**OUTER HOUSE, COURT OF SESSION**

**[2024] CSOH 76**

**P234/24**

OPINION OF LORD SANDISON

In the Petition of

GREGORY BROWN

Petitioner

for

Judicial review of a decision by Glasgow City Council to grant full planning permission for the erection of a boundary fence to the sports pitch at Jimmy Johnstone Academy of Football, 835 Cathcart Road, Glasgow

**Petitioner: Deans, McPhee; R & R Urquhart LLP**
**Respondent: Burnet KC, Breen; Harper Macleod LLP**

6 August 2024

**Introduction**

[1] In this petition for judicial review, the petitioner challenges a decision made on 14 December 2023 by the respondent, Glasgow City Council, to grant full planning permission for the erection of a boundary fence to a sports pitch at 835 Cathcart Road, Glasgow, on the basis that the decision was predicated on a material error of fact regarding the impact of the development on public access to the pitch, failed to have regard to the relevant development plan, and separately failed to comply with the Council's statutory duty under section 13(1) of the Land Reform (Scotland) Act 2003. He seeks declarator to that

effect and reduction of the decision. The matter came before the court for a substantive hearing to determine the dispute.

**Background**

[2] Cathkin Park is a municipal park on Florida Avenue in southeast Glasgow. It was formerly the home of the second Hampden Park, where Queen's Park and subsequently Third Lanark football clubs played their home games from the latter part of the nineteenth century until the mid-1960s. Now it is home to the Jimmy Johnstone Charitable Trust, a charity that teaches children how to play football there. The Trust leases a football pitch in the park from the respondent, under terms requiring that public access to the pitch is maintained for local community sport groups when the Trust is not using it.

[3] On 22 May 2023 the Trust applied to the respondent for planning permission to construct a new fencing system at Cathkin Park to prevent "unauthorised use and non-permitted activities" and to "restrict unauthorised use" and "unnecessary footfall on the grass". The proposed development consists of the erection of a 3-metre-high boundary fence around the perimeter of the existing sports pitch, with 5-metre-high ball stop netting at either end. Access to the existing sports pitch, and an area of 8280 square metres in total, would be by way of a lockable gate which would be controlled by the Trust. The petitioner claims that the section of the park to which the proposed development would restrict access is frequently used by local residents for various recreational purposes, in particular by residents of the Myrtle Park social housing estate which neighbours the park.

**Relevant statutory provisions**

[4] The Town and Country Planning (Scotland) Act 1997 makes the following provisions:

> "**24 Meaning of *'development plan'***
> (1) For the purposes of this Act, any other enactment relating to town and country planning and the Land Compensation (Scotland) Act 1963, the development plan for an area is to be taken as consisting of the provisions of—
> (a) the National Planning Framework,
> (b) any strategic development plan for the time being applicable to the area, together with—
> (i) the Scottish Ministers' notice of approval of that plan, and
> (ii) any supplementary guidance issued in connection with that plan, and
> (c) any local development plan for the time being applicable to the area.
>
> **25 Status of development plan**
> (1) Where, in making any determination under the planning Acts, regard is to be had to the development plan, the determination is, unless material considerations indicate otherwise, to be made in accordance with that plan.
>
> …
> **37 Determination of applications: general considerations.**
> (1) Where an application is made to a planning authority for planning permission—
> (a) subject to sections 27B(2), 58 and 59, they may grant planning permission, either unconditionally or subject to such conditions as they think fit, or
> (b) they may refuse planning permission.
> (2) In dealing with such an application the authority shall have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations."

The Land Reform (Scotland) Act 2003 contains the following terms:

> "**1 Access rights**
> (1) Everyone has the statutory rights established by this Part of this Act.
> (2) Those rights (in this Part of this Act called *'access rights'* ) are—
> (a) the right to be, for any of the purposes set out in subsection (3) below, on land; and
> (b) the right to cross land.
> (3) The right set out in subsection (2)(a) above may be exercised only—
> (a) for recreational purposes;
> (b) for the purposes of carrying on a relevant educational activity; or
> (c) for the purposes of carrying on, commercially or for profit, an activity which the person exercising the right could carry on otherwise than commercially or for profit.

(4) The reference—

(a) in subsection (2)(a) above to being on land for any of the purposes set out in subsection (3) above is a reference to—

(i) going into, passing over and remaining on it for any of those purposes and then leaving it; or

(ii) any combination of those;

(b) in subsection (2)(b) above to crossing land is a reference to going into it, passing over it and leaving it all for the purpose of getting from one place outside the land to another such place.

