

Re Woodhouse Moor and other open spaces

ADVICE

Introduction

1. I have been asked to advise on a number of issues regarding the appropriation by Leeds City Council (“LCC”) of various parcels of open space to facilitate the development of New Generation Transport (“NGT”), a proposed trolleybus scheme which is being promoted under a Transport and Works Act Order (“TWAO”).
2. Specifically, I am asked to consider the following questions:
 - (i) Whether the appropriation of nine open spaces needed for NGT has already taken place;
 - (ii) Whether it is possible to appropriate land in advance of a TWAO being granted and, if not, whether the appropriation is invalid;
 - (iii) Whether it is lawful to appropriate land with the intention of avoiding Special Parliamentary Procedure;
 - (iv) Whether the appropriation of the open space was lawful in any event;
 - (v) Whether the appropriation precludes the Inspector from taking into account the loss of open space when making his decision;

Factual Background

3. The factual background is well known to those instructing me and is only set out very briefly here.
4. LCC and Metro have jointly applied to the Secretary of State for Transport for a TWAO for a new trolleybus scheme in Leeds known as NGT.

5. The proposals for NGT require the use of 9 parcels of land held by LCC as public open space (“the Open Spaces”). In order to use that land, advice was received suggesting that the land would need to be appropriated under section 122 Local Government Act 1972 (“LGA 1972”).
6. The proposed appropriation was advertised in the Yorkshire Post, a local newspaper, on 19 and 26 October 2013, pursuant to the consultation requirements set out in section 122(2A) of the LGA 1972.
7. An officer’s report dated 18 December 2013 (“the OR”) summarises objections that were received from the consultation and recommends that the Director of City Development appropriate the land.
8. On 8 January 2014 the Director of City Development approved the appropriation under his delegated powers.
9. Mr William McKinnon obtained copies of the NGT project board minutes (“the Minutes”) on 23 July 2014 following a request under the Freedom of Information Act 2000

Legal Framework

The open space

10. The circumstances surrounding the acquisition of the Open Spaces and any statutes or trusts under which they may be held have not been included in my instructions. However, it is common ground that they all form part of land owned by LCC which is held as public open space for the purposes of public recreation.

Appropriation

11. Appropriation is a process that permits a local authority to allocate land held for one purpose, to some other statutory purpose. Section 122 LGA 1972 provides the mechanism under which a local authority can appropriate land. It provides, so far as is relevant, that:

“(1)Subject to the following provisions of this section, a principal council may appropriate for any purpose for which the council are authorised by this or any other enactment to acquire land by agreement any land which belongs to the council and is no longer required for the purpose for which it is held immediately before the appropriation; but the appropriation of land by a council by virtue of this subsection shall be subject to the rights of other persons in, over or in respect of the land concerned.”

12. LCC is a principle council (see section 270(1) of the Local Government Act 1972).
13. There are three main requirements that must be satisfied in order to appropriate land under section 122:
- i. The land must already belong to the council;
 - ii. It must be appropriated for a purpose for which the council is authorised by statute to acquire land;
 - iii. The land must no longer be required for the purpose for which it is currently held.
14. The correct approach to the question of whether the land is “*no longer required*” has been considered in a number of cases, most recently *R (Lorraine Elizabeth Maries) v The London Borough of Merton* [2014] EWHC 2689 (Admin), where King J at [59] summarised the following principles from the Court of Appeal decision in *Dowty Boulton Paul Ltd v Wolverhampton Corporation (No. 2)*:

“1) whether land is still or is no longer required for a particular purpose, meaning no longer needed in the public interest of the locality for that purpose, is a question for the local authority, subject to Wednesbury principles, and not the court.

2) the statute is concerned with relative needs or uses for which public land has been or may be put. It does not require it to fall into disuse before the authority may appropriate it for some other purpose.

3) the authority is entitled when exercising its appropriation power to seek to strike the balance between comparative local (public interest) needs: between the need for one use of the land and another with the wider community interests at heart. It is for it to keep under review the needs of the locality and is entitled to take a broad view of local needs.”

