KIRKLEES LOCAL PLAN EXAMINATION - Stage 4

Hearing Statement re. matter 30 - Huddersfield Sub-Area allocations.

Site H1747 (Bradley Park golf course).

Question (b): Is the allocation of site H1747 consistent with paragraph 74 in the National Planning Policy Framework?

1. In this statement, we set out what we consider to be the correct interpretation of paragraph 74 of the National Planning Policy Framework (NPPF). It is axiomatic that the Local Plan is unsound if it fails to comply with the National Framework, and it is this case which we propose to advance.

2. NPPF paragraph 14 states:-

"Local Plans should meet objectively assessed needs, with sufficient flexibility to adapt to rapid change, unless

- any adverse impacts in doing so would significantly and demonstrably outweigh the benefits when assessed against the policies in this Framework taken as a whole; or
- specific policies in the Framework indicate development should be restricted"

3. The first thing to say about NPPF paragraph 74 is that it constitutes a "specific policy in the Framework indicating development should be restricted" within the wording of paragraph 14 as quoted. No Framework provision could be so obviously restrictive of development than paragraph 74. It is necessary to make this somewhat obvious statement to counter the comment in paragraph 5.11 of the SPRU report (April 2017) that paragraph 74 should not be considered as a paragraph 14 restriction. The SPRU report correctly says that paragraph 14 contains a footnote [9] and also correctly lists the restrictive policies referred to in that footnote. However, what it fails to say is that, before the list, footnote [9] starts with the words: "For example….". This clearly means that the list which follows is <u>not</u> exhaustive. So it is false and misleading for SPRU to proceed in paragraph 5.12 to treat the footnote list as if it were exhaustive and to state (as it does) that the only NPPF paragraph 14 restriction applicable to Bradley Golf Course is Green Belt. NPPF paragraph 74 clearly applies as a specific policy restricting development, and this attempt by the SPRU report's author to exclude it from consideration is to be resisted.

4. As the Council has not stated which particular bullet-point(s) in NPPF para. 74 it relies on, it is presumably necessary to deal with each of the three bullet-points. The importance of their correct interpretation and application cannot be overemphasised.

<u>5. First bullet-point (surplus to requirements)</u>.

5.1 The first bullet-point of NPPF paragraph 74 stipulates that existing open space, sports and recreational buildings and land 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.

5.2 In this case, no less than four assessments have been presented, two of them dated after consultation on the Publication Local Plan had closed and therefore never consulted on. Despite the number of reports, it is submitted that none clearly shows Bradley Park golf course as being

genuinely surplus to requirements. The mere fact that it has taken four reports to secure the magic phrase “deemed to be surplus to requirements” speaks volumes in itself.

5.3 The first report by Knight Kavanagh & Page dated October 2015 (KKP1) nowhere refers to the golf course at Bradley Park as surplus to requirements. The main thrust of KKP1 is directed at establishing an oversupply of golf provision in the district, with sufficient demand at the surrounding golf courses to meet any need arising in the event of closure of any of the 12 courses reviewed. It does not suggest that Bradley Park should close; on the contrary it acknowledges Bradley Park as the only municipal pay-and-play course in Kirklees, and more than once praises it as a successful and innovative golf facility:

5.3.1. on page 19 : “Bradley Park offers a good mixture of golf facilities at which the game of golf can be played, taught and practiced at all ability levels”

5.3.2. on page 29 : “Bradley Park has successfully tapped into the nomadic market”.

5.3.3 on page 36 : “Bradley Park is one of the few remaining municipally-owned courses in either Kirklees or the neighbouring authority areas”

5.3.4 on page 39 : “Bradley Park GC….has a unique role as a municipal ‘pay and play’ facility, providing both playing and learning facilities”.

5.3.5 on page 39 : “At Bradley Park…the quality of the product is good and the demand for its playing, teaching and social facilities remains strong”.

Far from concluding it to be surplus to requirements, KKP1 strongly implies that, whilst it may be located in an area of stated oversupply and in a climate of declining participation, Bradley Park itself is a much needed and appreciated facility.

5.4 The Smith Leisure report (Smith) obtained in April 2016 provided much information not seemingly considered relevant in KKP1, including details of the course’s income and footfall figures. Bradley Park comes out well on the figures given. On the question of oversupply, Smith comes, on a much better figures analysis, to the opposite conclusion to KKP1. Smith concludes (paras. 6.9 and 6.16) that there is no oversupply. And again, Smith nowhere states or implies that Bradley Park golf course is surplus to requirements. The Smith report effectively provides a suggested path for mitigation if Bradley Park is closed - it makes no comment whatsoever as to whether it should close, although it leaves the impression that the author was perhaps not in favour. The income and footfall figures in Smith show that Bradley Park remains a perfectly viable, indeed profitable, facility.

5.5 As a suggested mitigation measure, Smith raises the possibility of Bradley Park golfers “transferring” to Willow Valley Golf Club, should the former close.

5.6 Upon closure of consultation, there were thus two golf reports neither of which suggested that Bradley Park was surplus to requirements.

