropriate standards, an assumption "that only up to 30 matches a year are to be carried out at the Stadium …". AEC went on to suggest that two noise limits might be appropriate, namely an "[activity] noise level limit of no greater than 55dBLAeq at the nearest residential property during the day (0900-2300hrs)" and a "[typical] maximum noise level of 67dBLA1 … at the nearest residential property during [the] day."

33. In paragraph 4.1 of the report AEC explained that the assessment of the likely impacts of noise from the proposed stadium had been based on noise data gathered at Bury FC's stadium when FC United played Nantwich FC on 25 August 2010 (paragraph 4.1).

34. In section 5 it was noted (in paragraph 5.4) that FC United's business plan was based on an increase from 2,500 fans attending a match in the stadium in "Year 1" to 3,300 in "Year 5", and (in paragraph 5.2) that "at full capacity the stadium could eventually hold around [5,000] people".

35. Assessing the proposals in section 6 of the report, AEC said this about the "Noise from Stadium Pitch Use and Crowd":

> "6.1 Calculations have shown that, based on the measured noise data, and assuming that the stadium stand walls/roof are continuous and solid (having a mass of at least 10kg/m2), the noise levels in the gardens at ground floor at the front of the properties on St. Mary's Road would typically be around 54[dB]LAeq, 15 mins, and thus would just meet the proposed noise limits. However, based on the business plan and stadium capacity, this noise level could increase to 58dBLAeq. However, it should be noted that the existing traffic noise level is around 10dB above 55dBLAeq, 15 mins, at all periods, and thus this exceedance should not be significant.
>
> 6.2 Calculations have also shown that … the noise levels from the stadium at the rear of the properties … on Sydney Jones Court, at first floor level would typically be around 53dBLAeq, 15 mins … (increasing to around 57dBLAeq) and thus would initially meet, and eventually only marginally … exceed the proposed noise limits, which should not be significant."

36. In section 7 of the report AEC stated their conclusions:

> "…
>
> 7.3 AEC's calculations also show that with the Stadium use – noise levels will initially just meet, and eventually just exceed, the proposed limits of 55dBLAeq at the nearest residential properties on St. Mary's Road and Sydney Jones Court, and at worst will not exceed existing ambient noise levels.

> 7.4 AEC's calculations also show that without any barrier, and with all floodlit pitches operating, the ambient noise from the Astroturf pitches may exceed AEC's proposed noise limit of 50dBLAeq for the daytime period, and 45dBLAeq for the evening period. However, the above also shows that if a barrier having a minimum height of 3 m were to be provided, and assuming the nearest pitch to the rear of the properties on Sydney Jones Court were not used after 2000h, then the noise from the Astroturf pitches … would not only meet the daytime noise limit, but would also just meet the evening requirement.
>
> …
>
> 7.7 With regards to the Clubhouse/function suite – provided the music noise level in the function room [is] limited to around 92dBLAmax, and the spectrum levels provided in the report, via the use of a noise limiter device, the external envelope can be designed to control noise breakout, particularly during late evening functions, but an alternative means of ventilation will need to be provided. Any doors leading from the Function Rooms to outside should be lobbied, and kept shut when not in use.
>
> 7.8 Plant noise for the Stadium/Clubhouse – can easily and effectively [be] controlled to meet appropriate limits.
>
> 7.9 Road traffic/Parking – Noise impact from these activities should be insignificant compared to existing activities."

The Environmental Protection Specialist's comments

37. On 14 October 2011 the City Council's Environmental Protection Specialist wrote again to the planning officer. He now offered his views on the proposed development in the light of AEC's report of 5 October 2011 and Azymuth Associates' of 11 August 2011, and having made measurements of his own both at Bury FC's stadium during matches played there and at the site of the proposed development. As to the noise from the stadium he said that FC United had "detailed that around 20 Saturday/Sunday matches and 10 midweek evening matches will take place annually". He added that "[the] number of events, the period of event, and the character of the noise are important factors to be considered". And he went on to say:

> "The applicant's acoustician has predicted that the noise levels at the façade of the closest residential [properties] on St Mary's Road during matches will be below the existing equivalent continuous (A-weighted) sound level (LAeq). … Assuming the calculated predictions are correct, and with regard to the measurements recorded then the prediction would be correct during Saturday/Sunday matches.
>
> However, it should be recognised that during match events, the actual effect of the noise levels experienced at the residential façade would be, at times[,] hidden below the general traffic noise, and then audible above traffic noise as the number … and variety of vehicles changes over a short period of time.
>
> Further to this[,] short periods of maximum noise levels … (scored goals, missed goals etc) produced by the spectators would clearly rise above the general noise level at the façade of the residential [properties]. Noise levels experienced in these homes, windows open, would therefore produce a 10-15 dB lower than the outside noises, a mixture of traffic and sometimes stadium noise. Closed windows would substantially reduce both external noises and provide an internal level accepted as reasonable. Brief maximum noise levels produced by road traffic and stadium noise may [be] audible within homes with windows closed. Locations further away from the

> stadium activity would experience a lower level of noise from the stadium but audible at times outside of their premises.
>
> The impact of noise during match events upon some façades of Sydney Jones [Court] would be greater because the existing measured LAeq values at the rear of Sydney Jones Court would be generally just below that of the predicted stadium noise, and therefore stadium noise would be potentially greater.
>
> This would be particularly noticeable during evening matches where the measured existing levels fall much lower and therefore stadium noise would be more noticeable at the external façade. Noise levels experienced in these homes, windows open, would therefore produce a 10-15 dB lower than the outside noise, a mixture of traffic and stadium noise. Closed windows would substantially reduce both external noises, particularly stadium noise and provide an internal level accepted as reasonable.
>
> It should be noted that[,] in general, noise surveys would seek to compare the predicted LAeq values of a 'new' noise source to that of the existing background levels (LA90). This methodology provides a level of comfort and protection against disturbance to existing residents, and would be particularly appropriate where the 'new' noise was persistent.
>
> Sound levels form the use of PA systems must be properly controlled and managed to avoid excessive noise levels at adjacent residential premises."

The Environmental Protection Specialist also concluded that the installation of the proposed acoustic barrier would be necessary to reduce the impact of noise from the use of the AstroTurf pitches to an acceptable level. He said:

> "The installation of a 3 metre high, full length acoustic barrier, as detailed by AEC would be necessary to reduce the noise impact to a similar level to that which presently exist during day time. Operation of the closest Astro pitch to Sydney Jones Court should not take place after 20.00hrs, further, this pitch should not be in operation on Bank Holidays and Sundays until after 10.00 hrs. Additionally there must be no possibility of direct impact upon the acoustic barrier during use of the Astro pitches. The Astro pitch would therefore need to be properly fenced in order [to] defend against such direct contact. I would also recommend that such pitch fencing closest to Sydney Jones Court be acoustically designed to reduce ball impact noise to a minimum, e.g. substantial wired fence rather than full plate."

AEC had shown the noise from externally mounted equipment and plant, and from the use of the "function room/clubhouse" could be made acceptable by the imposition of appropriate conditions, respectively limiting plant noise to a level "5 dB below the existing background levels (LA90), in all octaves, and at all times during operation when measured at the nearest residential premises" and noise from the clubhouse to a level "below the existing background levels (LA90) when measured at the façades of the residential premises".

The Head of Environmental Health's response to consultation

38. On 17 October 2011 the City Council's Head of Environmental Health, City Wide Services sent the Head of Planning his formal response to consultation on the planning application, recommending a number of conditions, including conditions to limit the hours of use of the Astroturf pitches and the "Clubhouse/Function room", and to require the acoustic insulation of the "Clubhouse/Function room" and of any "[externally] mounted ancillary plant, equipment and servicing". He did not recommend any conditions to restrict the use of the stadium.

The Head of Planning's report to committee

39. On 27 October 2011 the application went before the Planning and Highways Committee.

40. In her report to the committee the Head of Planning said (in paragraph 12) that the proposals were "to provide a new home for FC United football club approximately 30-50 days a year", but also "a community facility through the use of the [proposed] function rooms within the clubhouse and the laid out community pitches".

41. Reporting the responses to consultation, she reproduced (in paragraphs 63 to 81) the comments of the Environmental Protection Specialist.

42. In paragraph 113 of her report she told the committee about the screening of the proposals under the EIA regulations, saying that the application had been subject to a screening opinion carried out in accordance with the EIA regulations and Circular 02/99, and that the screening opinion issued to FC United on 9 May 2011 "concluded that an Environmental Assessment was not required in this instance as the proposal is unlikely to have a significant effect on the environment."

43. In her advice on "Noise" the Head of Planning told the committee that a substantial number of objections had raised "the issue of noise impacts as a result of the proposed stadium, pitches and synthetic turf pitch" (paragraph 216 of her report). She referred to Azymuth Acoustics report (ibid.) and AEC's "assessment of the potential noise impact of the developed site on the nearest noise sensitive properties" (paragraph 217). She said the City Council's environmental health officers had reviewed the information provided to them and their own acoustic measurements at the application site and at Bury FC's ground, and concurred with the measurements provided by AEC (paragraph 218). She "acknowledged that the … proposals will introduce activities which will increase the perceptible noise environment in the locality of the application site at times when matches are to be played at the stadium and through the use of the community pitches and in particular the 3G pitch" (paragraph 219).

44. The Head of Planning's conclusions on noise from the use of the stadium during "football match events" were that "for both of the nearest most likely noise sensitive premises to the proposed development (residential homes on St Mary's Road and the sheltered homes of Sydney Jones Court) … during match periods at the stadium internal noise levels within these properties with the windows closed would provide a level accepted as reasonable" (paragraph 221); that "the period of these noise impacts will be limited to an estimated total period of approximately 2 hours fifteen minutes (to include pre-match start, the match period and a post match finish period)", noting that AEC's report "suggests that 20 Saturday/Sunday matches and 10 midweek evening matches will take place at the stadium" and that this "appears a reasonable assumption based on previous [years'] fixtures for the Club, although additional games may be played during the off season period" (paragraph 222); and "[after] consideration of the potential noise impacts of the proposed use of the stadium, the frequency, and the duration of events the proposal is considered to be acceptable in terms of noise" and that it was in accordance with the relevant policies of the development plan (paragraph 223). In the following paragraphs of her report (paragraphs 224 to 228) the Head of Planning concluded that the likely effects of noise from the use of the synthetic turf pitches, from equipment and plant, and from the use of the "function room/clubhouse" were all acceptable. And her overall conclusion in this part of the report (in paragraph 229) was this:

> "… that matters relating to noise have been appropriately considered and that the mitigation measures proposed by the applicant and the hours of use of the synthetic pitch recommended by

> the Head of Environmental Health are acceptable. The Head of Environmental Health has confirmed that the noise levels predicted at the noise sensitive receptor premises will be compliant with the guidance provided within PPG24 and would not give rise to a level of disamenity that would warrant refusal of the application. … ."