15. When land is appropriated for development, the same degree of “requirement” or “necessity” should be shown as with compulsory purchase (*R v Leeds City Council, ex p Leeds Industrial Cooperative Society Ltd* (1997) 73 P & CR 70 at 77). It is irrelevant who the local authority proposes will carry out the activity or purpose specified, and it need not be carried out by the local authority itself.

16. There is also an additional consultation requirement where the land in question is currently held as public open space. Section 122(2A) LGA 1972 provides that:

“A principal council may not appropriate under subsection (1) above any land consisting or forming part of an open space unless before appropriating the land they cause notice of their intention to do so, specifying the land in question, to be advertised in two consecutive weeks in a newspaper circulating in the area in which the land is situated, and consider any objections to the proposed appropriation which may be made to them.”

Compulsory purchase of open space

17. Section 19 of the Acquisition of Land Act 1981 provides that open space which falls within a compulsory purchase order must be subject to Special Parliamentary Procedure unless the appropriate Minister certifies that equivalent land will be given in exchange or the land in question does not exceed 250 square yards.

18. Section 12(1) of the Transport and Works Act 1992 provides that:

“An order under section 1 or 3 above authorising a compulsory purchase shall be subject to special parliamentary procedure to the same extent as it would be, by virtue of section 18 or 19 of the Acquisition of Land Act 1981”

Discussion

Whether the open spaces have already been appropriated

19. It would appear that the decision to appropriate the Open Spaces was made by the Director of City Development under delegated authority on 8 January 2014. Details of this decision along with the decision notice and the OR were published on the LCC website on 9 January 2014.¹ Under 'Decision status', the website entry records that the recommendations in the OR were approved.

20. Those recommendations are then set out under details of the decision, which states that the Director of City Development:

"1. confirmed that the parcels of land identified on the attached plans, which are currently held for public recreation purposes are no longer required for those purposes;

2. approved the appropriation of the parcels of land to planning purposes to facilitate the carrying out of the development proposed in the NGT TWAO in accordance with section 226 of the Town and Country Planning Act 1990, and in accordance with section 122(1) of the Local Government Act 1972."

21. Accordingly, it would appear that the Open Spaces were appropriated, following the recommendation in the OR, on 8 January 2014. That also accords with the intention noted in the NGT minutes from a project board meeting on 16 December 2013 which state that:

*"Subject to agreement by lead members MF is to approve the appropriation of open space land on behalf of the Council under his powers of delegation... There is a risk that if the decision is delayed beyond early January this could jeopardise the Public Inquiry."*²

¹ <http://democracy.leeds.gov.uk/ieDecisionDetails.aspx?ID=40774>

² Paragraph 4g of Minutes from meeting on 16 December 2013.

22. Furthermore, when deciding to appropriate land, section 122(1) of the 1972 Act requires the land to be *“no longer required for the purpose for which it is held immediately before the appropriation”* (emphasis added). Since the Council is required to make a decision based on the position immediately before the appropriation, it is likely that a decision which did not take immediate effect would be unlawful, since the need for that land may materially change during the subsequent period.

23. I note that this position contradicts what is said on the NGT website, which states that *“The land would not be appropriated until and if Full Approval is granted for the project”* (emphasis added).³ However, in light of what I have said above, I think that it must be assumed that this statement is incorrect. One explanation for this apparent conflict might be that, although the land has been formally appropriated, it will continue to form part of the open space until the TWAO is approved. This is clarified by paragraph 5 of the introduction to the OR, which states that:

“In practical terms, the land will continue to be managed by Parks and Countryside and retain its open nature pending the Secretary of State’s approval of the proposed Transport and Works Act Order and the detailed design out of the scheme”

24. Finally, it is perhaps also worth noting that it appears that the decision was properly authorised. Article 12 of LCC’s constitution lists the Director of City Development as a Chief Officer who will have the functions and responsibilities set out in the Officer Delegation Scheme (Executive Functions) at Part 3 Section 3E of the Constitution. Part 3, section 3E(05) provides that the Director of City Development is authorised to discharge functions relating to the management of land (including valuation, acquisition, appropriation, disposal and other dealings with land or any interest in land).