…

(7) The land in respect of which access rights are exercisable is all land except that specified in or under section 6 below.

…

**6 Land over which access rights not exercisable**

(1) The land in respect of which access rights are not exercisable is land—

…

(e) which has been developed or set out—

(i) as a sports or playing field; or

(ii) for a particular recreational purpose …

…

**7 Provisions supplementing and qualifying section 6**

…

(7) Section 6(1)(e) above prevents the exercise of access rights over land to which it applies only if—

(a) the land is being used for the purpose for which it has been developed or set out and, in the case of land which is not a sports or playing field, the exercise of those rights would interfere with the recreational use to which the land is being put;

(b) the land is a golf green, bowling green, cricket square, lawn tennis court or other similar area on which grass is grown and prepared for a particular recreational purpose; or

(c) in the case of land which is a sports or playing field, the surface of the land is comprised of synthetic grass, acrylic, resin or rubber granule.

**13 Duty of local authority to uphold access rights**

(1) It is the duty of the local authority to assert, protect and keep open and free from obstruction or encroachment any route, waterway or other means by which access rights may reasonably be exercised.

(2) A local authority is not required to do anything in pursuance of the duty imposed by subsection (1) above which would be inconsistent with the carrying on of any of the authority's other functions.

…

> **14 Prohibition signs, obstructions, dangerous impediments etc.**
> (1) The owner of land in respect of which access rights are exercisable shall not, for the purpose or for the main purpose of preventing or deterring any person entitled to exercise these rights from doing so—
> …
> (b) put up any fence or wall, or plant, grow or permit to grow any hedge, tree or other vegetation …
>
> **28 Judicial determination of existence and extent of access rights and rights of way**
> (1) It is competent, on summary application made to the sheriff, for the sheriff—
> (a) to declare that the land specified in the application is or, as the case may be, is not land in respect of which access rights are exercisable …"

**Petitioner's submissions**

***Mistake of fact***

[5] On behalf of the petitioner, counsel submitted that the decision complained of was predicated on a material mistake as to fact which gave rise to unfairness. Reference was made to *E* v *Secretary of State for the Home Department* [2004] EWCA Civ 49, [2004] QB 1044, [2004] 2 WLR 1351 at [63] - [64] and at:

> "[66] In our view, the time has now come to accept that a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law […] Without seeking to lay down a precise code, the ordinary requirements for a finding of unfairness are apparent from the above analysis of the *Criminal Injuries Compensation Board* case [i.e. *R v Criminal Injuries Compensation Board, ex parte A* [1999] 2 AC 330, [1999] 2 WLR 974]. First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been 'established', in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant (or his advisers) must not have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the Tribunal's reasoning."

In terms of section 37(2) of the Town and Country Planning (Scotland) Act 1997 the respondent was required to have regard to "any other material considerations". Access for the general public was a material consideration. Despite many objections having been made in the course of the planning application process which pointed out the contrary, the report

by officers to the respondent's Planning Applications Committee (the "report to committee") dated 12 December 2023 stated that: "Public access is not being removed altogether […] The proposed fence will protect the pitch for continued use as a sports pitch as designated in the City Development Plan." That was objectively verifiable as a mistake, or at the very least a serious mis-statement of the position. Affidavits had been lodged from the petitioner and other concerned residents of the neighbourhood describing in detail the largely untrammelled use to which they had previously been able to put the park (including the pitch) for leisure and recreational purposes and their reasonable apprehensions as to the restrictions which would in future be imposed on such use. The proposal was avowedly to "allow the academy to control the use of the pitch". The stated purposes of the proposed development were to prevent "unauthorised use and non-permitted activities" and to "restrict unauthorised use" and "unnecessary footfall on the grass". The entire purpose of the proposed development was to prevent or at least to restrict access by the public. The practical effect of the proposed development was to erect a fence which would only be accessible through a lockable gate controlled by the Trust. The petitioner was not responsible for the mistake made by the respondent. That mistake had formed a material part in the respondent's decision-making, as it was the respondent's answer to the most common objection made to the proposed development.