45. In the section of her report where she considered "Residential Amenity" the Head of Planning said that "the use of the stadium for matches is estimated to be between 30 and 50 times a year and the community pitches will be in use regularly", and that the site "currently contains grass football pitches which operate without restriction on hours …" (paragraph 232). She went on (in paragraph 233) to conclude that "[given] the [proposals'] relationship to surrounding properties, that vehicular access to the proposal is taken from Lightbowne Road, the permeability of the site and the overall intensity of the use of the site" the development was "not considered to be so detrimental to neighbouring occupiers as to warrant a refusal of planning permission subject to the recommendations for conditions relating to hours of use of the pitches, floodlighting and inclusion of [an] acoustic barrier and the event management procedures proposed by the applicant."

46. Having covered all the planning issues raised by the application, the Head of Planning recommended (on page 61 of her report) that the proposals be approved, subject to conditions and a section 106 agreement to provide for use of the site by the community; to require the production, monitoring and review of a travel plan; and to ensure that off-site car parking would be made available. This was her recommendation "for the reasons set out in this report", which she said were summarized in the following three paragraphs:

> "It is acknowledged that this application has generated significant interest and this includes concerns from the local neighbourhood. Having considered all the issues raised, it is believed that the proposals would provide high quality formal recreational facilities on a site which has historically been utilised for recreation both for formal and informal recreation. The facilities have the real potential to enhance sporting provision and enable greater access for the community within Moston and this part of the City.
>
> Whilst there would be some impact arising from the development it is considered that the proposal has been sited to reduce the visual impact on the surrounding residential area. Following careful consideration it is also believed that the proposal along with the inclusion of the proposed mitigation measure will not give rise to unacceptable impacts on adjacent properties either through noise, light or traffic for the reasons set out in this report. The proposal will not impact on European Protected species so as to disturb them within the meaning of the 1994 Regulations.
>
> The proposal is considered to accord with policies H2.2, E2.2, E2.3, E2.4, E2.6, DC22.1, DC26.1, DC26.2, DC26.3, DC22.4 and DC22.5, L1.2 of the adopted Unitary Development Plan for the City of Manchester and national planning policy contained within Planning Policy Statement (PPS1), Planning Policy Statement 9 (PPS9), Planning Policy Guidance 13 (PPG13), Planning Policy Guidance Note 17 (PPG17), Planning Policy Statement 23 (PPS23), Planning Policy Statement 25 (PPS25), and the North West of England Plan – Regional Spatial Strategy to 2021) which are summarised in the body of the report, and there are no material considerations which outweigh the benefits of the proposal."

The decision of the Planning and Highways Committee

47. Following the Head of Planning's recommendation the Planning and Highways Committee resolved that it was minded to approve the application, subject to conditions and the completion of a section 106 agreement.

The Secretary of State's letter of 14 November 2011

48. On 14 November 2011 the Secretary of State rejected the request, made to him in "a number of items of correspondence", that he call in FC United's application for his own decision. In doing so, he said that he was "satisfied that the issues raised do not relate to matters of more than local importance, which would be more appropriately dealt with by him rather than by the local planning authority".

The "EIA Update"

49. On 27 June 2012 the City Council undertook an "EIA Update", revisiting both the initial screening opinion of 9 May 2011 and the review of 9 September 2011. The conclusion was that there had not been "any changes in the locality since the decision of the Planning Committee in its consideration of the application to suggest that the initial opinion of the LPA with regards to the requirement for an EIA has changed".

50. In her witness statement the Head of Planning amplifies this part of the history (in paragraph 14). She says that although "a check" on the need for EIA was made on 9 September 2011 and again on 27 June 2012, "officers in Manchester's Planning Service are trained to keep environmental impacts under review throughout the determination of planning applications in order to ensure that the [City] Council complies with its obligations under [the EIA regulations …] and [the EIA directive]". She adds that "[if] it becomes clear that an application would be likely to have significant effect on the environment, then the [City] Council will review its published screening opinion", and that "[while] the records may be very brief they are intended as notes of activity rather than detailed records of all matters taken into account or reasons for the decisions."

The section 106 agreement of 6 July 2012

51. On 6 July 2012 the City Council and FC United entered into a section 106 agreement. The recital to the agreement stated that the City Council was satisfied that the obligations in the agreement were, among other things, "necessary to make the Development acceptable in planning terms …". In Schedule 4 to the agreement, the "Community Use Provisions" included FC United's covenant (as "Owner" of the site) to comply with the terms of the Partnership Agreement of 9 March 2012 between FC United, Moston and District Sports and Youth Club and the City Council. In clause 2.3 of the Partnership Agreement, relating to "Community Development and Added Value", it had been agreed that "[the] partnership will work for the wider benefit of the local area and communities irrespective of whether they use the site or not". Clause 4.3, relating to the "Community Forum" provided that FC United would "establish a Community Forum which will meet regularly during each year to deal with any problems that might be caused by the running of the site". Part 7 of the Partnership Agreement related to "Facility Use", clause 7.1.2 providing that, under the "Licence Agreement" to be entered into between FC United and the Moston and District Sports and Youth Club, the sports pitches would be made available for certain minimum periods of use, and that the use of the "Stadium Pitch" would be specified "for prestigious games at times to be mutually agreed". Clause 7.2 provided that "[all] other uses of the site will be determined by [FC United] as per its own community, commercial and development needs". Part 10 of the Partnership Agreement provided for "Other Sport Development" on the site.

The planning permission

52. As I have said, the City Council granted planning permission for the development on 6 July 2012. The decision notice describes the "Proposal" as the "Erection of sports stadium (capacity circa [5,000]), club house, sports pitches and associated car parking and landscaping". It states that the development "has been Approved in accordance with the application and plans submitted subject to the condition(s) listed below …".

53. The part of the decision notice that is headed "Reason(s) for decision" contains only the third of the three paragraphs of reasons recommended by the Head of Planning in her report to committee. The other two paragraphs were omitted.

54. 44 conditions were imposed on the permission. I must refer to some of them.

55. Condition 2 states:

> "The development hereby approved shall be carried out in accordance with the following drawings and documents unless otherwise agreed in writing by the City Council as Local Planning Authority …"

There then follows a long list of the relevant drawings, and after that a list of documents, including:

> "The Design and Access Statement, the Planning Statement, …
>
> Noise Assessment prepared by AEC … date stamped as received by the local planning authority on 10th October 2011.
>
> …".

The reason stated for the imposition of that condition was:

> "To ensure that the development is carried out in accordance with the approved plans. Pursuant to policies H2.2, T2.6, T3.1 and T3.7 of the Unitary Development Plan for the City of Manchester."

Condition 6 states:

> "Prior to the commencement of the use hereby approved, a fully detailed Event Management Plan shall be submitted to and approved in writing by the local planning authority. The Event Management Plan shall also include a detailed Traffic Management Plan. The management of Events shall be fully implemented in accordance with the approved strategy, unless otherwise agreed in writing by the City Council as Local Planning Authority."

The reason for the imposition of that condition was:

> "To ensure that there are satisfactory event management procedures in place for the development in order that the development respects the highway network and residential amenity of the area in accordance with Policies H2.2, E1.1, T2.4 and T2.6 of the Unitary Development Plan for the City of Manchester."

Condition 7 states:

> "Prior to the use of the development hereby approved for any large scale non sporting events, full details of the proposed event including the nature, the proposed hours, the expected number of visitors and the proposed car parking arrangements shall be shall be submitted to and approved in writing by the City Council as the Local Planning Authority. The event shall then be operated in accordance with the approved details, unless otherwise agreed in writing with the Local Planning Authority."

The reason stated for that condition was:

> "To ensure that a satisfactory strategy is implemented for the development that respects the highway network and residential amenity of the area in accordance with Policies H2.2, E1.1, T2.4 and T2.6 of the Unitary Development Plan for the City of Manchester."

A number of other conditions were imposed for reasons relating to the safeguarding of the "amenity" or "amenities" of local residents, or the protection of the local environment There are stipulations and restrictions relating to the management of car parking (condition 5), measures to avoid FC United's matches and "other large scale events" coinciding with "Manchester City FC home matches or other large scale events at the Sportcity complex" (condition 8), the approval and implementation of a "Travel Plan Strategy" (condition 10), and the approval and implementation of a "building lighting scheme" (condition 20). Several conditions relate either directly or indirectly to noise. Condition 23 states:

> "Before the use hereby approved commences, the club house shall be acoustically insulated and treated to limit the break out of noise in accordance with the attenuation measures described in AEC's acoustic report dated 5th October 2011 … submitted to the City Council as local planning authority by email on the 6th October 2011. The scheme shall be implemented in full before the use commences or as otherwise agreed in writing by the City Council as local planning authority."

Condition 24 states:

> "Any externally mounted ancillary equipment … shall be acoustically insulated in accordance with a scheme submitted to and approved in writing by the City Council as local planning authority in order to secure a reduction in the level of noise emanating from the site.
>
> Externally mounted ancillary plant, equipment and servicing shall be acoustically treated in accordance with a scheme designed so as to achieve a noise level of 5dB below the existing background (LA90) in each octave band at the nearest noise sensitive location."

Condition 28 states:

> "Prior to any part of the development hereby approved coming into use [the] acoustic fence as indicated on the approved drawings … shall be erected and thereafter retained and maintained to the satisfaction of the local planning authority at all times thereafter."

Condition 33 states:

> "The stadium shall not be used by more than 5,000 spectators at any time."

Condition 37 states:

> "The pitch identified as Community Pitch Number 1 … shall not operate outside of the following hours for each of [the] respective Pitch Zones as identified on the approved drawing:
> - Pitch Zone 1a and Pitch Zone 1b … shall not be used before 09.00hrs and beyond 21.00hrs Monday to Sunday.

> - Pitch Zone 1c … shall not be used before 09.00hrs and beyond 20.00hrs Monday to Saturday and before 10.00hrs and beyond 20.00hrs on Sundays and Bank Holidays."

Condition 38 states:

> "The hours of use of the Clubhouse including the rooms identified as Multi use function room 1, Multi use function room 2 and Multi use function room 3 … on the first floor plan … are:
> Monday to Saturday 0900hrs to 0000hrs
> Sundays and Bank Holidays 0900hrs to 2300hrs".