³ http://www.ngtmetro.com/Open_Space_Appropriation/

Whether it is possible to appropriate land in advance of the TWAO being made

25. Section 122 of the Local Government Act 1972 provides that:

“(1)Subject to the following provisions of this section, a principal council may appropriate for any purpose for which the council are authorised by this or any other enactment to acquire land by agreement any land which belongs to the council and is no longer required for the purpose for which it is held immediately before the appropriation; but the appropriation of land by a council by virtue of this subsection shall be subject to the rights of other persons in, over or in respect of the land concerned.” (emphasis added)

26. In this case, the OR and the Decision indicate that the Open Spaces were appropriated for *“planning purposes to facilitate the carrying out of the development proposed in the NGT TWAO in accordance with section 226 of the Town and Country Planning Act 1990”*.

27. So far as is relevant, section 226 of the Town and Country Planning Act 1990 provides that:

“A local authority to whom this section applies shall, on being authorised to do so by the Secretary of State, have power to acquire compulsorily any land in their area

(a) if the authority think that the acquisition will facilitate the carrying out of development, re-development or improvement on or in relation to the land”

28. Accordingly, LCC have the power to appropriate land if they think that it will facilitate the carrying out of development, in this case NGT. In *R v Leeds City Council, ex p Leeds Industrial Cooperative Society Ltd* (1997) 73 P & CR 70 at 77, the court held that appropriation was the equivalent of compulsory purchase and the same degree

of “requirement” or “necessity” should apply in each case. In my view, LCC were entitled to conclude that there was sufficient necessity to facilitate the development of NGT to satisfy this requirement.

29. Whilst the other requirements of section 122 must also be satisfied, I do not think that it was unlawful for LCC to appropriate land to facilitate development which has not yet received consent.

Whether it is lawful to appropriate open space in order to avoid Special Parliamentary Procedure or the provision of equivalent open space as a replacement

30. It is clear from the OR and the Minutes that LCC have sought to appropriate the open public space so as to avoid the need to compulsorily acquire the land, triggering the need for SPP where appropriate replacement land is not provided.

31. Paragraphs 2.10 – 2.11 of the OR state that:

“The land is currently within the scope of the compulsory purchase powers conferred by the Order. However, if the order is made containing compulsory purchase powers over open space, it cannot come into force until it had been approved by Parliament, under what is known as “Special Parliamentary Procedure” or SPP

[...]

In order to avoid SPP, it is proposed that the Director of City Development no approves the appropriation of the 9 parcels and holds them for planning purposes, namely the development proposed in the NGT TWA Order” (emphasis added).

32. The conclusion to the OR then states at paragraph 5.1 that:

“In order to remove the prospect of SPP, the Council should appropriate the 9 parcels of land for planning purposes” (emphasis added).

33. The Minutes express similar sentiments. Paragraph 4f of the Minutes from the meeting on 16 September 2013 make it clear that appropriation was considered the only alternative to SPP.

“AW provided an update on the issues surrounding replacement public open space (POS) explaining that if the TWAO includes for acquisition of POS then either the order has to be approved under Special Parliamentary Procedures which can be a lengthy process or the council to designate the land as surplus to requirements and to appropriate it for NGT. SS raised concerns that it will be difficult to designate the land on Woodhouse Moor as surplus and KP asked how this was dealt with on the Supertram project. GB states that in hindsight this process should have been considered when the decision to go ‘on Moor’ was made earlier in the year. AW reiterated that the only other option was to consider Special Parliamentary Procedures which would introduce a greater risk to the project.

34. Whilst it is clear that LCC wished to appropriate the land so as to avoid the need for SPP, its reasons for this approach (see paragraphs 2.10 and 4.5.1 of the OR) are perfectly understandable and do not necessarily mean that the appropriation was unlawful.