[6] The access which members of the public had previously taken to the pitch (temporary fencing having been erected round it after the grant of planning permission for the permanent fence) was lawful in terms of the Land Reform (Scotland) Act 2003. Although section 6(1)(e) exempted from the general access rights recognised by the Act land which had been developed or set out as a sports or playing field, or for a particular recreational purpose, that exemption was in turn restricted by section 7(7)(a) so that it

applied only during periods when the land in question was actually being used for the purpose for which it had been developed. Reference was made to observations to that effect in Gordon and Wortley's *Scottish Land Law* (SULI, 3rd ed) at 27-05, and in the "Part 1 Land Reform (Scotland) Act 2003 - Guidance for Local Authorities and National Park Authorities" document issued by the then Scottish Executive in February 2005. That interpretation of section 7 was consistent with the overarching policy of the 2003 Act to promote, rather than to restrict, public access to land.

***Development plan***

[7] Section 25(1) of the 1997 Act required the respondent to make its decisions in accordance with the development plan. The effect of that section was explained by Lord Clyde in *City of Edinburgh Council* v *Secretary of State for Scotland* 1998 SC (HL) 33 at 43G - 44A, 44G - 45B, 1998 SLT 120 at 126L - 127B, 127G - 127K:

> "the development plan is no longer simply one of the material considerations. Its provisions, provided that they are relevant to the particular application, are to govern the decision unless there are material considerations which indicate that in the particular case the provisions of the plan should not be followed. If it is thought to be useful to talk of presumptions in this field, it can be said that there is now a presumption that the development plan is to govern the decision on an application for planning permission. … if the application accords with the development plan and there are no material considerations indicating that it should be refused, permission should be granted. If the application does not accord with the development plan it will be refused unless there are material considerations indicating that it should be granted.
> …
> In the practical application of section 18A it will obviously be necessary for the decision-maker to consider the development plan, identify any provisions in it which are relevant to the question before him and make a proper interpretation of them. His decision will be open to challenge if he fails to have regard to a policy in the development plan which is relevant to the application or fails properly to interpret it. He will also have to consider whether the development proposed in the application before him does or does not accord with the development plan. There may be some points in the plan which support the proposal but there may be some considerations pointing in the opposite direction. He will require to assess all of these and then

> decide whether in light of the whole plan the proposal does or does not accord with it. He will also have to identify all the other material considerations which are relevant to the application and to which he should have regard. He will then have to note which of them support the application and which of them do not, and he will have to assess the weight to be given to all of these considerations. He will have to decide whether there are considerations of such weight as to indicate that the development plan should not be accorded the priority which the statute has given to it. And having weighed these considerations and determined these matters he will require to form his opinion on the disposal of the application. If he fails to take account of some material consideration or takes account of some consideration which is irrelevant to the application his decision will be open to challenge. But the assessment of the considerations can only be challenged on the ground that it is irrational or perverse."

In terms of section 24(1)(a) of the 1997 Act, the National Planning Framework was a relevant part of the development plan. In terms of section 24(1)(c), a Local Development Plan was also such a part. The City Development Plan ("CDP") was a Local Development Plan. The respondent was required, unless material considerations indicated otherwise, to make its decision in accordance with the development plan. The respondent's decision did not indicate that any material considerations outweighed the contents of the development plan. The report to committee stated:

> "The proposal was considered to be in accordance with the Development Plan and there were no material considerations which outweighed the proposal's accordance with the Development Plan".

[8] The proposal was, however, not in accordance with National Planning Framework 4 ("NPF4") Policy 20 on blue and green infrastructure. This stated that:

> "Development proposals that result in fragmentation or net loss of existing blue and green infrastructure will only be supported where it can be demonstrated that the proposal would not result in or exacerbate a deficit in blue or green infrastructure provision, and the overall integrity of the network will be maintained. The planning authority's Open Space Strategy should inform this."

The respondent did not have regard to Policy 20. Although it was correct that the fact that a particular policy was not mentioned in the decision did not necessarily mean that it had been ignored unlawfully - *St Modwen Developments* v *Secretary of State for Communities and*

*Local Government* [2017] EWCA Civ 1643, [2018] PTSR 746 - the decision notice was based on the information provided in the report to committee. That report specifically listed the NPF4 policies which were considered to be relevant. NPF4 Policy 20 was absent from that list. In the circumstances, it was a reasonable inference that it had not been considered. Nothing suggested that it had been considered. In any event, if the respondent had indeed considered NPF4 Policy 20, it had failed to apply it to the true facts. Cathkin Park was "green infrastructure" for the purposes of NPF4. The proposed development amounted to a net loss of existing green infrastructure because it would remove public access to a large section of the park. It amounted to a fragmentation for the purposes of NPF4 as it would necessarily divide Cathkin Park into smaller parts. The respondent's decision did not consider or demonstrate that the proposal would not result in or exacerbate a deficit in green infrastructure provision. The respondent argued that the erection of a fence did not amount to a loss of green infrastructure, but if the result of the fence was to curtail or exclude access to the public, then there was a loss of green infrastructure. The erection of a fence resulted in fragmentation of green infrastructure.