The resolution of 18 October 2012

56. On 18 October 2012 Mr Richard Paver, the City Treasurer, who had delegated authority to deal with the management of the City Council's interests in land, signed a resolution to the effect that, if the planning permission were implemented and the lease to FC United surrendered, forfeited or terminated so that the City Council acquired the right to occupy or dispose of the land, the City Council would abide by the obligations in the section 106 agreement or would require any new occupier or user of the land to do so.

The section 106 agreement of 19 October 2012

57. On 19 October 2012 the City Council and FC United entered into a second section 106 agreement. In that agreement FC United's covenants, as "Owner", with the City Council, were set out in Schedule 1, which provides:

> "1. …
>
> a. that the use of the Stadium pitch for any purpose except its care, maintenance and repair shall not exceed 50 days in any Football Season [defined in the agreement as meaning "the annual football match season as sanctioned each year by the Football Association Limited of England and Wales"].
>
> b. The Stadium pitch shall not be used outside the hours of 12.00 hours to 18.00 hours on Saturdays and Sundays and 18.00 hours to 22.00 hours on weekdays[.]
>
> c. The Artificial Pitch and the Grass Pitches shall not be used at any time when the Stadium is in use for events attended by the public.
>
> d. The Community Rooms [defined as meaning "the multi-function community room and smaller classroom and club room contained in the club house, and which forms part of the Stadium's south stand"] shall not be used for events attended by the public at any time when the Stadium is in use for events attended by the public, EXCEPT that the Community Rooms may be used in the two hour period immediately before the Commencement of an Event and immediately after the End of [an] Event [defined as meaning "the final whistle of a football match or the end of any other activity held in the Stadium"] by persons attending the site in connection with that event.
>
> e. Before first use of any public address system provided in the Community Rooms, the public address system shall be fitted with a noise limiter, which has first been approved by the [City] Council in writing and which ensures that the maximum noise levels inside the Community Rooms does not exceed the levels set out in Table 5 on page 13 of the AEC Noise Assessment dated 5th October 2011 attached at Appendix 2. Any such public address system limiter shall be kept in working order at all times after fitting."

The deed of variation of 19 December 2012

58. On 19 December 2012, the second day of the hearing, the City Council and FC United entered into a deed of variation. This deed changed one of the provisions of the section 106 agreement of 19 October 2012, leaving that agreement otherwise fully in force. It provided, in its schedule:

> "Clause 1a in Schedule 1 of the Section 106 Agreement shall be deleted and replaced by the following clause:
>
> "a. that the use of the Stadium pitch for any purpose except its care, maintenance and repair shall not exceed 50 days in any one calendar year, that is from 1 January to 31 December.""

The issues for the court

59. There are now three main issues for the court to decide. These are the issues in grounds 1, 3 and 6 of the claim form. They are:

    (1) whether the City Council unlawfully granted planning permission for use of the stadium (i) on an unlimited number of days a year and (ii) at unrestricted times of the day and night (ground 1);
    (2) whether the City Council unlawfully granted the permission without including conditions to ensure that the noise standards and limits suggested by FC United would be met (ground 3); and
    (3) whether the City Council failed to undertake a lawful EIA screening exercise (ground 6).

60. None of the other grounds originally argued in the claim is now said by the claimant to be a basis for quashing the City Council's decision. In ground 8 of the claim the claimant asserted that the City Council gave unlawful summary reasons for issuing the permission. However, if the planning permission survives on all three of the main grounds the claimant contends not for the quashing the permission, but for an order modifying the reasons. In ground 2 of the claim the claimant maintained that the City Council unlawfully granted planning permission allowing the use of the stadium at the same time as the use of the community pitches or the clubhouse, or both. But the claimant has accepted that the section 106 agreement of 19 October 2012 achieves such control. In ground 4 it was submitted that the City Council unlawfully granted a planning permission enabling it to modify the controls imposed by conditions 2, 4, 8, 12, 14, 23 and 32 without a further statutory approval, and in ground 5 that the permission was also unlawful because the City Council could later allow the modification of the approved schemes, details and strategies required under conditions 3, 5, 7, 8 13, 19, 20, 41 and 44 without a statutory process (see the judgment of Ouseley J. in *R (Midcounties Co-operative Limited) v Wyre Forest District Council* [2009] EWHC 964 (Admin) at paragraphs 7, and 66 to 75). The City Council having acknowledged the need to excise the offending words from the conditions, the claimant does not pursue an order to quash the permission on either of those two grounds. Ground 7, which alleged that the City Council unlawfully entered into, and took into account, the section 106 agreement of 6 July 2012, was abandoned in view of the resolution signed by the City Treasurer on 18 October 2012. Before the hearing the parties agreed the relief that could be ordered if the planning permission is not quashed on any of grounds 1, 3 and 6.

61. Neither the City Council nor FC United persisted in their contention that the permission for the claim to proceed should be denied because of the claimant's delay.

Ground 1

Submissions for the claimant

62. For the claimant Mr Hugh Richards submitted that the City Council ought to have expressly restricted the use of the stadium by limiting the number of days in a year on which it can be used for football matches or other large scale events, and the hours of such use – in particular, the time at which the use must cease at night. This omission, he said, is unlawful either because (1) the permission unlawfully approved use of the stadium that was a substantial alteration in the development proposed in the application (see *Kent County Council v. Secretary of State for the Environment* (1976) 33 P. & C.R. 70), (2) the development permitted is thus so changed that the claimant and others have been deprived of the opportunity of consultation upon it (see *Wheatcroft (Bernard) Ltd v. Secretary of State for the Environment* [1982] J.P.L. 37), and (3) the permission exceeds the assumptions on which the proposals were assessed (see the decision of the Court of Appeal in *Midcounties Co-Operative Limited* ([2010] EWCA Civ 841); or because it was perverse of the City Council not to impose such conditions.

63. Mr Richards contrasted what was said about the use of the stadium in the documents submitted to the City Council by FC United. The Transport Assessment assumed about 28 home matches a year. No assessment of the impacts of unrestricted use or of use for "large scale non sporting events" was undertaken. The final Noise Assessment report assumed that the stadium would be used for football matches up to 20 times a year between 12 noon and 6 p.m. on Saturdays and Sundays and up to 10 times a year between 6 p.m. to 10 p.m. on midweek evenings. There was no assessment of the impact of the use of the stadium on any greater number of days each year, or after 10 p.m.; no noise assessment of the use of the stadium for "large scale non sporting events"; and no assessment of the noise likely to be created by spectators moving on foot to and from events in the stadium. The City Council's Environmental Protection Specialist had himself advised that the number of events and the period of the events were "important factors to be considered".

64. The response to this ground offered by the City Council and FC United was not a good answer to it, said Mr Richards. Conditions 2, 6 and 7 do not provide sufficient or appropriate control. Condition 2, which refers to the development being "carried out" in accordance with drawings and documents, does not control the use of the facilities once constructed. But in any event; none of the documents referred to in that condition actually sets any firm restriction on use, and they are obviously inconsistent on the level of use envisaged for the stadium. Although condition 6 requires the submission of a plan to control the "management of Events", it does not impose any control on the number or frequency of such events; it is concerned only with their management. Condition 7 relates to the use of the "development hereby approved" for "large scale non sporting events", which are not defined. The section 106 agreement of 19 October 2012 had limited the use of the "Stadium pitch" to 50 days in any "Football Season", which is defined by reference to the period prescribed by the "Football Association Limited of England and Wales". There was thus no limit on the use of the stadium pitch outside that part of the year period. And whilst the hours of use of the pitch are limited, the hours when the stadium itself could be used were not. So there was still no proper control over the use of the stadium.

Submissions for the City Council

65. For the City Council Mr Richard Drabble QC submitted that the claimant's argument on this ground was misconceived. When it granted planning permission for the development, with the benefit of the professional advice it had from its planning and environmental health officers, the

City Council judged for itself what a sufficient and reasonable degree of planning control on the use of the stadium would be. That exercise of judgment is not vulnerable to the criticism that it was perverse. And its result, in the form of the conditions imposed on the permission, did not constitute any breach of the principles in the authorities to which Mr Richards had referred.

66. The three conditions of particular relevance to the issue in this ground – conditions 2, 6 and 7 – are clear in their terms and, together, enable the City Council to exert effective control on the use of the stadium. Other conditions relate to specific aspects of the operation of the facilities, with a view to protecting the local environment and the living conditions of local residents. Condition 2 clearly relates to the use of the development as well as to its construction. This much is clear from the list of documents itself, which, in addition to the Planning Statement and the Design and Access Statement, includes the Transport Assessment and the Noise Assessment reports. Conditions 6 and 7 allow the City Council to control the number of days on which the stadium is used and the hours of use. They both require the submission of the details of events being held at the stadium, for approval by the City Council. This regime is clearly wide enough to enable the City Council to achieve reasonable control over the number of events as well as the hours of operation. And even if that submission were not accepted, this ground of the claim still cannot succeed. The additional controls in the section 106 obligations, including now the deed of variation of 19 December 2012, combine with the conditions to provide a comprehensive and legally unimpeachable regime for controlling the use of the development, including the total number of days each year and the particular hours of the day and night when the stadium pitch may be used.

Submissions for FC United

67. For FC United Mr Sasha White adopted Mr Drabble's submissions. Even on the most beneficial view of the claimant's argument, he submitted, this ground must be seen as having no merit at all in the light of the section 106 obligations, whose legal validity has not been questioned. As local planning authority the City Council has an array of statutory powers to enforce the controls binding the use of the development. Those controls would continue outside the football season, both under the conditions and under the section 106 obligations. In practice, the conditions will work to control the frequency and times of events at the stadium. And that control has been widened and reinforced by the section 106 obligations. It is inconceivable that the detailed management plan submitted and approved under condition 6 will not set out the number of events – both football matches and other events – and when they will take place. The point taken by Mr Richards about the lack of control on the use of the stadium, as opposed to the stadium pitch, was wholly unconvincing. It is inconceivable that any event that took place within the stadium, but using the stadium pitch, would cause harm to the claimant or any other local resident. No such potential use had been identified. But in any case the control on "hours of use" under condition 7 is not confined to the use of the pitch.

Discussion

68. I cannot accept Mr Richards' submissions on this issue. In my view, those of Mr Drabble and Mr White are correct.

69. The principles of law relating to the imposition of conditions on grants of planning permission are well established. To be lawful, a planning condition must be imposed for a planning purpose, must fairly and reasonably relate to the development permitted, and must not be so unreasonable that no reasonable local planning authority could have imposed it (see *Newbury*

District Council v Secretary of State for the Environment [1981] A.C. 578, and *R v Bristol City Council, ex parte Anderson* (1999) 79 P. & C.R. 358).