35. I have considered whether the appropriation of the Open Spaces in order to avoid SPP would be unlawful on the basis that it amounts to use of the powers of appropriation for an unauthorised purpose, however I do not think this to be the case. It seems clear that the main reason for appropriating the land was to facilitate the development of NGT, even if appropriation was chosen as the preferred method because it avoided the risk and delay posed by SPP. The courts have generally taken the view that a public body will not have acted unlawfully merely because of some subsidiary unauthorised purpose where the dominant purpose accorded with the purpose for which the powers were conferred and was lawful (*Re Kelly’s Application for Judicial Review* [2000] NI 103). That would appear to accurately describe the present circumstances. For the avoidance of doubt, I should also make it clear that

there is nothing to suggest that LCC acted in bad faith when deciding to appropriate the land.

36. In my view, the flaws which arise from the desire to appropriate the land in order to avoid SPP are more properly characterised as amounting to an irrelevant consideration, or pre-determination of the issue as to whether the Open Spaces were no longer required in the public interest. Both of these issues are discussed in detail below.

Whether the appropriation of land was lawful

37. It is clear the decision of whether to appropriate the Open Spaces was a matter for the judgment of LCC. The exercise of that judgment can only be challenged by a court on Wednesbury grounds. However, to be lawful, the decision must also satisfy the usual requirements for decisions made by public bodies. Having reviewed the OR and the Minutes, I consider that there appear to have been a number of flaws in the decision-making process. These flaws fall within the following categories:

- i. Flawed consultation / pre-determination
- ii. Irrelevant considerations
- iii. Irrationality

Flawed consultation and pre-determination

38. Since the land appropriated was public open space, its appropriation is subject to an additional consultation requirement which is prescribed by section 122 (2A) Local Government Act 1972. This provides that:

“A principal council may not appropriate under subsection (1) above any land consisting or forming part of an open space unless before appropriating the land they cause notice of their intention to do so, specifying the land in question, to be advertised in two consecutive weeks in a newspaper circulating in the area in which the land is situated, and consider any objections to the proposed appropriation which may be made to them.”

39. In the present case, LCC published notice of its intention to appropriate the land in the Yorkshire Post on 19 and 26 of October 2013. The public were given until the 9 November 2013 to respond. 152 objections were received and these are summarised and dealt with in the OR.
40. Where consultation is required or undertaken, it is important that it is carried out lawfully and meets certain requirements. These were summarised in *R v North and East Devon HA, ex p Coughlan* [2001] QB 213 as follows:
- (i) It is undertaken when the relevant proposal is still at a formative stage;
 - (ii) Adequate information is provided to the consultees to enable them to properly respond to the consultation exercise;
 - (iii) Consultees are afforded adequate time in which to respond; and
 - (iv) The decision-maker gives conscientious consideration to the consultees' response.
41. I have not seen copies of the adverts so I am unable to comment on the adequacy of the information provided in the adverts. Nor do I have any reason to think that the public were not given an adequate time to respond. Indeed, objections received after the deadline were still taken into account (see paragraph 4.17 of the OR). However, the timing of the consultation appears to indicate that it was not undertaken when the proposal was still at a formative stage and that the objections were not conscientiously taken into account.
42. It is clear from the Minutes that the land that was required for the Scheme had already been decided. Therefore it is common ground that at this stage the Open Spaces were going to be required. Indeed, in the meeting on 16 September 2013, Gary Bartlett is recorded as stating that the issues surrounding the use of open space "*should have been considered when the decision to go 'on Moor' was made earlier in the year*" (emphasis added). The only issue at this stage was therefore the method by which the Open Spaces would be allocated for the purpose of the Scheme.