[9] Further, the report to committee of 12 December 2023 stated that the proposed development complied with CDP Policy 1 (the placemaking principle). CDP Policy 1 was attended by supplementary guidance ("SG1"). Part 2 of SG1 stated at paragraph 1.41 that:

> "It is the Council's aim that all residential development should be served by good quality, accessible community infrastructure. As part of this aspiration, wherever possible all existing community facilities and services should be retained."

"Community facility" was defined at paragraph 1.39 as including parks. The sports pitch was a community facility. Paragraph 1.52 of Part 2 of SG1 stated:

> "Development which would result in the loss of land and buildings which provide valued recreational and leisure opportunities will be resisted and only be permitted provided it can be demonstrated: a) that there is an excess of similar facilities in

> surrounding neighbourhoods which are easily accessible by sustainable transport, on foot and/or by cycle; b) that the loss would not adversely affect the potential future recreational and leisure needs of the local population; or c) the proposed development is for an indoor or outdoor recreational or leisure facility with at least equal benefit and community access which outweighs the loss of the existing or former recreational use."

The proposed development did not accord with CDP Policy 1 as it did not follow the guidance in SG1. The development would adversely affect the potential future recreational and leisure needs of the local population because it would reduce the availability of facilities used by the community. The proposed development would result in the removal of community facilities close to residential development and in the loss of land which provided valued recreational and leisure opportunities. There was no excess of similar facilities in surrounding neighbourhoods which were easily accessible. The proposed development did not retain the same level of community access to outweigh the loss of the former recreational usage. The report to committee purported to consider the SG1 guidance on the loss of community recreational and sports facilities, but failed to apply the guidance correctly due to the respondent's error in fact that public access was not being removed.

[10] The report to committee further stated that the proposed development complied with CDP Policy 6 (green belt and green network). That policy stated:

> "Development that is likely to adversely impact on open spaces identified on the Council's Open Space Map and/or on the existing Green Network will not be supported unless it includes appropriate mitigation."

The proposed development did not accord with CDP Policy 6. Cathkin Park was identified on the respondent's Open Space Map. The proposed development would adversely impact the open space identified as it involved the enclosure and removal of public access to a large section of Cathkin Park. No mitigation had been suggested by the applicant. The report to committee stated:

> "The area on which the fencing is to be erected lies within the footprint of the area identified as '6.51 Sports Areas - Playing Field' on the Council's Open Space Map which, in turn, falls within the wider area identified as '6.1 Public Park and Garden' on the Open Space Map – ie. Cathkin Park. The football pitch is currently in use for both junior and community football purposes and the purpose of the fence is to protect the surface (and thereby users) from conflicts resulting from dog fouling, motorised vehicles and golf practice. Given that the pitch is clearly identified as contributing to the ongoing supply in the Councils' emerging sports pitch strategy, the area is a sports pitch first and foremost and not general parkland. […] Accordingly, the proposal is not considered to be contrary to either CDP 6 or IPG 6."

That showed that the respondent had failed properly to interpret CDP Policy 6. Regardless of whether the area was a sports pitch or general parkland, CDP Policy 6 stipulated against adverse impact on open spaces. The erection of a fence which curtailed and excluded public access was an adverse impact on an open space. CDP Policy 6 was supplemented by guidance ("IPGC6"). Paragraph 4.2 of IPGC6 stated:

> "In accordance with policy CDP6, there is a strong presumption in favour of the retention of the categories of open space shown in Table 3, as identified on the Council's Open Space Map".

Table 3 included public parks and sports areas. The respondent was accordingly in breach of its statutory duty in terms of section 25(1) of the 1997 Act. Had it properly considered its own policies and guidance, there was a real possibility that that would have made a difference to the decision it would have made, which was all that was required: *Bolton Metropolitan Borough Council* v *SSE* (1990) 61 P&CR 343 per Glidewell LJ at page 352.