70. This is not a case in which the reasonableness or the enforceability of the conditions actually imposed is doubted – apart from the submissions made, and not opposed, about the tailpieces in some of the conditions and the need for some minor refinement of the drafting. What is submitted, however, is that the local planning authority ought to have imposed conditions that it did not. The essential question on this ground of the claim is whether the City Council erred in law in not securing, by planning condition or planning obligation or a combination of the two, a sufficient means of controlling the number of days and the number of hours on which the stadium may be used.

71. As Mr Drabble submitted, this question may be considered, first, in the light of the conditions the City Council imposed to regulate the development and its use, especially conditions 2, 6 and 7, and secondly, by having regard to the section 106 agreement of 19 October 2012 as adjusted by the deed of variation of 19 December 2012.

72. None of the conditions on the planning permission imposes a limit on the number of days on which the stadium may be used or the period for which it may be used on any particular day.

73. Condition 2 requires the development to be "carried out" in accordance with the drawings and documents listed. The documents include the Design and Access Statement, the Planning Statement, the Transport Assessment "with travel plan and parking strategy", and the Noise Assessment prepared by AEC. Given the scope and content of those documents, I do not think it can be right to understand the expression "carried out" in condition 2 in the narrow sense contended for by Mr Richards, which essentially was "constructed" rather than "constructed and used". Although the City Council's decision notice does not state that permission is granted for the use of the operational development it approves, this is obviously entailed in the grant. Section 75(3) of the 1990 Act provides that, if planning permission for the erection of a building does not specify the purposes for which a building may be used, the "permission shall be construed as including permission to use the building for the purpose for which it is designed". In any event, as Mr Drabble submitted, the requirement that the development be "carried out" in accordance not only with the drawings but also with the documents referred to in condition 2 is plainly directed both at the construction of the development and its subsequent use once built. For example, the main purpose of the Transport Assessment is to consider the effects of traffic on local roads and the likely success of the proposed Travel Plan and its parking strategy when the development has been completed and the stadium, club house and sports pitches are in use.

74. Condition 2 serves to reinforce the description of the "Proposal" given in the decision notice. It incorporates into the planning permission the listed drawings and documents. It thus sets in place the framework within which the control of the development is to be achieved through the conditions governing its construction and use. Those conditions include conditions 6 and 7, dealing respectively with "Event Management" and the regime for "large scale sporting events", as well as conditions relating to the acoustic insulation of the club house (condition 23) and of "externally mounted ancillary equipment" (condition 24), the erection of an acoustic fence (condition 28), a limit of the number of spectators in the stadium at any time (condition 33), and restrictions on the hours of use for "Community Pitch Number 1" (condition 37) and the clubhouse (condition 38).

75. Conditions 6 and 7 are concerned with different aspects of the use of the site once developed. They are not to be seen in isolation. They belong to the entire scheme of control laid out in the conditions to which I have referred. Both are aimed at protecting "the highway network and

residential amenity" in the locality, in accordance with four policies of the development plan – policies H2.2, E1.1, T2.4 and T2.6 of the UDP. Condition 6 requires a strategy to be put in place for the management of events and the traffic generated by them, and condition 7 is concerned with the detailed arrangements to be made for any "large scale non sporting events".

76. These two conditions require the site owner or operator to provide to the City Council, for its approval, details of events planned for the stadium. Neither of them limits the number or the duration of the events to which they refer. As Mr Drabble submitted, however, they do enable the City Council to ensure that no event will be held in the stadium that would be harmful to the living conditions of local residents or to the safe and efficient operation of the local road system. Condition 7 plainly envisages the possibility of the City Council withholding approval for such an event if, for example, the hours proposed for it, the number of people likely to be attracted by it or the car parking to serve it are unacceptable. And, as Mr Drabble pointed out, additional control may also be available under the licensing legislation. The concept of the Event Management Plan in condition 6 is different, and wider. The ambit of condition 6 plainly goes beyond "large scale non sporting events". It includes football matches as well. When determining the strategy in the "Event Management Plan", the City Council will be able to consider the overall pattern, frequency and timing of events in the stadium in the course of a year, including FC United's home fixtures. And that exercise will be assisted by the relevant parts of the documents listed in condition 2.

77. Thus, although the planning permission does not set any maximum number of days on which, or hours for which, the stadium may be used, it does provide an effective mechanism for keeping such use to an acceptable level.

78. Whether the conditions it imposed on the planning permission were adequate was essentially a matter of planning judgment for the City Council as local planning authority. The court will not interfere with an authority's exercise of planning judgment except on the traditional grounds of judicial review. As Lord Hoffmann said in *Tesco Stores Limited v Secretary of State for the Environment* [1995] 1 W.L.R. 759 (at page 780), "[if] there is one principle of planning law more firmly settled than any other, it is that matters of planning judgment are within the exclusive province of the local planning authority or the Secretary of State". That principle applies also to the imposition of conditions on a grant of planning permission (see the speech of Lord Scarman in the Newbury case, at page 618F to page 619H).

79. Was it irrational – as Mr Richards submitted, perverse – or unlawful in some other way for the City Council to grant planning permission without adding to conditions 2, 6 and 7, and all the others that regulate the use of this development, an express restriction on the days and hours of use of the stadium? I do not think it was. In my view, for the reasons submitted by Mr Drabble and Mr White, this aspect of the City Council's decision-making cannot be impugned on *Wednesbury* grounds, nor is it otherwise legally flawed.

80. Mr Richards' argument rests on two propositions. The first is that such a condition was necessary to prevent the development exceeding what had been proposed and consulted upon. The second is that a condition of this kind was needed to tie the development to the proposals assessed in the various documents presented with the planning application, including, in particular, the Planning Statement and the reports comprising the Noise Assessment and the Transport Assessment.

81. The first proposition is, in my view, misconceived. The premise for it is false. In reality, FC United did not propose in its planning application a specific number of days or hours for the use of the stadium. The exact number of football matches and other events envisaged in the course

of a year, and the period of the day during which such events would take place, were not elements of the proposals for which planning permission was sought. FC United did not seek to confine the proposed use of its development in that way. It did not specify any precise timetable for events in the stadium. What it did, however, was to indicate in general terms how often it expected the stadium to be used. This information was given in various ranges and approximations. In the Planning Statement it was stated that the stadium would provide FC United with "a new home … for approximately 30-50 days a year", and that each year there would be "approximately 30-50 [FC United] games that may be held" there. In the Design and Access Statement it was said that the site would be "used as a football stadium for approximately 30-50 days a year". The authors of the Transport Assessment report assumed that FC United would be playing at home on "28 or so occasions per year". For the purposes of the analysis in the Noise Assessment report it was assumed that the stadium pitch would be used between noon and 6 p.m. on Saturdays and Sundays "[up] to 20 times a year" and between 6 p.m. and 10 p.m. on midweek evenings "[up] to 10 times a year". The fact that in these documents one sees differing forecasts as to the use of the stadium is, I think, significant. Had it been FC United's intention to propose a specific number of days or hours for the use of the stadium or to invite a condition delimiting those days and hours, one might have expected more precision than is actually there. Instead, there was deliberate flexibility. No doubt – as Mr White said – this was, at least in part, to allow for the changes in form and fortune that any club may experience in the course of a football season. As well as a set number of matches in its league, a club may well have several at home in a cup competition – perhaps more if the team has a good run, fewer if not. Anyway, I do not believe there is any material inconsistency in the application documents, and certainly none that had to be overcome by a condition restricting the number of days and hours when the stadium may be used.

82. It is, I think, important to recognize the distinction between a definite proposal and broad indications of the possible or likely level of use, such as one sees here in the Planning Statement and the Design and Access Statement. And there is also a difference between an indication of that sort and an assumption adopted, as a working hypothesis, in the assessment of traffic or noise. The City Council seems to have been well aware of this. In her report to committee the Head of Planning, when introducing the proposals to the members, said they would "provide a new home for FC United … approximately 30-50 days a year" (paragraph 12). She noted (in paragraph 222 of her report) that FC United's "acoustic report suggests that 20 Saturday/Sunday matches and 10 midweek evening matches will take place at the stadium" and that this seemed "a reasonable assumption" in view of previous years' fixtures, "although additional games may be played during the off season period." In the section of her report where she considered "Residential Amenity" she said (in paragraph 232) that the "use of the stadium for matches is estimated to be between 30 and 50 times a year …".

83. I therefore reject the submission that a condition placing specific limits on the number of days and hours of use of the stadium was necessary to restrict the planning permission to the development that had been proposed and consulted upon. The proposals had not been framed in that way. Condition 2, which referred to all the relevant documents, was enough to achieve a complete connection between the application and its approval. The City Council was not obliged to go further by introducing a limit on the days and hours of use of the stadium. And it did not, in fact, enlarge the landowner's freedom to use the stadium by granting permission for more than had been sought, or more than had been consulted upon. The well known principles of law in the Kent County Council case and *Wheatcroft* were not offended here.

84. I turn then to the second proposition – that the City Council failed to tie the development to the proposals assessed, and that this was an error of law. Again, I see no force in the claimant's argument. In the first place, as I have said, the application was not specific either as to the

number of occasions on which the stadium would be used or as to the hours of its use. Secondly, though the work that was done to assess the impacts of noise and traffic was – as it had to be – based on assumed levels of use, the assumptions themselves were not fixed, nor were they exactly the same in each assessment. Thirdly, the consultants' conclusions were not said to depend critically on the assumptions they had made. Neither in the assessment of traffic nor in the assessment of noise was it said that if, say, 50 events were to take place in the stadium each year, rather than about 30, this would cause undue disturbance to local residents or harm the local environment in some other way. There was no material before the City Council to compel such a conclusion. In these circumstances, as Mr Drabble submitted, it is impossible to say that a condition restricting either the number of football matches or the total number of events each year to 50 – or any other particular level – was imperative, or that it was irrational not to impose one. Quite simply, the need for such a constraint on the use of the stadium had not been demonstrated. Although in his response to consultation the City Council's Environmental Protection Specialist noted the assumption in AEC's report "that around 20 Saturday/Sunday matches and 10 midweek evening matches will take place annually", and remarked that the "number of events, the period of event, and the character of the noise are important factors to be considered", he did not suggest in his advice to the City Council that these were matters that ought to be controlled by a planning condition or obligation. He did not say that a ceiling of 30 matches or events a year was justified. It was not incumbent on FC United to disprove the need for a condition that neither the City Council's environmental health officers nor its planning officers thought necessary.