5.7 Post-consultation, in March 2017, Knight Kavanagh & Page produced a further report entitled “Comparison of Existing & Future Sports Provision: Bradley Park” (KKP2). This report’s stated intention was to show that development for alternative sports & recreational provision would outweigh the loss of golf at Bradley Park under NPPF para. 74 bullet-point 3. KKP2 principally confined itself to this brief, but contained, almost as an aside, a comment that Bradley Park “can be deemed to be surplus to requirements” (first paragraph, page 2). The stated reasons for this observation are that present golf provision in the district is “more than sufficient” to meet current

and future demand and other local golf facilities have capacity to meet the needs and demands of Bradley Park golfers.

5.8 KKP2 nowhere explains the apparent volte face from KKP1, in which Bradley Park's role was hailed as "unique", etc. It also forfeits all pretensions as an independent assessment by its opening paragraphs extolling the delivery of houses at Bradley Park – it is thus more in the nature of a polemic in favour of development than an independent report.

5.9 To state that Bradley Park "can be deemed to be surplus to requirements" (which is as far as KKP2 is prepared to go) is a weak and unconvincing choice of words against paragraph 74's requirement that the assessment should "clearly show" that the facility is surplus to requirements. KKP2 does not clearly show Bradley Park as surplus to requirements - it makes no reference whatsoever to its obvious viability both as to income, membership and popularity. Equally there is no retraction of the conclusions in KKP1 that the course is "unique" in the district and demand for its services is strong - KKP cannot maintain both these contrary views simultaneously.

5.10 Just how weak the KKP2 surplus to requirements "verdict" is, is confirmed by the choice of words used by the Council's other specialist - on page 49 of the SPRU report (half-way down in the right-hand column) : "The council's evidence *suggests* that the existing golf course is surplus to requirements" - hardly a ringing endorsement that the evidence "clearly shows" the course as surplus to requirements as per paragraph 74.

5.11 The grounds given in KKP2 for the "surplus to requirements" conclusion are equally unconvincing. Firstly, the previous reports do not in fact concur that there is an oversupply in the district (the Smith report says the reverse). In their letter of 19/12/2016, Sport England also concluded that evidence of oversupply was lacking. Even if the previous reports had shown a current oversupply, that would not of itself mean that a golf course in that particular area was surplus to requirements. We would say that such a judgment requires due consideration of the nature of the course in question, its financial viability, the services and facilities offered, its popularity, its appeal to and nurture of golf beginners, etc. In the case of a failing course (both as to income, footfall, membership and maintenance), no doubt the existence of an oversupply of golf provision in the area and the ability of other courses to take on displaced golfers would be material considerations in arriving at a surplus to requirements judgment, but Bradley Park is not a failing golf course. On KKP2's logic, virtually any golf course with others nearby would be in danger of being "deemed surplus to requirements" – indeed Willow Valley Golf Club itself could be "deemed surplus to requirements" as it is in the same geographic area as Bradley Park and subject to the same local market forces.

5.12 The probability of other golf courses accommodating displaced Bradley Park golfers (the other "ground" advanced in KKP2) is (1) debateable in regard to cost and access (especially for nomads) and (2) not a proper marker of whether a surplus to requirements situation has arisen. Of course, other golf clubs would take on displaced golfers. That is their raison d'etre. Bradley Park itself can and would take on golfers from other courses. This is no more than a statement of the obvious. A surplus to requirements judgment cannot be based on the probability that other courses will step into the breach – that is merely a matter of mitigation. A judgment of whether a sports facility is surplus to requirements must be based principally on that facility's proper functioning or otherwise in the market as previously mentioned (e.g. popularity, financial viability, etc.).

5.13 A successful golf course should not be deemed surplus to requirements on the basis of the KKP2 grounds, even if valid.

5.14 To conclude Bradley Park as being surplus to requirements, one would expect at the very least some evidence from the course managers, Kirklees Active Leisure (KAL). However, there is none. Instead, it transpires that KAL was not consulted by Kirklees Council about the housing allocation - see the website representation during Publication Local Plan consultation by Councillor Jim Dodds (then Lord Mayor of Huddersfield and throughout a KAL trustee). See also KAL's initial website posting following the allocation announcement clearly expressing surprise and concern. (Appendix A)

5.15 To summarise, Bradley Park remains an economically profitable, well-used and popular sports facility, and as such it is not surplus to requirements, cannot be so considered and there is no assessment clearly showing that to be the case. Indeed 900 objections at draft Local Plan stage demonstrate strong local feeling that the facility is not surplus to requirements; likewise the recent proposal to retain a 9-hole course amounts to a tacit admission that the facility is not surplus to requirements.

6. Second bullet-point (provision of replacement facilities).

6.1 There is a proposal, extraordinarily late in the day, to substitute a 9-hole course, utilising some of the existing holes, as a "replacement" for the present course.

6.2 Under NPPF para. 74 bullet-point 2, it is "the loss resulting" from the proposed development which is to be replaced - the "loss resulting" in this case would be an 18-hole 6,280-yard championship golf-course. A 9-hole course, even with double sets of tees on each hole, does not approach being an equivalent or better replacement facility for this loss.