43. It is also clear from the Minutes that the project board were anxious to avoid having to acquire the Open Spaces under the TWAO as that would trigger the need for replacement land or SPP. Following *“concerns that it will be difficult to designate the land on Woodhouse Moor as surplus”*, it is recorded that Andrew Wheeler *“reiterated that the only other option was to consider Special Parliamentary Procedure which would introduce a greater risk to the project”*.⁴
44. At a further meeting on 21 October 2013, when the consultation had only just begun, the Minutes at paragraph 4f appear to indicate that the board had already decided how it would demonstrate that the Open Spaces were no longer required. After concern was again raised that it would be *“difficult to argue the case for land being classed as surplus”*, Andrew Wheeler *“advised that this [was] being dealt with through mitigation, citing the improvements to Woodhouse Moor as an example”*.
45. This suggests not only that the decision to appropriate the land in order to avoid SPP had already been taken, but also that it had been made at a stage when the consultation had only just begun. Moreover, the statement that a solution to any objections had already been *“dealt with”* suggests that the OR did not really give conscientious consideration to the subsequent public objections. As a result, this failure would have been passed on the Director of City Development who ultimately made the decision.
46. An alternative way of looking at this sequence of events is that the ultimate decision was flawed because it suffered from pre-determination. The test for pre-determination is whether the fair-minded observer would conclude that there was a real risk that minds were closed (*R (Lewis) v Redcar and Cleveland BC* [2009] 1 WLR 83 per Pill LJ at [68]).
47. Whilst it is important to recognise that there is a distinction between pre-determination and pre-disposition (*R (Cummins) v London Borough of Camden* [2001] EWHC Admin 111 at [256]), and pre-determination does not occur simply because a decision-maker has previously expressed an inclination towards a certain

⁴ Paragraph 4f of minutes from meeting on 16 September 2013.

outcome, previous statements should not be totally disregarded. Moreover, there are particular facts in this case which reinforce the apparent pre-determination of the appropriation of the Open Spaces. First, it is clear from the Minutes that, despite the obvious desire to appropriate the land, it was clearly felt that it would be difficult to argue that the land at Woodhouse Moor was surplus. Second, it appears that *“following meetings with legal advisors from Leeds and BDB”* the solution to this difficulty had been found before the consultation to ascertain the usage and need for the open space had barely begun. Finally, the OR dealing with Woodhouse Moor is poorly reasoned (see below), which is indicative of an attempt to massage the objections and shoe horn them into a conclusion that had already been decided.

48. I therefore consider that it is likely that the decision to appropriate the Open Spaces suffered from a flawed consultation and or pre-determination. However, it would be important to gather further information to demonstrate this.

Irrelevant considerations

49. When making a decision a public body must take into account all those considerations to which it must have regard and disregard any considerations that are irrelevant to the matter to be decided (*SSES v Tameside MBC* [1977] AC 1014 at 1065 per Lord Diplock). It appears from the OR that, in making the decision to appropriate the Open Spaces, a number of irrelevant considerations were taken into account.

50. First, it appears from the OR that the desire to avoid SPP or having to provide replacement land was a key consideration when deciding whether to appropriate the Open Spaces. Paragraphs 2.10 of the OR explains that *“if the order is made containing compulsory purchase powers over open space, it cannot come into force until it has been approved by Parliament, under what is known as “Special Parliamentary Procedure” or SPP”*. The paragraph then sets out various disadvantages of SPP before concluding that *“SPP would therefore add a significant level of risk, and risk of delay to the NGT proposals”*. Accordingly, paragraph 2.11 suggests that:

“In order to avoid SPP, it is proposed that the Director of City Development now approves the appropriation of the 9 parcels and holds them for planning purposes, namely the development proposed in the NGT TWA Order” (emphasis added).

51. That suggestion is then revisited in the conclusion of the OR at paragraph 5.1 which again states that:

“In order to remove the prospect of SPP, the Council should appropriate the 9 parcels of land for planning purposes” (emphasis added).

52. The conclusion is immediately preceded by a prominent section on “risk management”, which states in no uncertain terms that:

“If the Council does not appropriate the site and hold it for planning purposes to be used for NGT, then the Order will be subject to SPP. This is inherently risky, and it could lead to the public inquiry effectively being re-run in Parliament, but without the safeguards that apply to quasi-judicial decision making by the Secretary of State, as no appeal or judicial review is possible in the case of Parliamentary decisions, and without the local knowledge that Councillors can bring to bear on this decision. SPP is also likely to add at least 12 months to the programme for NGT, which could jeopardise the availability of DfT funding. The appropriation removes the risk of SPP.”