85. I do not think Mr Richards' argument is assisted by the Court of Appeal's decision in *Midcounties Co-Operative Limited*. The facts of that case were materially different from this. The development proposed there was a supermarket. Outline planning permission was granted. A condition – condition 6 – was attached to the permission, which restricted the net retail sales area to 2,919 square metres, as had been shown in the layout plan, whereas in a questionnaire forming part of the application the "floor space for retail trading" was said to be 2,403 square metres. Thus there was an apparent discrepancy within the planning permission itself. Laws L.J. accepted (in paragraph 8 of his judgment) that it was "as a matter of law elementary" that a local planning authority has no power on a planning application to grant permission for more than had been applied for. He noted (in paragraph 7) that "a selling space over an area of [2,403 square] metres" was "the basis on which experts for the developers and the council gave their advice" and also "the basis on which the council officials advised the Planning Committee that "on balance" the development would not have deleterious effects on the town centre". Not surprisingly, that assessment had been based on the proposal in the planning application, which was explicitly for net retail floor space of 2,403 square metres. As Laws L.J. saw it, however (in paragraph 20), the question in the end was this:

> "… Given that the clear basis on which the application was put forward was that the actual selling space should be limited to [2,403 square metres], does this circumstance invalidate the permission? The nature of the invalidity might be expressed as a variant of the first of the appellants' four propositions … : the planning permission allowed a greater area for actual selling space than had been applied for."

An answer to this difficulty, Laws L.J. held, lay in the section 106 agreement subsequently entered into by the appellants, which, together with condition 6, provided "a sufficiently clear and certain form of control of the intended actual selling space to [2,403 (2,401) square] metres" (paragraph 27). However, the rationale of the decision there was not that assumptions made for the purposes of assessing a proposed development must automatically be translated into formal controls attached to the planning permission. That case ultimately turned on the principle that

permission must not be granted for more than is sought. In this case that principle was not breached.

86. I come finally on this issue to the relevant provisions in the section 106 obligations. If I were wrong to hold, as I have, that there was no legal onus on the City Council to limit by condition the annual number and daily duration of events in the stadium, I would nevertheless regard the commitments made by FC United in the agreement of 19 October 2012 and the deed of variation of 19 December 2012 as conclusive. A similar view was reached in *Midcounties Co-Operative Limited*. It is not – and cannot be – in dispute that a planning obligation in suitable terms is capable of putting right a defect in the conditions originally imposed on a grant of planning permission. Here the agreement of 19 October 2012 provides enforceable limitations on the hours of use of the stadium pitch and the other pitches and facilities in the development. And the deed of variation of provides an enforceable limit on the number of days – a maximum of 50 in any calendar year – on which the stadium pitch may be used for an event. The deed of variation defeats the claimant's argument that the way in which the agreement of 19 October 2012 was drafted would allow unrestricted use of the stadium outside a "Football Season". Both during the "Football Season" and for the rest of the year there will be continuous control on the use of the stadium, not only under the section 106 agreement as now varied but also under the conditions on the planning permission. The restriction to 50 days applies not just to football matches but to use "for any purpose", and thus to all events on the stadium pitch, including those embraced in the management strategy under condition 6 and the "large scale non sporting events" within condition 7. It is not incompatible with what is said about the use of the stadium in the documents referred to in condition 2. It coincides with the upper end of the range of "approximately 30 [to] 50 days" for the use of the stadium as a venue for football indicated in the Planning Statement and the Design and Access Statement, and it is not at odds with the assumptions made as to the number of home games for FC United in the Noise Assessment and Traffic Assessment reports (respectively "up to 30 matches a year" and "the 28 or so occasions per year that the Club will play at home").

87. Ground 1 of the claim therefore fails.

Ground 3

Submissions for the claimant

88. Mr Richards submitted that, despite the assumptions made in AEC's Noise Assessment report and in the Head of Planning's report to committee, the planning permission does not include any conditions relating to noise that (1) fix the noise standards the development should meet or specify the places where noise should be monitored to ensure that those assumptions are realized; (2) fix noise limits and require regular monitoring at the residential properties in St. Mary's Road and Sydney Jones Court, particularly during evening matches; (3) achieve, through monitoring and management, any proper control of (i) the use of the PA system, (ii) externally mounted equipment and plant, (iii) noise from the use of the clubhouse and function room; or (4) otherwise control the use of the development in the way that AEC's report had suggested and assumed, so that noise from the development would meet acceptable standards and be kept within acceptable limits. In failing to impose such conditions, Mr Richards submitted, the City Council neglected matters it should have taken into account and acted perversely.

89. Mr Richards said that conditions 2, 6, 7, 23, 24, 28 and 37 and the section 106 obligations did not overcome the claimant's concerns. Condition 2 sets no noise standards and requires no monitoring that could be made the subject of a breach of condition notice. The approval of an

"Event Management Plan" under condition 6 could not set noise standards nor could it require noise monitoring at particular locations. The details of proposed events approved under condition 7 could not set noise standards nor require noise monitoring from particular locations. Whilst condition 23 requires that the club house to be "acoustically insulated and treated to limit the break out of noise in accordance with attenuation measures described" in AEC's report of 5 October 2011, that report does not give details of any acoustic insulation or attenuation measures. Condition 24 requires a scheme for reducing noise from externally mounted ancillary equipment, such as a public address system, "at the nearest noise sensitive location", but does not guarantee such a reduction at all relevant noise sensitive locations. Condition 28 requires the erection of an acoustic fence, but the drawing of this is not identified, and in any event its acoustic properties are undefined. Condition 37 does not properly control the hours of use of the community pitches. The section 106 agreement of 19 October 2012 took these matters no further.

Submissions for the City Council

90. Mr Drabble submitted that conditions 2, 6 and 7 enable the City Council to control the use of the stadium to ensure that the assumptions underpinning its assessment of the scheme are met. Conditions 23, 24, 28, 37 and 38 all concern the limitation of noise. It is clear that these conditions enable the City Council to address the claimant's and other residents' concerns about noise. But anyway, the City Council was not legally obliged to impose conditions to ensure that those concerns were addressed. The issue here is whether the City Council acted lawfully in deciding that the noise impacts of the development could be adequately controlled through the conditions it has imposed, which have been supplemented now in section 106 obligations. The Head of Planning explains in her witness statement the very close scrutiny to which the likely noise effects of the development were subjected. It is impossible to stigmatize as perverse the City Council's decision to impose the conditions it did, rather than different or extra conditions.

Submissions for FC United

91. Like Mr Drabble, Mr White based his submissions on this ground upon conditions 2, 6, 7, 23, 24, 28 and 37, and on the section 106 obligations. These, he submitted, created for the City Council a comprehensive system of control over noise. Condition 2 requires the development to accord with AEC's Noise Assessment report. The detailed "Event Management Plan" to be submitted under condition 6 will certainly deal with the noise that events in the stadium will generate. Under condition 7 the details of "large scale non sporting events" will include details of the noise likely to be caused by those events.

Discussion

92. On this ground too I consider the submissions of Mr Drabble and Mr White to be sound, and I reject those made by Mr Richards.

93. Once again, the court must avoid being drawn into a consideration of the planning merits. It is not for me to decide whether the conditions contended for by the claimant were justified by expert calculation and judgment. Both FC United and the objectors presented to the City Council reports prepared by acoustic consultants. The City Council also had the benefit of advice from its own professional officers responsible for environmental health and for planning. The assessment prepared by AEC for FC United examined the likely consequences of noise

from the proposed stadium during football matches, noise from the use of the AstroTurf pitches, noise from equipment and plant mounted on the outside of the proposed buildings, and noise from the use of the proposed clubhouse and function room. AEC assessed the potential noise impacts on the nearest noise sensitive properties, the dwellings on St Mary's Road and the sheltered housing at Sydney Jones Court. Noise likely to arise from the use of the site once developed was compared to existing noise levels. The assessment of noise from the use of the stadium was empirically based, on background noise levels in the vicinity of the site and measurements of noise taken at a match between FC United and Nantwich FC at the Bury FC ground in August 2010.

94. Plainly, as Mr Drabble said, the kind of noise likely to come from crowds at football matches and at other events in a football stadium is inherently hard to curb: hence the need for a design that would minimize the escape of such noise and its audibility to local residents. In their report of 5 October 2011 AEC concluded that this would be achieved by FC United's proposals. In paragraph 6.1 of the report they said their calculations had shown that, assuming the stadium stand walls and roof were "continuous and solid (having a mass of at least 10kg/m2)", noise levels in the front gardens of the properties on St Mary's Road would "typically be around 54 dBL$_{Aeq}$, 15 mins", and would thus "just meet the proposed noise limits". They acknowledged (ibid.) that this "could increase to 58dBL$_{Aeq}$", but noted that the existing traffic noise level was "around 10dB above 55dBL$_{Aeq}$, 15 mins, at all periods", and concluded therefore that the higher levels of noise from the stadium "should not be significant". The noise levels likely to be experienced at first floor level in the rear of the properties at Sydney Jones Court would, according to AEC's calculations, "typically be around 53 dBL$_{Aeq, 15 mins}$ … increasing to around 57dBL$_{Aeq}$" and thus "would initially meet … and eventually only marginally … exceed the proposed noise limits" (paragraph 6.2 of the report). This, they said (ibid.), "should not be significant". They also considered other potential sources of noise, applying what they considered to be the relevant criteria or principles. They concluded (in paragraph 7.4 of their report) that, if a barrier at least 3 metres in height were put up, and if the AstroTurf pitch nearest to the rear of the properties in Sydney Jones Court were not used after 8 p.m., the noise from the use of the pitches "would not only meet the daytime noise limit, but would also just meet the evening requirement". As to the clubhouse and function room, their conclusion (in paragraph 7.5) was that by installing a "noise limiter device" to limit noise levels in the function room to 92 dBL$_{Amax}$, the "external envelope" could be "designed to control noise breakout". They concluded (in paragraph 7.8) that noise from plant in the stadium and clubhouse could be "easily and effectively controlled to meet appropriate limits". And they found that the impact of traffic noise "should be insignificant compared to existing activities" (paragraph 7.9).

95. AEC's assessment in their report of 16 May 2011 was criticized by Azymuth Associates in theirs of 11 August 2011. But Azymuth Associates did not press for a monitoring condition, or offer any thoughts of their own on what conditions might be suitable if planning permission were granted.