6.3 By its very nature (shared fairways and greens) a 9-hole course cannot accommodate at any given time the same number of playing golfers as an 18-hole course.

6.4 For a more comprehensive overview of this topic, please refer to the critique headed "Proposal to replace BPGC with a 9-hole alternative facility" prepared by club members Phil Smith, Michael Hanson and Gary Ward.

7. Third bullet-point (development for alternative sport).

7.1 We believe the Council has throughout laboured under a false understanding of this provision. The Framework's words are, however, quite clear. Existing open space and sports buildings and land should not be built on unless the development is for alternative sport and recreational provision….. There should be no need to finish this sentence, as it is at once apparent that this bullet-point cannot apply by virtue of the fact that the development/allocation is not for alternative sport and recreation; it is for housing. Consideration as to whether the needs for any alternative sport outweigh the loss, under the second part of this bullet-point, accordingly does not arise.

7.2 The Council's misreading of this provision is exemplified in both the Initial Masterplan and in the Phase II Masterplan Delivery Statement, in both of which documents the following words appear: "The masterplan also recognises/responds to the requirements of NPPF paragraph 74, that loss of a sporting facility should either be replaced with equivalent or better provision, or that alternative sports facilities should be provided to outweigh the loss." (para. 2.5.2 Initial Strategic Masterplan and para. 9.5 Masterplan Delivery Statement).

7.3 This loose and misleading merger of the provisions of the second and third bullet-points of paragraph 74 gives the impression that the third bullet-point is satisfied provided some alternative sports facilities are provided (subject only to the outweighing the loss requirement, although even

that is downplayed by omitting the word "clearly"). But this is NOT what bullet-point 3 says - what it says is that the development in question is to actually be for alternative sport. It is not a question of merely providing some alternative sport – that is what the development has to be for.

7.4 Examples of the development being for alternative sport would be the replacement of football pitches by a cricket pitch or the removal of an ice-skating rink to be replaced by an indoor bowling facility - in the case of something as large as a golf course, possibly a cross-country track for athletes or horse-riders. The mere provision of some football pitches (which could easily go elsewhere) cannot by any stretch of imagination be considered as "development for alternative sport".

7.5 All sides agree that the development/allocation here is for housing. A belated proposal to include some alternative sports provision does not bring it within bullet-point 3. The development is still for housing, and not for alternative sport.

7.6 Support for this interpretation of the third bullet-point comes from:

7.6.1 the legal rules of construction which require that words be given their natural and ordinary meaning, unless that gives rise to a perverse outcome;

7.6.2 regard for the draftsman's choice of words - had (s)he intended the provision of some alternative sport to be sufficient, (s)he would have used some other form of words (e.g. "the development *includes/provides for* alternative sport, etc..." or "*part of* the development is for alternative sport.."). The Council's meaning requires this kind of addition or insertion of words not used by the draftsman, and examples of this are to be found in their documentation. This adding of words to arrive at a preferred interpretation is not allowable. The draftsman could have, but deliberately did not, use these words. The draftsman said what (s)he meant and meant what (s)he said.

7.6.3 the recent Supreme Court decision in Richborough Estates Partnership LLP –v- Cheshire East Borough Council, where on the interpretation of a similar phrase in NPPF, paragraph 49 (namely "policies for the supply of housing"), the Court ruled that the word "for" in that phrase could not be expanded to mean "affecting" (i.e. "policies affecting the supply of housing") – this is analagous to the present suggestion that the word "for" in this clause in paragraph 74 should be extended to mean "including" – see para. 57, p. 24 of the Richborough judgment.

7.6.4 Counsel's advice (Philip Robson of Kings' Chambers, Leeds) confirming his opinion that bullet-point 3 does not apply here. (Appendix B and Appendix C).

7.7 No doubt mixed housing/sport developments have been allowed in the past, but we would argue not in regard to perfectly viable existing facilities. We believe that such cases have arisen where:

7.7.1 the existing facility was under-used and/or failing and consequently the paragraph 74 criterion employed was almost certainly bullet-point 1 (surplus to requirements). There is clearly no problem with mixed housing/sport developments where either bullet-points 1 or 2 are involved; and/or

7.7.2 the landowner/occupier was not opposing development; and/or

7.7.3 the third bullet-point's meaning was not argued.

7.8. We consider that the decisions itemised in the SPRU report can be distinguished from the present case on the above grounds.

7.9 As bullet-point 3 does not apply, the need to consider the second part of it as to whether any alternative sport clearly outweighs the loss of the present facility does not in our view arise. Consequently, as both reports fail to understand that the third bullet-point does not apply, the lengthy arguments advanced in the KKP2 and SPRU reports on this point are rendered academic. Nevertheless, we would state that we cannot in any event agree with the SPRU report that usage of the proposed 3G football pitches will "clearly" outweigh the numbers currently using the golf facilities. The golf usage figures are actual and verifiable; the football usage figures are hypothetical and projected. Furthermore, the projections will doubtless prove over-optimistic, especially once the novelty has worn off. An ageing population (well illustrated by Figure 4.1.2 on p. 28, KKP2) is more likely to participate in golf than football. Furthermore, football pitches can be located in any number of places - indeed the Football Pitches report refers to a publicly-available 3G pitch being installed at All Saints' School, which is only 500 yards away from Bradley Park.