53. LCC’s wish to avoid SPP is perfectly understandable and there is nothing wrong with deciding that it would be preferable to appropriate the land. However, no matter how laudable the desire to avoid SPP was, it should plainly not have formed part of the decision to appropriate the land. The position is akin to the decision in *R v SSE, ex p Kingston upon Hull City Council* [1996] Env LR 248, where Harrison J held at 262 that the designation of estuaries could not be carried out by reference to the costs that would have arisen by reason of such designation, as such costs could not be relevant to a genuine and rational assessment of what actually constitutes an

estuary. Likewise, the risk of delay caused by SPP cannot possibly be relevant to whether or not public open space is needed in the public interest of the locality.

54. Indeed, it would be perverse if the wish to avoid SPP or the provision of replacement land could form part of the decision to appropriate land, fundamental to which is the consideration of whether that land is still needed for recreation.
55. The inclusion of the need to avoid SPP in the OR at paragraphs 2.10 – 2.11, and again immediately before and in the concluding reasons suggests that there was a very real risk that the decision-maker took this factor into account when deciding whether or not to appropriate the land.
56. The second irrelevant consideration is perhaps even more fundamental. It goes to the heart of the decision that the open spaces were no longer needed for public recreation. It is the suggestion that the decision of whether the Open Spaces were needed could be made on the basis of whether there were adequate mitigation measures. This theme of mitigation crops up erroneously throughout the OR. Paragraph 2.8 refers to “*numerous mitigation works*”. Paragraph 2.9 states that “*significant environmental improvements are proposed as part of the NGT project to mitigate for the loss of land*”. Paragraph 3.4.1, dealing with land on the corner of the Holtdale Approach, concludes (amongst other reasons) that “*given...the general mitigation and amenity works...it is reasonable to conclude that this parcel is not still needed in the public interest for recreation*”. Paragraph 3.4.2, dealing with land to the east of Otley Old Road, states that “*this loss of green space will be mitigated for by the planting along Otley Old Road*”. Paragraph 3.4.4, dealing with land to the northeast of Otley Road, noted that “*it is intended to plant additional trees in this area which will benefit recreation generally*”. Paragraph 3.4.9, dealing with land at Belle Isle Circus, also describes proposals to “*implement enhanced tree and shrub planting*”, concluding that “*the mitigation works will ensure that the recreational value of the whole area is maintained*”.

57. However, it is in paragraph 3.4.5, dealing with Little, Cinder and Monument Moor, where the erroneous reliance on mitigation measures is most apparent. It describes how LCC and Metro *“will implement landscaping and environmental mitigation works on the Moor, as well as at other locations. These will enable the Council as local planning authority to ensure that the mitigation works will result in the recreational value of the Moor being at least as high after the appropriation as it is at present”*. It goes on to describe how the opportunity will be taken to *“carry out significant replanting and public realm improvements in the Cinder Moor and Monument Moor areas...creating a “grasscrete” area that can be used for parking...resulting in an area that will be more attractive for recreation which will create an overall benefit”*. This is concluded by the statement that *“it is expected that the recreation amenity of the overall area will be of at least as high value for public recreation”*.

58. The Minutes leave little doubt that these mitigation measures formed a central consideration to the decision that the appropriated open space was no longer needed. At paragraph 4f of the Minutes from 21 October 2013, Andrew Wheeler responded to concerns that the land could not be considered surplus with the statement that *“this is being dealt with through mitigation”*.

59. What is perhaps most bizarre about the inclusion of mitigation measures as a justification for the loss of open space is that the OR expressly states at paragraph 3.3 that *“this report does not deal with objections relating to...the amenity value of the land as greenspace generally, as those issues will be considered at the Public Inquiry”*. It is wholly irrational that objections relating to loss of amenity value have been discounted on the basis that they are irrelevant to whether there is a need for the public open space, but that those very same issues have been taken into account as mitigation upon which the loss of open space is largely justified.