96. Having had consultants' reports from either side, the City Council was able to form its own conclusions in the light of the advice of its Environmental Protection Specialist, and it clearly did that. In his letter of 14 October 2011, responding to consultation on the planning application, the Environmental Protection Specialist considered AEC's assessment of noise from the stadium during a match. He did so having taken account of what Azymuth Associates had said in their report. He advised the City Council that, assuming AEC's calculations were correct – and he did not suggest they were not – the L$_{Aeq}$ levels at the closest residential properties on St Mary's Road would be below the existing, but those at Sydney Jones Court would generally be above present levels, which, he said, "would be particularly noticeable during evening matches where the measured existing levels fall much lower and therefore stadium noise would be more

noticeable at the external façade". He did not ignore the fact that, although the noise levels experienced at the façades of dwellings would sometimes be "hidden below the general traffic noise", there would be times when it was "audible above traffic noise as the number … and variety of vehicles changes over a short period of time". He also acknowledged that there would be "short periods of maximum noise levels … (scored goals, missed goals[, etc.]) produced by the spectators", which would "clearly rise above the general noise level" at the façades of residential properties. But both in the dwellings in St. Mary's Road and at Sydney Jones Court, in his opinion, the likely internal levels of noise, with windows closed, could be "accepted as reasonable". He referred to FC United having "detailed that around 20 Saturday/Sunday matches and 10 midweek evening matches will take place annually" in the stadium, and commented that the "number of events, the period of event, and the character of the noise are important factors to be considered", he did not say that his conclusions would have to be revised if the number of events were assumed to be at the upper end of the range indicated in the Planning Statement and the Design and Access Statement, or even somewhat greater than that. He also accepted the conclusions of AEC on the noise likely to arise from the use of the proposed AstroTurf pitches, from external plant and equipment, and from the use of the proposed clubhouse and function room. He recommended the conditions he thought were necessary to control noise from the development. These did not include a condition to require the monitoring of noise levels.

97. The Environmental Protection Specialist's advice was distilled in the response to consultation sent to the City Council's Head of Planning to the Head of Environmental Health, City Wide Services on 17 October 2011, and then in the Head of Planning's own assessment of the proposal in her report to the City Council's Planning and Highways Committee for its meeting on 27 October 2011. The conditions recommended by the Head of Planning did not include any to require noise monitoring. Several conditions relating either directly or indirectly to the attenuation and control of noise appear in the City Council's decision notice. I have already referred to those conditions. None of them specifically required regular noise monitoring. But they did create for the City Council as local planning authority as much control over the noise impacts of the development as it judged to be necessary when it granted planning permission. They were later added to by the provisions of Schedule 1 to the section 106 agreement of 19 October 2012, which, in paragraph 1 e, requires a noise limiter to be fitted to the public address system so that its performance meets the relevant levels referred to by AEC in their report of 5 October 2011.

98. The absence of a noise monitoring condition in the planning permission was said by Mr Richards to be irreconcilable with the assertion in the Planning Statement that "the noise impact of the [proposed] use has … been carefully analysed and measures put in place to ensure this remains within acceptable levels, which will be monitored by conditions". But I do not read that as an invitation to the City Council to impose a condition stipulating the regular measurement and recording of noise levels at particular locations on or near the site. Rather, it seems intended to reassure third parties that the measures employed to keep impacts within acceptable levels would be enforced through conditions.

99. Even if I have misunderstood that sentence in the Planning Statement and, in spite of Mr Drabble's and Mr White's submission to the contrary, FC United was indeed inviting noise monitoring conditions, I would still be unable to hold that the City Council had no option, as a matter of law, but to impose such conditions. Subject to the tests in law to which I have already referred, it was for the City Council, as local planning authority, to decide what conditions should be imposed, and what those conditions should require, in view of all the material it had before it, including the documents accompanying the application, the consultants' reports and its officers' advice. It did so. Mr Richards could find no cogent criticism to make of the advice the

City Council received from its officers. As I understood him, he did not seek to suggest – nor could he – that that advice, and the City Council's response to it in the decision it made, were beyond the range of reasonable planning judgment. And it cannot be said that the City Council would have come under a duty to impose a particular condition simply because either FC United as applicant, or the claimant, or any other objector had urged it to do so.

100. In my view the City Council's treatment of the noise issues in this case was impeccable. To make a lawful decision on the application for planning permission it did not have to fix particular noise standards for the development to meet, nor establish, through conditions, particular noise limits at particular properties, nor dictate that monitoring of noise from the stadium during events, from the public address system, from plant and equipment, or from the use of the clubhouse must be carried out at particular times in those locations, nor add any other conditions to the ones it did impose. As may be seen from the history of the City Council's handling of the application, which the Head of Planning sets out in her witness statement (at paragraphs 16 to 29), the likely noise impacts of the development were carefully scrutinized, and when the time came for the members to determine the application they were well able to reach their own view on what would be an effective and sufficient set of conditions to protect local residents against unacceptable levels of noise.

101. In my judgment, therefore, this ground of the claim does not succeed.

Ground 6

The statutory provisions

102. Regulation 2 of the EIA regulations defines "EIA development" as including "Schedule 2 development likely to have significant effects on the environment by virtue of factors such as its nature, size or location". Regulation 3(2) prohibits a local planning authority from granting planning permission for EIA development unless it has first taken the environmental information into consideration. A person who is minded to carry out development may request a screening opinion from the local planning authority under regulation 5(1). Under regulation 4(5), where a local planning authority has to decide whether Schedule 2 development is EIA development, the authority must take the selection criteria set out in Schedule 3 into account. Schedule 2 contains a table setting out descriptions of development and applicable thresholds and criteria for the purpose of classifying development as Schedule 2 development. The table includes, in paragraph 10(b) in Column 1, "Urban development projects, including the construction of shopping centres and car parks, sports stadiums, leisure centres and multiplex cinemas." The relevant criterion in Column 2 is that "[the] area of development exceeds 0.5 hectare". Schedule 3 lists selection criteria for screening Schedule 2 development. These are divided under three headings "1. Characteristics of development", "2. Location of development" and "3. Characteristics of the potential impact".

Relevant jurisprudence

103. The jurisprudence relating to screening under the EIA regulations is clear. The test to be applied when considering the lawfulness of the approach in a screening opinion is whether the project is likely to have significant effects on the environment (see *R (Loader) v Secretary of State for Communities and Local Government* [2012] EWCA Civ 869). "Likely" means something more than a bare possibility; any serious possibility will suffice (see the judgment of Moore-Bick L.J. in *R (Bateman) v South Cambridgeshire District Council* [2011] EWCA Civ 157, at paragraph 17). The

decision-maker must have regard to the precautionary principle and to the degree of uncertainty, as to environmental impact, at the date of the decision. On the information available it may or may not be possible to make a judgment as to the likelihood of significant effects on the environment (see the judgment of Pill L.J. in *Loader*, at paragraph 43). Where mitigation measures are canvassed at the screening stage the decision-maker must "examine the actual characteristics of the particular project" and "consider whether the uncertainties present are such that their favourable implementation can or cannot be assumed when the screening opinion is formed" (see Pill L.J's judgment in *Loader*, at paragraph 41). Each case will turn on its own particular facts (see the judgment of Sullivan J., as he then was, in *R (Lebus) v South Cambridgeshire District Council* [2003] P. & C.R. 5, at paragraph 45).

Relevant guidance

104. Circular 02/99 "Environmental Impact Assessment" provides the Government's guidance on the application of the EIA directive and the EIA regulations. In paragraphs 32 to 34 it sets out general considerations relevant to the screening of Schedule 2 development. In paragraph 33 it states:

> "… In the light of [the selection criteria in Schedule 3], the Secretary of State's view is that in general, EIA will be needed for Schedule 2 developments in three main types of case:
>
> a. for major developments which are of more than local importance (paragraph 35);
> b. for developments which are proposed for particularly environmentally sensitive or vulnerable locations (paragraphs 36-40); and
> c. for developments with unusually complex and potentially hazardous environmental effects (paragraphs 41-42)."

In paragraph 34 it adds this:

> "The number of cases of such development will be a very small proportion of the total number of Schedule 2 developments. It is emphasised that the basic test of the need for EIA in a particular case is the likelihood of significant effects on the environment. …".

As to "[major] development of more than local importance" the circular says this in paragraph 35:

> "In some cases, the scale of a development can be sufficient for it to have wide-ranging environmental effects that would justify EIA. There will be some overlap between the circumstances in which EIA is required because of the scale of the development proposed and those in which the Secretary of State may wish to exercise his power to 'call in' an application for his own determination … . However, there is no presumption that all called-in applications require EIA, nor that all EIA applications will be called in."

Submissions for the claimant

105. Mr Richards submitted that, in screening FC United's proposals, the City Council (1) generally failed to apply the "precautionary approach"; (2) wrongly equated localized impacts with impacts unlikely to be significant; and (3) erred in taking into account the promised mitigation measures, contrary to the approach endorsed by the courts.

106. The screening opinion correctly identified the proposed development as an "urban development project" falling within Schedule 2 of the EIA Regulations, referred to the relevant selection criteria set out in Schedule 3, and noted the guidance in paragraph 33 of Circular 02/99 that, in general, EIA will be needed for Schedule 2 developments in three main types of case, one of which is a major development of "more than local importance". However, Mr Richards submitted, the screening opinion was unlawful because (1) it failed to consider the magnitude of effects arising from the use of the stadium for up to 50 football matches a year; (2) failed to consider use of the proposed development by users other than FC United and local community groups, and, in particular, the use of the stadium for events other than football matches; (3) failed to consider whether the effects on the local environment and on local residential amenity – whatever "local" might mean – would nonetheless be "significant", bearing in mind that the site is in a residential area, close to sheltered housing and a school; (4) wrongly took into account the nature of the assessments that would be required, as an alternative to EIA, to accompany the application for planning permission; (5) wrongly took into account proposed mitigation measures, which in this case were not clear-cut and whose success could not be assumed; and (6) irrationally concluded that the development was unlikely to have significant effects on the living conditions of local residents. These errors were perpetuated when the screening process was reconsidered in September 2011, and this happened again in June 2012.

107. Mr Richards elaborated on his submission that the City Council misled itself by screening out the proposals because the effects of the development were likely to be only local. Although a local environmental effect might be unlikely to be significant, this is not the same as an environmental effect not being significant because it is local. Mr Richards argued that the problem seems to have come from paragraphs 33 and 35 of Circular 02/99, which conflict with the principle that a member state exceeds its discretion under articles 2(1) and 4(2) of the EIA directive if it establishes criteria or thresholds excluding a whole class of developments from EIA (*Aannamaersbedrijf P.K. Kraaijveld v Gedeputeerde Staten van Zuid-Holland* (Case C-72/95, at paragraph 53 in the judgment of the European Court of Justice). The advice in those paragraphs of the circular, though extant, had not been retained in paragraphs 34 to 36 of the consultation draft of its replacement, published in 2006, nor was it to be found in the parallel guidance in Scotland (in paragraph 40 of the Scottish Government's Circular 3/2011). There is, said Mr Richards, a subtle but correct change of emphasis in the draft replacement of Circular 02/99. No longer would it be a relevant criterion in a screening decision that a development is of "more than local importance".