This Statement has been prepared and submitted by Nicholas Howe, member and former secretary of Bradley Park Golf Club. 23rd January 2018

Appendix:

A. Kirklees Active Leisure website posting dated 29th September 2015.
B. Letter from N. Howe dated 14th July 2017 to Counsel's clerk Jake Brooke accompanying instructions to Counsel.
C. Counsel's Opinion (Philip Robson, King's Chambers) dated 26th July 2017.

14th July 2017

F.A.O. Jake Brooke

Dear Mr. Brooke,

Re: Bradley Park Golf Club, Huddersfield. Direct Access. Interpretation of National Planning Policy Framework, paragraph 74 (Open space & sports facilities).

Until March of this year, I was Secretary of Bradley Park Golf Club (BPGC) in Huddersfield, which is threatened with housing development under Kirklees Council's emerging Local Plan, and I am still a member of the club serving on its housing development sub-committee. Until my retirement a few years ago, I was for 40 years a practising solicitor in Huddersfield. The present Secretary of BPGC has authorised me to submit this letter and its enclosures to you on the Club's behalf.

The Club seeks direct access to a barrister with planning expertise as to the interpretation of certain parts of NPPF para. 74, particularly the first and third bullet-points. A fellow committee member and I talked with Philip Robson about this at the end of a recent seminar at which Philip spoke and which we attended at King's Chambers upon the interpretation of NPPF following the Richborough case.

BPGC is a members' golf club attached to the municipal golf course at Bradley Park. The course is owned by Kirklees Metropolitan Council (KMC). The course is undoubtedly one of the best municipal pay-&-play courses in Yorkshire and is the only such course in Kirklees. BPGC has approximately 190 members, but the course also accommodates at affordable prices a large number of "nomadic" (i.e. unattached) golfers. The golf complex at Bradley Park also comprises the only viable driving-range in Kirklees and also FootGolf. KMC has allocated the site for housing in its Local Plan with a view to building some 2,000 odd houses on it. As site owner, KMC clearly has a vested interest financially.

The golf course at Bradley Park is currently and has for many years been part of the green belt. It seems that KMC is proposing to redraw the green belt boundaries as part of the Local Plan process.

It appears to be acknowledged by all parties that Bradley Park is a very fine golf course, which apart from being the only pay-&-play facility in Kirklees is also well-used, profitable, popular, well-run and well-maintained. Nevertheless KMC seek to declare it "surplus to requirements" within the meaning of the first bullet-point on NPPF, para. 74. It has now produced no less than 3 "golf needs assessments", the last one of which (dated and produced only a few weeks before the Plan was submitted to the Secretary of State on 25th April and well after the last consultation period had closed) does finally state that the course "can be deemed to be surplus to requirements". However, the first assessment, whilst indicating that there may be an oversupply of golf courses in the district, stated in terms that Bradley

Park was “unique” and that demand for its facilities “remains strong”. The second assessment referred only to mitigation and remediation options that could be considered if the course were to be closed, while at the same time seemingly concluding that there probably was no oversupply of golf in the area after all. The third assessment claiming the course to be “surplus to requirements” was provided by the same company which had previously concluded the golf course to be “unique” with “strong” demand for its services!

There is a fourth report commissioned by KMC (again dated and produced post-consultation) which seeks to justify the inclusion of the site in the Local Plan by reference to the third bullet-point of NPPF, para. 74. This particular report argues that the inclusion by KMC within the housing development of certain alternative sports/recreational facilities (principally football pitches and cycling/running tracks) brings the third bullet-point into play, and then seeks to establish that this “alternative sports provision” outweighs the loss of the golf course as stated in that bullet-point. BPGC considers the arguments put forward in this report in favour of the so-called alternative sports provision to be weak and the statistics given on the likely usage to be suspect. But more importantly, BPGC is doubtful that the third bullet-point applies at all. It has always been BPGC’s case that the third bullet-point is simply not applicable because the development is not “**for** alternative sports, etc” as stated, but is **for** housing. BPGC interpret the third bullet-point as applying to, for instance, the replacement of an athletics/cycling track by a cricket pitch and pavilion. KMC are trying to extend the meaning of the word “for” in the third bullet-point to incorporate the concept of “including”, but BPGC considers this to be a strained reading. The draftsman of NPPF could have easily written for the third bullet-point “the development includes alternative sports, etc…”, but did not. Nevertheless this report introduces a number of previous Inspectors’ decisions, some dealing with golf courses, which purport, at least on first reading, to justify application of the third bullet-point in cases of mixed housing/alternative sports provision. BPGC think that nearly all these cases can be distinguished from the present situation – most deal with land where the sporting use has already been abandoned or is failing financially, and it would appear that in several cases the decision was probably based on “surplus to requirements” in any event. Certain of the comments stated to have been made in the Blue Mountain Golf Course (pp. 22 & 23) and Basingstoke Golf Club (pp. 25 – 27) cases do appear to allude, however, to a somewhat lax interpretation of the third bullet-point of NPPF, para. 74. Counsel will doubtless appreciate BPGC’s interest over the fact that in the Richborough case the meaning of the word “for” was not allowed, in the context of NPPF, para. 49, to be extended to mean “affecting”, and would argue that by inference the word “for” cannot be extended to mean “including” in the context of NPPF, para. 74.