60. The irrelevance of mitigation measures in the decision to appropriate the land is further reinforced by the fact that all of these measures are simply proposed ‘in principle’. Thus, even if it were a relevant consideration, there is absolutely no

guarantee that they could be secured, which is even acknowledged in the OR. For example, paragraph 3.4.5 notes that *“These proposals have been considered and approved in principle by City Plans Panel, and the precise details of the mitigation measures will require the approval of the Council as local planning authority”*. Moreover, if the NGT TWAO is not made, there is no guarantee that any of these measures would take place, however the land will have already been appropriated and no longer protected as public open space.

61. I also find the conclusion that land is not needed because it only represents a small portion of larger open space rather baffling. Especially, in the context of a general shortage of open space.⁵ Such a conclusion is drawn at various parts of the OR. For example: *“the loss of this land will not prohibit or unduly impact on the recreational use or remaining open space”* (paragraphs 3.4.1, 3.4.3 and 3.4.4); *“where the land to be taken represents a small portion of a larger open space, where the specific public recreation that takes place on the land can readily continue on the remaining land”* (paragraph 3.4.5); *“where any actual uses of the grass verge for public recreation can readily be accommodated on the main part of the Moor”* (paragraph 3.4.6); *“the land affected makes up only a small part of an open space”* (paragraph 3,4,8); *“where the land proposed to be appropriated is a small part of a larger open area”* (paragraph 3.4.9). Ultimately, this is a matter of judgment for LCC on a case by case basis and the fact that it seems an odd conclusion will not necessarily make it unlawful. However, if it could be demonstrated that LCC adopted a stance that the loss of a small part of a much larger area of open space was sufficient to demonstrate that the smaller area of land was not needed as recreational space *per se*, then I consider that that would be an unlawful approach.

62. Finally, it appears that a number of relevant representations relating to the loss of open space have been wrongly discounted. It is not immediately clear from the OR why 69 objections referring in general terms to the loss of open space were

⁵ I have been instructed that this is the case and understand that a report is being prepared to demonstrate this.

discounted (OR paragraph 3.3). In my view, these were relevant to the issue under consideration and should have been taken into account.

Irrationality

63. Irrationality is a high threshold concerning consideration of whether a decision is beyond the range of responses open to a reasonable decision-maker (*R v Ministry of Defence, ex p Smith* [1996] QB 517 at 554 per Sir Thomas Bingham MR). However, in my view, the conclusion that the loss of open space required for public recreation can be compensated through the provision of additional planting and environmental improvements to the remaining open space overcomes this threshold. It is a conclusion which fundamentally misunderstands the test which needs to be applied. That test is whether the land due to be appropriated is no longer needed in the public interest of the locality for public recreation. That question, which LCC are required to determine, cannot be answered by reference to improvements to the remaining land, especially in circumstances where objections have been received which indicate that there is still a need for the land due to be appropriated. Moreover, the suggestion that activities currently undertaken on the land due to be appropriated could “*readily continue on the remaining land*” misses the point. If that reasoning were applied, it would always be possible to show that open space was no longer required, irrespective of the need, provided that only part of it was being appropriated.

Is the Inspector precluded from taking loss of open space into account

64. The development of the Open Spaces is contrary to local and national planning policies, which the Inspector must have regard to when making his decision. Although the requirement in section 38(6) of the Planning and Compulsory Purchase Act 2004 does not apply to TWAOs (*R (Samuel Smith Old Brewery (Tadcaster)) v SSECC* [2012] 2 All ER 849), the Inspector is still required to take local and national policy conflict into account.

65. Policy N1, is a saved policy of the Leeds Unitary Development Plan. It concerns the development of land that has been identified as protected greenspace. It provides that:

“Development of land identified on the proposals map and city centre inset map II as protected greenspace, will not be permitted for purposes other than outdoor recreation, unless the need in the locality for greenspace is already met and a suitable alternative site can be identified and laid out as greenspace in an area of identified shortfall.”