Submissions for the City Council

108. Mr Drabble submitted that the City Council's screening of the scheme was exemplary. The City Council took into account the relevant criteria set out in Schedule 3 of the 1999 regulations – the characteristics of the development, its location, and the characteristics of the potential impact. The proposed development was analysed closely and with care. The screening opinion was later reviewed twice. The City Council's approach, explained in the Head of Planning's witness statement, is beyond sensible criticism.

109. When it adopted its screening opinion the City Council understood perfectly well that the stadium, which it had been told would accommodate a crowd of about 5,000 people, would be likely on occasions to operate at full capacity, and that it was likely to be used on between 30 and 50 days a year – as FC United had made plain when it was promoting the scheme at Ten Acres Lane. It is clear from the screening opinion that the City Council assessed the potential impacts of the development in detail, without assuming that a planning permission personal to FC United would be granted, and concluded – as a matter of judgment – that the effects were

unlikely to be significant. The complaint that the screening opinion did not address the question of whether the localized effects referred to would be significant, and so require EIA, is plainly misconceived. Read properly, the document demonstrates that the City Council was aware of the nature of the surrounding land uses and considered that neither in this locality nor in a wider area would the effects of the development be significant. So Mr Richards' submissions about the shortcomings of government advice in Circular 02/99 were not only unattractive but also misdirected. The submission that the City Council unlawfully took into account the fact that the scheme would in due course be subject to detailed assessments also depends on a partial reading of the screening opinion, ignoring the conclusion that, on the information before the City Council, the development did not require EIA because it was considered unlikely to have a significant impact on the environment. That assessment was not put off. It was done, as it had to be, at the screening stage. Nor was this a case of an authority concluding that there would be significant effects but for the proposed mitigation. The City Council said no such thing. But it was realistic and right to take into account the fact that this would be a reasonably managed development (see paragraph 45 of Sullivan J.'s judgment in *Lebus*). Mr Richards' submission that the screening decision was irrational is plainly wrong. That decision was clearly the product of an analysis of the relevant considerations against the relevant statutory criteria in Schedule 3 of the EIA regulations. It was, in the circumstances, an entirely reasonable decision.

Submissions for FC United

110. Mr White's submissions were similar to Mr Drabble's. In summary, he submitted that the City Council's approach to screening was appropriately detailed and was lawful. It had not been alleged that the information given to the City Council fell short of what was required to inform the screening process, nor is there any evidence that the City Council overlooked any of the criteria that had to be applied to that information if the statutory requirements for screening were to be met, or misunderstood the relevant guidance in the circular, or departed from the precautionary approach, or misdirected itself as to any of the principles stressed in the case law. In reality, the claimant is left with the argument that the outcome of the screening process was perverse, and that argument is hopeless.

Discussion

111. In my view Mr Richards' argument on this issue is unsustainable, as the submissions of Mr Drabble and Mr White showed.

112. In the first place, there is no dispute that FC United's application was a Schedule 2 application. The proposed development was an "urban development project" because of its size – occupying, as it would, a site of 5.2 hectares – and the type of development it was.

113. Secondly, in my view, it cannot be said that the information before the City Council when it embarked on the screening process was either deficient or inaccurate.

114. Thirdly, it is also clear that, in screening the proposals with a view to deciding whether this was development "likely to have significant effects on the environment by virtue of factors such as its nature, size or location" (regulation 2 of the EIA regulations), the City Council took account of the relevant selection criteria in Schedule 3, relating to the characteristics of the development, its location and the characteristics of the potential impact (regulation 4(5)). The screening opinion was structured to address each of those criteria.

115. And fourthly, because the claimant's argument focuses on certain passages in the section of the screening opinion where the characteristics of the potential impact are considered, it is necessary to read that section fairly and in its totality. When one does that and then goes on to read the "Conclusion" of the document, it becomes clear, I believe, that Mr Richards' argument is unsound.

116. I see no force in the submission that the City Council failed to consider in its screening opinion the impacts that would arise if the proposed stadium were to be used at full capacity for up to 50 matches a year. It is quite clear on the face of the document that the City Council knew the stadium would have a capacity of "around 5,000". It also understood the nature of the change the development would bring to the local area. There would be, it said, "a significant intensification of use and activity at the … site", which was "likely to give rise to greater consideration of matters relating to noise and light pollution/nuisance as a result of the proposal". No mention was made of the likely number of days when the stadium would be used. But that of itself does not invalidate the screening process. Even if I were to ignore what the City Council's Head of Planning says in her evidence to the court, where (in paragraph 10 of her witness statement) she refers to the City Council relying on its knowledge of the proposals from its experience of the Ten Acre Lane application (in which it had been said that the stadium would be used by FC United on about 30 to 50 days a year), I would still consider the process robust. To make no assumption about the level of use of the stadium would not be to weaken the process but might, if anything, serve to strengthen it. However, I do not think I have to go that far. It is enough to conclude, as I do, that the integrity of the screening process was not impaired by the lack of any obvious assumption about the days and hours of the stadium's use.

117. I have come to a similar conclusion on Mr Richards' submission that the screening opinion ignored the prospect of the stadium and other facilities being used not only by FC United and local community groups but by others as well. Again, the point is bad on the facts. In looking at the likely impacts of the development the City Council did not assume a personal permission was to be sought, or granted. It noticed the way in which FC United intended to use and manage the facilities. But when judging whether the impacts would be significant it did not base its views on the prospect of FC United having exclusive use of the site or occupying it permanently. It tested the impacts of the development, not the impacts of the developer. It did so, in my view, in sufficient detail and depth. And in discharging its task under regulation 4 and Schedule 3 of the EIA regulations, it concluded, as I think it was reasonably entitled to conclude, that the impacts would not be significant, and therefore that this was not a case in which an environmental statement was required.

118. I also reject the submission that the City Council did not consider whether the localized effects to which it referred in its screening opinion would nonetheless be significant and so require assessment under the EIA regulations. In my view it is a misconception that, in tackling the likely impacts of the proposed development, the City Council concentrated only or mainly on the geographical extent of those impacts, and took as the decisive reason for its negative screening opinion the belief that they would be of only local significance. That is not what the City Council did. It is true that the expressions "localised in nature", "confined to the local area", "localised", "of local significance only", "of a localised nature and not widespread" and "limited to the surrounding area" can all be seen in the document. But, as I think Mr Richards conceded, one must not detach those phrases from their full context. They comprise only one element in a comprehensive appraisal, in which the nature of the potential effects of the development was considered, and an opinion formed as to whether those effects were likely to be significant.

119. Those responsible for preparing the screening opinion were familiar with the site and the surrounding area. They knew the development would affect local residents. They clearly

concluded that the likely impacts they had identified would not be significant. At least five passages in the screening opinion illustrate this, four of them in the section in which the characteristics of the potential impact were considered, the fifth in the "Conclusion". First, in the opening paragraph of the section on the potential impact – a general, introductory paragraph – one sees the conclusion that not only would the impact be "confined to the local area" but also that its "magnitude and complexity … would be limited". Secondly, in the next paragraph it is said that the "[short]-term" impacts relating to construction activity "will not give rise to significant environmental effects". Thirdly, in the following paragraphs, where the individual "[longer]-term impacts" are considered, none of the conclusions relies simply on the local extent of the impacts. Fourthly, the penultimate paragraph in the section adds to the conclusions already stated – beginning, as it does, with the phrase "In addition to the above" – by repeating the view that, as well as being confined to the local area, the "magnitude and complexity of the impact would be limited" and "predictable", and that it was capable of being mitigated. And fifthly, if at this stage there were any lingering doubt about the basis of the City Council's screening opinion, it could not survive the wholly unambiguous statement in the "Conclusion" that the proposed development would "not … give rise to significant environmental effects".

120. It follows that the argument pursued by Mr Richards in his supplementary skeleton argument, in which he submitted that the approach advised in paragraphs 33 and 35 of Circular 02/99 finds no support in the EIA directive, and indeed is unlawful and incompatible with the decision of the European Court of Justice in *Kraaijeveld*, is academic. The City Council did not approach the screening of FC United's project presuming that the Government's advice in those paragraphs of the circular means, or implies, that an environmental effect cannot be significant if it is only "local".

121. And in any event I do not think Mr Richards' argument is well founded in the language of the circular. It is not easy to reconcile with what Pill L.J. said in *Loader* (at paragraph 44 of his judgment):

> "The criteria in the annexes to the Regulations justify the approach to the question proposed in Circular 02/99, paras 33, 34 and annex A … . It is stated, at [paragraph 34 of the circular], that the number of cases of [Schedule] 2 development which are EIA developments will be "a very small proportion of the total number of [Schedule] 2 developments".

Neither of the two paragraphs of the circular criticized by Mr Richards states that Schedule 2 development will not – or not generally – qualify for assessment under the EIA regulations if its likely effects on the environment are only local. Nor is this the logical implication of what is said. Paragraph 33 refers to "major developments which are of more than local importance" as one of the "three main types of case" in which "in general, EIA will be needed …". But the corollary of this is not that developments of only local importance will, as a rule, be incapable of satisfying the criteria in Schedule 3. Likewise, when paragraph 35 of the circular says that "the scale of a development can be sufficient for it to have wide-ranging environmental effects that would justify EIA", it is not to be inferred that developments whose effects are not wide-ranging will generally be exempt. The paragraph goes on to refer to the "overlap" between the circumstances in which EIA is required "because of the scale of the development proposed" and cases where the Secretary of State exercises his power to call in an application for his own determination, but it denies any presumption that all called-in applications require EIA and vice versa. Nowhere in those paragraphs of the circular does one see, in my view, an attempt to remove "a whole class of developments" from EIA, in spite of the decision in *Kraaijeveld* (at paragraph 53). If there has now been, as Mr Richards put it, a "subtle … change of emphasis" in the corresponding parts of the 2006 consultation draft of the amended circular on EIA for England and Wales (paragraphs 34 to 36), and in the equivalent guidance in Scotland (in paragraph 40 of the Scottish

Government's Planning Circular 3/2011), that does not displace the relevance, in a screening process, of the likely effects of the development not extending beyond the local area. Schedule 3, it should be remembered, includes as one of the selection criteria relating to the "[characteristics] of the potential impact" in paragraph 3, "(a) the extent of the impact (geographical area and size of the affected population)".