Copies of all four of the golf assessment reports commissioned by KMC are enclosed for Counsel’s consideration, if necessary. Comments relevant to BPGC are highlighted in some of these, which may afford Counsel some assistance. Copies of any further documents which Counsel may wish to see can be supplied on request, or can be viewed on Kirklees Council’s Local Plan website.

I should perhaps add that Sport England opposes the development for housing at Bradley Park and has posted to that effect on KMC’s website portal during the consultation process. In addition to this, during the first consultation on the initial draft Local Plan, nearly 900 objections were posted on KMC’s website. It goes without saying that BPGC have, with several others, objected at this stage to the Local Plan as not being sound.

At present, BPGC seeks a written Opinion from Counsel as to:

(a) the interpretation of the somewhat vague phrase “surplus to requirements” in the first bullet-point of NPPF, para. 74. For instance, does it connote at least some element of under-use or

non-profitability? And is it what is surplus to the land-owner's requirements, or surplus to the requirements of the persons/community served by the open-space or sports facility?

(b) the interpretation of the phrase "the development is for alternative sports and recreational provision" in the third bullet-point of NPPF, para. 74 and particularly whether that allows for the mere inclusion of alternative token sports facilities in a development for housing, especially in the light of the decision in the Richborough case concerning the meaning of the word "for".

(c) if Counsel does agree with BPGC's interpretation of the third bullet-point (namely that the word "for" cannot have an extended meaning of "including"), does he also agree that therefore the third bullet-point has no application here?

The above are principally the points upon which BPGC seeks guidance, but would also be very interested if Counsel wished to comment:

(d) as to the green belt situation;

(e) as to whether the lateness of the two most recent golf "assessments", particularly their being produced post-consultation, may render the Plan not legally compliant.

The Publication Local Plan is due to come before the Inspector for certain preliminary issues in October 2017, but it seems that specific sites will not be dealt with until the new year. The golf club hopes that Counsel can provide an Opinion on the above by direct access at an early date, and I look forward to hearing from you as to whether this can be arranged and the cost estimate.

Yours sincerely,

(Nicholas C.W. Howe)

[Enclosures:

(1) Sheet showing text of NPPF para. 74; KMC Local Plan Policy DLP54; and extract from Strategic Masterplan for Bradley Park.

(2) "Golf Needs Assessment" - Knight Kavanagh & Page (October 2015)

(3) "Independent Golf Options Report" - Smith Leisure (21st April 2016).

(4) "Comparison of Existing and Future Sports Provision" - Knight Kavanagh & Page (March 2017).

(5) "Report on Bradley Park Local Plan Housing Allocation" - DLP Planning Limited (April 2017).]

Mr. Jake Brooke,
Clerk to Mr. Philip Robson,
Barrister at Law,
King's Chambers,
5, Park Square,
LEEDS,
LS1 2NE.

Re: Bradley Park Golf Club, Huddersfield

OPINION

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1. I am instructed by Mr. Howe on behalf of Bradley Park Golf Club on a direct access basis. Those instructing me are very familiar with the facts, as such I won't rehearse them here. Instead, I will refer back to particular facts and documents as needed through this advice.

2. The particular issues upon which I am asked to advise are as follows:

   a. The interpretation of the phrase "*surplus to requirements"* in the first bullet---point of NPPF 74;

   b. The interpretation of the phrase "*the development is for alternative sport and recreational provision*" in the third bullet---point of NPPF 74;

   c. Whether the third---bullet point of NPPF 74 applies to this case.

NPPF 74

3. The only authority on the operation of NPPF 74 is *R(Loader) v Rother DC* [2016] EWCA Civ. 795. The appellant appealed against the dismissal of her claim for judicial review of a planning permission granted by the first respondent local authority for a development of sheltered apartments at a bowls club in Bexhill. It involved the demolition of the bowls club buildings, the construction of a new clubhouse and an indoor bowls rink, the replacement of the two outdoor bowling greens with one, and the erection of a block of 39 sheltered apartments, which would face the listed terrace. NPPF 74 applied to the development.

4. The appellant argued, *inter alia*, that the judge had been wrong to conclude that the local authority could properly find that the second requirement of NPPF 74 was met, as about half of the existing open space on the site was going to be lost and views of it would largely be blocked by the new buildings.