66. The NPPF does not form part of the statutory development plan, but it is a material consideration which any decision-maker must take into account. Paragraph 74 of the NPPF provides that:

“Existing open space, sports and recreational buildings and land, including playing fields, should not be built on unless:

- an assessment has been undertaken which has clearly shown the open space, buildings or land to be surplus to requirements; or*
- the loss resulting from the proposed development would be replaced by equivalent or better provision in terms of quantity and quality in a suitable location; or*
- the development is for alternative sports and recreational provision, the needs for which clearly outweigh the loss.”*

67. It is clear that prior to the appropriation of the Open Spaces, any development on them would have been contrary to policy N1 and paragraph 74 of the NPPF. However, it is less clear what effect appropriation has had on the application of these policies. In other words, now that LCC has decided that the land should be allocated for the development of the Scheme, can the promotion of the Scheme be regarded as contrary to policy N1 and/or NPPF paragraph 74.

68. At one level it would seem odd if, having decided that public open space should be appropriated for development purposes, the decision-maker was then required to regard such development as contrary to policies which are aimed at protecting open space. Especially given that the tests under those policies to determine whether development will be permitted are essentially the same as the test for appropriation, requiring consideration of whether there is a need for the land and whether it is surplus to requirements.
69. However, there is one material difference which is that the tests under N1 and NPPF paragraph 74 do not appear to take into account a balance between the comparative local needs for the land and whether its development might be regarded as being in the greater public interest of the locality (cf. the interpretation of the test for appropriation set out in *R (Lorraine Elizabeth Maries) v The London Borough of Merton* [2014] EWHC 2689 (Admin) at [59]). It might be thought that the same approach should be read into the application of these policies. However, that cannot be right because those considerations will already be taken into account under other policy considerations, against which any conflict with these policies will be balanced.
70. Furthermore, it would seem that policy N1 and paragraph 74 do not apply exclusively to designated open space. Were that the case, it could be argued that following the appropriation the land was no longer protected open space and as such the policies had no application. However, that is not the case. Paragraph 74 certainly appears to envisage that it will cover land which extends beyond formally designated open space, stating simply that it applies to “*Existing open space, sports and recreational buildings and land, including playing fields*”. Policy N1 applies to “*land identified on the Proposals Map...as protected greenspace*”. As far as I can see this map has not been amended following the appropriation to indicate that these areas are no longer protected greenspace.
71. I also note that LCC appear to be of the view that these policies would still be applicable to the Open Spaces (see OR paragraph 4.1.6). Whilst the interpretation of policies is a matter of law for the courts to determine (*Tesco Stores Ltd v Dundee City*

Council [2012] UKSC 13 per Lord Reed at [18] – [19]), this at least indicates that LCC have independently formed the same conclusion.

72. Finally, as a matter of commons sense, it would seem logical to conclude that appropriation would not affect the application of these policies. Whilst the decision to appropriate the Open Spaces was made in order to facilitate the development of NGT, the decision to grant the TWAO and permit the Scheme must logically still take into account the fact that it will result in a loss of public open space.

73. Although it is far from clear whether policy N1 and NPPF paragraph 74 will continue to apply to open space that has been appropriated to facilitate development, I consider the better view to be that they will. Accordingly, the Inspector is not precluded from taking the loss of open space into account when making his decision. Indeed, he is under an obligation to consider it and weigh any policy conflict against the other policies and benefits of the Scheme.

Conclusion

74. For the reasons given above I have come to the following conclusions:

- i. The Open Spaces were appropriated by LCC on 8 January 2014;
- ii. It was not unlawful to appropriate the Open Spaces in advance of the TWAO being made;
- iii. The desire to avoid SPP does not, on its own, make the Open Spaces unlawful;
- iv. The decision to appropriate the Open Spaces is likely to have been taken unlawfully;

- v. The appropriation of the Open Spaces does not preclude the Inspector from taking the loss of public open space into account when deciding to recommend that the TWAO is made.

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