122. I disagree with Mr Richards' suggestion that, in screening the proposals, the City Council avoided the basic question it had to answer by deferring it to later detailed assessment, thus circumventing the requirements of the EIA regulations. As the Court of Appeal emphasized in *R (Jones) v Mansfield* [2003] EWCA Civ 1408 (see the judgment of Dyson L.J., as he then was, at paragraph 38, and that of Carnwath L.J., as he then was, at paragraph 61), the question on which the City Council had to form its own opinion – whether the project was likely to have significant effects on the environment – was one of degree, the sort of question that a local planning authority is well-equipped to answer. In the words of Laws L.J. in *Bowen-West v Secretary of State for Communities and Local Government* [2012] EWCA Civ 321 (at paragraph 33), this is "quintessentially a matter of judgment". And that judgment is susceptible to review by the court only on conventional *Wednesbury* principles (see the judgment of Pill L.J. in *Loader*, at paragraph 31), albeit that the threshold of likelihood is a low one and can be crossed even by a "serious possibility" (see paragraph 17 of Moore-Bick L.J.'s judgment in *Bateman*). In *Loader* Pill L.J. said this (at paragraph 43):

> "What emerges is that the test to be applied is: "Is this project likely to have significant effects on the environment?" That is clear from European and national authority, including the Commission Guidance at B3.4.1. The criteria to be applied are set out in the Regulations and judgment is to be exercised by planning authorities focusing on the circumstances of the particular case. The Commission Guidance recognises the value of national guidance and planning authorities have a degree of freedom in appraising whether or not a particular project must be made subject to an assessment. Only if there is a manifest error of assessment will the ECJ intervene (*Commission v United Kingdom* [2006] E.C.R. I-3969) …".

123. In *Jones* Dyson L.J. accepted that there may be uncertainties at the time when a local planning authority is engaged in a screening process, but this in itself will not necessarily prevent the authority from reaching the view that no significant effects on the environment are likely. That will depend on the circumstances of the case in hand. Dyson L.J. said (at paragraph 39):

> "I accept that the authority must have sufficient information about the impact of the project to be able to make an informed judgment as to whether it is likely to have a significant effect on the environment. But this does not mean that all uncertainties have to be resolved or that a decision that an EIA is not required can only be made after a detailed and comprehensive assessment has been made of every aspect of the matter. As the judge said, the uncertainties may or may not make it impossible reasonably to conclude that there is no likelihood of significant environmental effect. It is possible in principle to have sufficient information to enable a decision reasonably to be made as to the likelihood of significant environmental effects even if certain details are not known and further surveys are to be undertaken. Everything depends on the circumstances of the individual case."

124. In this case I cannot see in the City Council's screening opinion any reluctance or failure to grasp the key question for it at that stage – whether the project was likely to have significant effects on the environment. On the information before it when the request for a screening opinion was made, the City Council was able to take the view, and did, that an EIA was not required for these proposals. It did not postpone that decision to the time when a planning application was made. It revisited its screening opinion twice – in September 2011 and June 2012 – and saw no reason to change its mind.

125. I also reject the submission that the screening opinion was unlawful because it depended unduly on the possibility of future mitigation. The relevant principle here was encapsulated by Dyson L.J. in *Jones* (at paragraph 38), after his discussion of the decisions of the Court of Appeal in *Smith v Secretary of State for the Environment, Transport and the Regions* [2003] EWCA Civ 262 and *Gillespie v First Secretary of State* [2003] EWCA Civ 400, and those of the European Court of Justice in *Kraaijeveld* and *World Wildlife Fund v Autonome Provinz Bozen* [2000] 1 C.M.L.R. 149:

> "… It is clear that a planning authority cannot rely on conditions and undertakings as a surrogate for the EIA process. It cannot conclude that a development is unlikely to have significant effects on the environment simply *because* all such effects are likely to be eliminated by measures that will be carried out by the developer pursuant to conditions and/or undertakings. But the question whether a project is likely to have significant effect on the environment is one of degree which calls for the exercise of judgment. Thus, remedial measures contemplated by conditions and/or undertakings can be taken into account to a certain extent (see *Gillespie*). The effect on the environment must be "significant". Significance in this context is not a hard-edged concept: as I have said, the assessment of what is significant involves the exercise of judgment."

These observations of Pill L.J. in his judgment in *Loader* (at paragraph 43) are also germane:

> "… The decision maker must have regard to the precautionary principle and to the degree of uncertainty, as to environmental impact, at the date of the decision. Depending on the information available, the decision maker may or may not be able to make a judgment as to the likelihood of significant effects on the environment. There may be cases where the uncertainties are such that a negative decision cannot be taken. Subject to that, proposals for ameliorative or remedial measures may be taken into account by the decision maker."

126. I do not accept that in this case likely mitigation measures vitiated the screening process. The crucial point here is this: the City Council concluded that the development would be likely only to have insignificant and localized impacts, and not that those impacts would be, or might be, significant but for the proposed mitigation. It did not do more than was said to be permissible by Dyson L.J. in *Jones* and by Pill L.J. in *Loader*. It adhered to the precautionary principle. Though it said it would expect FC United, when submitting a planning application, to "identify any mitigation measures that may be required", it did not close its mind to the mitigation it had been told about, such as the Green Travel Plan and the "[acoustic] mitigation measures" that were to be "applied around the site" and the acoustic insulation of the clubhouse "to ensure a limited breakout of noise". But nor did it use its knowledge of those measures, and its ability to secure them by planning controls, as a substitute for EIA. What it said about them must, of course, be viewed in the context of the screening opinion as a whole. If it is, as Mr Drabble submitted, one can see the City Council doing what Sullivan J. (as he then was) said was acceptable in *Lebus* (at paragraph 45 of his judgment), which was "to envisage the operation of standard conditions and a reasonably managed development". The City Council did not do what Sullivan J. (at paragraph 46) said was inappropriate for an authority in a screening process, which was "to start from the premise that although there may be significant impacts, these can be reduced to insignificance as a result of the implementation of conditions of various kinds". The City Council neither began nor ended its screening opinion with that preconception. Its conclusion that the development would not give rise to significant environmental effects was clear, and unqualified.

127. Finally, the idea that the City Council's screening opinion was irrational is, in my view, untenable. The City Council directed itself as it should on the relevant statutory requirements, heeded the Government's advice in the relevant circular, and exercised its judgment on the relevant considerations by applying the relevant selection criteria. The claimant may disagree with the outcome, but in law it cannot be faulted.

128. Ground 6 of the claim therefore fails.

Ground 8

Submissions for the claimant

129. The City Council having accepted that two paragraphs of the recommended summary reasons were accidentally omitted from the decision notice, Mr Richards submitted that, if the planning permission is not quashed on any of the other grounds, the court should order that the missing paragraphs be brought into the decision notice, followed by a reference to the conditions and planning obligations in which the "mitigation measures and limitations on the use of the development" are secured.

Submissions for the City Council

130. Mr Drabble submitted that, even in the reduced form in which they appear in the decision notice, the City Council's reasons are entirely adequate to convey to an informed reader the basis of the decision to grant planning permission. As Sullivan L.J. observed in *R (Siraj) v Kirklees Metropolitan Council* [2011] J.P.L. 571, when a local planning authority had agreed with its officers' recommendation to approve a development a relatively brief summary of the reasons for the grant of permission may well be adequate. In this case the reasons indicate that the relevant policies of the development plan are summarized in the committee report, that the City Council has concluded that the scheme would comply with each of them, and that no material considerations outweighed the benefits of the proposals. That is sufficient to enable an informed reader to know why the City Council decided to grant permission. If, however, the court were to take the view that the reasons are deficient then, as the claimant now accepts, the solution is not for the permission to be quashed but for the court to order the City Council to add to its summary reasons the missing two paragraphs of the Head of Planning's recommendation. The claimant accepts that she would suffer no prejudice if this were done.

Submissions for FC United

131. Mr White advocated the course suggested by Mr Richards and not resisted by Mr Drabble.

Discussion

132. Mr Richards made it clear that the claimant no longer maintained this ground as a separate basis of challenge to the planning permission. However, there is no dispute that if I were to uphold the grant of planning permission but concluded nonetheless that the City Council had failed to discharge the requirements of article 31 of the Town and Country Planning (Development Management Procedure) (England) Order 2010, I should do as Ouseley J. said he would have been prepared to do at first instance in *Midcounties Co-operative Limited*. In that case Ouseley J. said (in paragraph 191 of his judgment) that, had the challenge to the local planning authority's reasons been made out, he would not have quashed the planning permission but could have required proper reasons by a mandatory order. He said that in his view – and this, I think, cannot now be controversial – it was not the inevitable consequence of an authority's

failure to comply with the statutory obligation to give reasons for the granting of planning permission that the permission, if plainly lawful, must be quashed.

133. Like *Midcounties Co-operative Limited*, this is not a case in which one simply cannot tell whether the grant of planning permission itself was lawful. The grant was lawful. None of the other grounds in the claim has succeeded, except in the agreed minor revisions to some of the conditions.

134. Are the reasons in the planning permission defective? It seems clear that, through some administrative error, they fail to reflect in full the recommendation that the Head of Planning made to the Planning and Highways Committee in her report. The City Council says that the omission from the decision notice of the first and second of the three paragraphs in which the Head of Planning summarized her conclusions was not deliberate; it was a mistake. The single paragraph of reasons that did find its way into the decision notice, the last of the three recommended by the Head of Planning, gives a summary of the policies in the development plan that were relevant to the decision to grant planning permission. So it meets the requirement of sub-paragraph (1)(a)(ii) of article 31. But in my view, as a summary of the City Council's reasons for the grant of permission, which is what sub-paragraph (1)(a)(i) requires, it is, at best, barely adequate. It was the other two paragraphs recommended by the Head of Planning that were evidently intended to meet that requirement. And they would.

135. Mr Drabble may have been right in his submission that the City Council's reasons are enough to convey to "an informed reader" the basis of the decision. Relatively succinct reasons were held to be sufficient by the Court of Appeal in *Siraj* (see paragraphs 16 and 17 in the judgment of Sullivan L.J.) and in *R (Telford Trustee No 1 Ltd) v Telford & Wrekin Council* [2001] EWCA Civ 896 (see paragraph 54 in the judgment of Richards L.J.) where, as here, the members had agreed with the recommendation made by their officers. In this case, the City Council's reasons do go further than simply naming the policies with which the development was "considered to accord". They refer to "the body of the report", and they say that "there are no material considerations which outweigh the benefits of the proposal". But as reasons for approving a scheme such as this, they are not merely brief; they are minimal.

136. Even that conclusion may be generous to the City Council. In the circumstances, I think the sensible thing to do is to accede to Mr Richards' request, which is not resisted by Mr Drabble or Mr White, and to order the City Council to issue fresh reasons in the form set out in the Head of Planning's report. No prejudice to the claimant, or to anyone else, would be caused by that.

Conclusion

137. For the reasons I have given, I grant permission to apply for judicial review, but the claim itself gains no more by way of relief than the City Council was prepared to concede before the hearing began (see paragraphs 60 and 130 above).