5. At [11] –[14], Lindblom LJ drew together the approach the Council had taken to applying NPPF 74:

> *11 With its application for planning permission Churchill submitted a "Leisure Use Assessment" prepared by its consultants, GVA. In section 4 of that document, "Planning Policy", GVA discussed the relevant planning policies, including the policy in paragraph 74 of the NPPF and Policy CF2 of the 2006 local plan. They said that the proposal "fully complies with the NPPF" (paragraph 4.8). In section 6, "The Need for Alternative Community Sports", they concluded that "the only suitable alternative community uses would appear to be for small scale outdoor sports", none of which had been found to be viable (paragraph 6.2). In section 8, "Conclusions", they said (in paragraph 8.4) that "<u>the active bowling green, and inactive bowling green, are both surplus to the local requirement for bowls greens … as there is an overprovision of greens in active use … compared to the national average provision</u>"; that "[the] proposed replacement clubhouse, indoor rinks and outdoor bowling green will provide a better quality and quantity of provision than the existing facilities that are in a poor state of repair"; and that "if there were a need to prove as much, there is no alternative outdoor small sports that would be suitable and viable for the site and for which there is an under---provision in supply in the Bexhill area"; and (in paragraph 8.5) that the proposal" fully complies with planning policy relating to the improvement and re---provision of sporting facilities".* [Emphasis supplied]
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> *12. In his main report to the committee for its meeting on 19 June 2014 the officer reminded the committee that none of the saved policies of the 2006 local plan, including Policy CF2 had been found not to comply with the NPPF, and said that these policies could therefore be "afforded full weight" (paragraph 1.1.2). The policies in paragraphs 70 to7 of the NPPF were relevant here (paragraph 1.3). The officer referred to GVA's "Leisure Use Assessment" as one of the application documents (paragraph 4.6). In summarizing the responses to consultation (in section 5.0), he listed an objection to the "[loss] of one of the few open spaces on the east side of the town centre", contending that "a Local Action Plan" – seemingly a reference to the council's "Sport and Recreation Study" "highlighted need to preserve green open spaces specifically identifying this site as being of exceptional quality".*
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> *13. In section 6.0 of the report, "Appraisal", the officer reminded the committee that the council's reasons for refusal of the previous proposal had included a reason contending there was conflict with Policy CF2 (paragraph 6.1.1). But this had been abandoned when the Sports Council accepted that "a satisfactory assessment had been provided concluding that one of the bowling greens was surplus to requirements and could not reasonably be used for other sports" (paragraph 6.1.2). In the appeal on the previous proposal, the inspector had concluded that, as the officer put it,"[the] loss of one outdoor bowls rink, in the circumstances of the proposal as a whole, would not compromise policy CF2" (paragraph 6.2.1). Under the heading "Asset of Community Value" the officer pointed out that the proposed development would "have the effect of ensuring the continuation of a Bowls Club on the site", and that it was "important to acknowledge that the Bowls Club support the redevelopment to deliver new facilities" (paragraph 6.8.3). He referred to the conclusion of the First---tier Tribunal that "the current use of the site as a whole (notwithstanding that there is a disused bowling green) furthered the social wellbeing or social interests of the local community". He acknowledged that the site had been "valued for its visual openness with public views of the greens", and that "visual permeability from Knole Road to the bowls green was a point that the planning appeal Inspector considered desirable …". But he regarded the redesign of the proposal with "areas of glazing" and the removal of fencing as a "balanced approach to maintaining awareness of the open space to the rear" (paragraph 6.8.4).*
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> *14. Drawing his conclusions together, the officer said this (in paragraph 6.9.1):*

"Consideration has been given to the loss of the disused bowls green and it is concluded that this should not be a factor that weighs heavily in the determination of the application. [Churchill's] Leisure Assessment concludes that there is already a surplus of bowls greens locally compared to the national average, that the new facilities will be an improvement and that there is no evidence of under provision for any other sport suited to the modest area in question. Sport England has objected on the basis that the needs of other bowls clubs have not been canvassed. However, Sport England did not raise this issue in connection with the earlier appeal, when the Inspector accepted that the site was not well suited to other sports (Paragraphs 43--46). In the consideration of the current application the [council's] Community and Economy (Sport and Recreation) Officer raises no objection to the loss of the disused bowls green and is not aware of any demand from within the town to utilise this green. It is concluded therefore that Local Plan Policy CF2 would not be compromised by acceptance of the scheme."

6. The *ratio* of the Court of Appeal's judgment is contained at paragraphs [20]-[23]:

20 The relevant parts of the policy in paragraph 74 are consistent with Policy CF2. Its first criterion requires an "assessment" to be undertaken to demonstrate that the facility or area is "surplus to … requirements". This corresponds closely to the words of the first bullet point in paragraph 74. Both policies refer to an "assessment". But neither prescribes what form that "assessment" must take. This will depend on the circumstances of the case in hand. Both policies hold the concept of a facility being "surplus to requirements". Whether this is so will call for the exercise of planning judgment, with which the court will interfere only on public law grounds see Lord Reed's judgment in Tesco Stores Ltd. v Dundee City Council *[2012] P.T.S.R. 983, at paragraph 17). The crucial question for the decision---maker, under both policies, is not how the "assessment" has been undertaken or in what form it has been presented, but whether it has clearly been shown that the facility is "surplus to the requirements of the community which it serves" (under Policy CF2), and thus "surplus to requirements" (under paragraph 74 of the NPPF). The second criterion in Policy CF2 – not present in paragraph 74 – adds to the first. The third criterion, though expressed differently from the test in the second bullet point in paragraph 74, is also concerned with an equivalent quantity and quality of alternative or replacement provision. Once again, this is classically a matter of planning judgment. The two policies are not, of course, identical. But at least as they fell to be applied in this case, they were, in substance, the same. In short, if the proposal complied with Policy CF2, it could hardly be said to be contrary to the policy in paragraph 74.*

21 There is nothing in either of the two officers' reports, or in the Committee Clerk's note of the committee meeting, to suggest any misunderstanding or misapplication of the policy in paragraph 74. The advice the members were given, though explicitly based on Policy CF2, was, I think, impeccable as an exercise in applying the policy in paragraph 74 of the NPPF to the facts and circumstances of this case. And it may safely be assumed that this advice was accepted by the committee. The officer's conclusion, in paragraph 6.9.1 of his report, was unequivocal. Policy CF2 would not be "compromised" by the development. That conclusion is not attacked in these proceedings, nor could it be. It represents an entirely reasonable planning judgment. It flowed from the officer's consideration of the matter in the earlier parts of his report, to which I have referred. It also reflected the conclusions in GVA's "Leisure Use Assessment", on which the officer clearly relied. And it was consistent with the inspector's conclusion to the same effect in her decision letter on the appeal for the previous proposal.

22 The three tests in paragraph 74 of the NPPF are disjunctive. The policy can be complied with if only one of them is satisfied. In this case, as is clear from the "Leisure Use Assessment", Churchill was inviting the council to accept that the proposal met both the first

and the second test. The judge accepted that the council could properly accept, and did, that the second test was satisfied, and the policy in paragraph 74 thus complied with. She was, in my view, undoubtedly right to do so, given the officer's conclusions in paragraphs 6.8.3 and 6.9.1 of the main report, which were amply supported by the "Leisure Use Assessment". The officer's conclusion in paragraph 6.9.1 that "the new facilities will be an improvement" was more than the test in the second bullet point in paragraph 74 requires – the test being "equivalent or better provision in terms of quantity and quality in a suitable location". It was an unimpeachable planning judgment, consistent with the appeal inspector's conclusion in paragraph 45 of her decision letter. In my view, therefore, the judge was clearly right to reject this ground of Ms Loader's challenge.

23 Unlike the judge, however, I think the council was entitled to conclude, and in fact did, that "the open space, buildings or land" lost through this development was "surplus to requirements" – so that the test in the first bullet point in paragraph 74 was also satisfied. This conclusion too was supported by the "Leisure Use Assessment", as the officer evidently accepted. He did not doubt the adequacy and accuracy of GVA's assessment. He also put before the committee, in the update report, Churchill's contention that, in the light of what had been said in paragraphs 6.1.2 and 6.9.1 of the main report, it could reasonably be concluded that the test in the first bullet point in paragraph 74 of the NPPF was met. Had he disagreed, he surely would have said so. Nor is there any suggestion that the committee took a different view.

7. Summarising the authority above, the approach to NPPF 74 is as follows:

   a. The tests in NPPF 74 are disjunctive. Therefore only one of the bullet-points needs to be satisfied to pass the test.

   b. The issue for the decision-maker is *not how the "assessment"* has been undertaken or in what form it has been presented, but whether it has clearly been shown that the facility is "*surplus to requirements*".

   c. The second bullet-point is a further example of planning judgment.

   d. The approach taken by the developer, and adopted by the Council, that the bowling green was surplus to requirements because "*there is an overprovision of greens in active use … compared to the national average provision*" was a legal sound (i.e. not unreasonable in the *Wednesbury* sense, or irrational).

e. Whilst it does not necessarily relate to the under-use or non-profitability of the facility to be lost, taking the wider lens approach as in *Loader* and KKP2, I can see no legal or policy restriction to taking a narrower approach to examining whether a facility is surplus to requirements, i.e. it caters for a specific and profitable segment of the market.

NPPF 74 – first bullet-point

8. The assessment of whether the Golf Club is surplus to requirements will be based upon the requirements of the persons/community it supports. That must be the starting point.

9. The approach taken by Knight, Kavanagh & Page in the third report (March 2017 – "KKP2") is summarised in the Executive Summary as follows:

> *There are three golf courses within 10 minutes' drive time and a further 12 within 20 minutes' drive time (Sport England's standard for accessing facilities). Many of these offer some, or a similar range of activities, to those available at Bradley Park. There is on average, more golf holes per 1,000 population within Kirklees on 18-hole courses than the regional and national averages; this will remain so, should Bradley Park be taken out of commission.…*
>
> *The level of provision of golf is more than sufficient to meet both current and future demand. In addition, the golf facilities that will remain within the 20 minute drive time catchment have more than sufficient capacity to meet the needs of and <u>demand from people in all the various market segments that apply</u>. As a consequence, it is confirmed that Bradley Park can be deemed surplus to requirements.* [Emphasis supplied]

10. In legal and policy terms, there does not appear to be anything necessarily wrong with the approach they have taken. As Lindblom LJ makes clear in *Loader*, the assessment and the judgment of being surplus to requirements is a matter of planning judgment, into which the courts will not interfere unless it is unreasonable/irrational in the public law sense. I do not think that the approach would meet either of those tests.

11. However, that is not the end of the matter.

12. It is perfectly possible for opposing sides to present two different arguments, both of which are legally compliant, and for a decision-maker (the Council or a Planning

Inspector) to prefer one approach over the other. As Mr. Howe has noted in KKP2 and the report by SPRU, there are issues with the approach they have taken to their analysis:

a. The appeal decisions relied upon focus on underused, poor quality, overgrown sports facilities and/or where the clubs supported the development. Cases where, unlike here, Sport England did not object to the loss of the facility.

b. The assessment of "*demand from people in all the various market segments* (above) does not take into account the point raised in KKP1 that the BPGC had "*tapped into the nomadic market*" and that this provision would be lost if the club was closed. This was supported in the Smith Leisure report. In short, KKP2 takes a broad---brush approach. A counter argument would be that the devil is in the detail and BPGC is financially successful because it caters for a specific market who would lose their golf course provision if the site was closed – therefore it is not surplus to requirements.

c. There is discrepancy as to whether there is an undersupply (Smith Leisure para 6.9) or an oversupply as concluded in KKP2.

13. In conclusion, whilst the Council's approach is legally sound (i.e. not irrational/unreasonable planning judgment), it is not immune from challenge. There are alternative ways to analyse whether BPGC is surplus to requirements or not. It is important to note that the first bullet-point requires only an assessment of whether the facility is surplus to requirements and not a balance of the provision of the facility against the need for the development. This a vital point as there is plainly a significant need for a development of this size to underpin the soundness of the whole of the Council's Local Plan with regard to housing.

14. I will set out below how these arguments can be put to the Inspector.

NPPF 74 – third bullet-point

15. I agree with the analysis of Mr. Howe, that the third-bullet point is for the situation where the development is entirely for further sporting facilities – i.e. where a cricket pitch is to be replaced entirely with a football pitch. Therefore I do not think that the third bullet-point applies in this case.

16. I also think it is arguable that the same analysis applies to the second bullet-point. "*The loss*" in the second bullet-point must be the loss of the facility referred to in the opening sentence of the policy. Therefore, it is arguable that the replacement must be for the same sport.

17. My major concern is the application of the first bullet-point to the proposed development.

Next steps

18. I note from the Council's website that the Stage 1 examination (in which the policies relating to the BPGC could be discussed) is scheduled for 10 – 18 October 2017. I have also seen that the Matters, Issues and Questions document that will form the basis of those sessions does not include anything on the allocation of the golf club site.

19. The Planning Inspectorate document, *Procedural Practice in the Examination of Local Plans* (June 2016), states at para 3.11 with regard to participating in the sessions:

> *The right to appear and be heard is limited to those persons defined in section 20 (6) of the Planning and Compulsory Purchase Act i.e. any person(s) that has made representations seeking a change to the plan. However, the Inspector is not precluded from inviting anyone to appear and be heard at a hearing session(s) where he or she thinks that person is needed to enable the soundness of the plan to be determined.*

20. I do not know if BPGC has objected to the plan and/or whether it has been allocated a speaking role.

21. At paragraph 21 of the Kirklees Local Plan Examination Guidance notes, the Inspector states that anyone who considers it necessary that they participate in

the hearing sessions should contact the Programme Officer (Yvonne Parker – 0128 450522/07813334305 or Yvonne.parker@kirklees.gov.uk).

22. I cannot see anything on the Local Plan website that suggests BPGC will be participating in the sessions. If the club would like to participate to put forward its views on the operation of NPPF 74 and the analysis with regard to being surplus to requirements, I suggest contacting the Programme Officer ASAP. That request should also say that you would like to submit written evidence that contradicts the Council's assessment of being surplus to requirements. It is also worth pointing out in the communication that the Golf Club has not had a chance to comment because of the lateness of the submission of KKP2. That lateness of the reports in itself will not make the Plan legally unsound. This is because the Club should be allowed to comment on the analysis, and put forward its own, at the hearing sessions.

23. With regard to drafting any written documents, that is a matter for the club. If the money is available, then it will be worth instructing your own professional consultant to produce a report. If the money is available, then the members of the club will have to do this themselves. I will happily look at any written evidence if produced. It is worth ensuring that written evidence will be allowed to go before the Inspector before committing time/money. Equally, if the club would like to be represented at any oral hearings, we can discuss this in due course.

24. In terms of overall prospects, I think that there is merit in getting the alternative analysis in front of the Inspector and arguing that yours should be preferred. What must not be forgotten is that this is a fundamental strategic housing site and therefore the Council will not give up easily. Although this won't be the basis for any decision of the Inspector, I am sure that it will be in her mind too. If I can be of any further assistance, please get in touch.

PHILIP ROBSON

Kings Chambers

Manchester/Leeds/Birmingham

26 July 2017