***Land Reform (Scotland) Act 2003***

[11] Further, section 13(1) of the Land Reform (Scotland) Act 2003 imposed a duty on the respondent to uphold access rights. The public sports pitch was a means by which access rights might reasonably be exercised. In terms of section 1(2)(a) of the 2003 Act, the public had the right to be on the land for recreational purposes, for the purposes of carrying on

educational activities, and for the purpose of carrying out commercial activities which could otherwise be carried out non-commercially (eg organised walks). In terms of section 1(2)(b) of the 2003 Act, the public had the right to cross the land. The respondent had a duty to assert, protect, and keep open and free from obstruction those access rights. The respondent's decision was in breach of its statutory duty as it had granted planning permission for the erection of a fence which restricted access to the public and entirely eliminated it at certain times.

[12] The respondent argued that such a challenge was premature and that an alternative remedy was to be found in section 28 of the 2003, which provided a mechanism for the judicial determination of the existence and extent of access rights. However, as I had stated in *Cains Trustees (Jersey) Limited, Petitioner* [2024] CSOH 50 at [27]:

> "A secondary strand to the respondent's argument on the competency of the petition was based on the familiar argument that the supervisory jurisdiction of the court will not ordinarily be exercised where an alternative remedy exists for the wrongs complained of by the petitioner. As so often, that argument invites a very close examination of what exactly it is that forms the subject of the complaint."

The subject matter of the petitioner's complaint in the present action was that the respondent's decision failed to uphold its statutory duty in terms of section 13(1) of the 2003 Act. The subject matter of the complaint was not that there was a dispute about the existence or extent of access rights. As in *Cains Trustees*, the alternative remedy did not address the petitioner's complaint.

[13] For any or all of these reasons, the court should grant the decrees of declarator and reduction sought.

**Submissions for the respondent**

[14] On behalf of the respondent, senior counsel submitted that each of the petitioner's grounds of challenge was unfounded and that the petition ought to be dismissed.
By lease dated 23 March and 6 April 2023 the respondent leased (i) an area of ground extending to 8,972 square metres or thereby forming the football pitch and (ii) a multi-use games area extending to 707 square metres at Cathkin Park to the Trust. On 22 May 2023, the Trust applied to the respondent for planning permission to construct a new fencing system at the football pitch in Cathkin Park. The respondent's Planning Applications Committee met on 12 December 2023 to determine the application. The report to committee was place before it in advance of its meeting. The Committee took the decision to grant full planning permission for the erection of a boundary fence with a lockable gate to the football pitch and issued that decision on 14 December 2023.

*Error of fact*

[15] The petitioner contended that, in taking its decision, the respondent materially erred in fact as to whether the proposed development would restrict the general public's access to the football pitch. He founded on the following statement in the report to committee:

> "Public access is not being removed altogether. As has been detailed in the above policy analysis, the proposed fence will protect the pitch for continued use as a sports pitch as designated in the City Development Plan".

The petitioner asserted that the erection of a fence and lockable gate around the football pitch in accordance with the decision would necessarily result in a complete removal of public access to the football pitch and that the respondent erred in fact by relying on the statement in the report to committee.

[16] In order to establish an error of fact giving rise to unfairness as a separate head of challenge in an appeal on a point of law a petitioner required to satisfy the four conditions set out in *E* v *Secretary of State for the Home Department*; see also *Bova* v *Highland Council* [2013] CSIH 41, 2013 SC 510 at [36]. The respondent did not err in fact. Its decision required to be read as a whole and in light of the information contained in the report to committee and associated documents. Taken in context, the statement relied on by the petitioner was not indicative of the respondent having based its decision on an error of fact. While the purpose of the development was to prevent irresponsible and destructive use of the football pitch, the erection of a fence and lockable gate would not necessarily prevent responsible access to the football pitch or other parts of the leased site. The development would simply permit the Trust (as lessee of the football pitch) to exercise greater control over access to it, with such control to be exercised in accordance with the terms of the relative lease. Clause 8 of that lease required the lessee to:

> "allow local Community Sports Groups to access and use the Subjects during periods outwith the periods which the Subjects are either being used for The Jimmy Johnstone Charitable Trust (in terms of Clause 7.1) or are in the course of being repaired or maintained by the Tenants".

The report to committee had stated expressly that:

> "The applicants have advised that, through their existing lease, while the use of the pitch would be intended for the use of the Jimmy Johnstone Football Academy (JJFA), it would also be available for wider community use. JJFA have used the park since 2010 and have recently secured funding of £500k to protect and re-lay the grass pitch. In 2022 they entered into a 20-year lease with the Council for use of the pitch, changing pavilion and multi-use games area."

The report to committee was considered by the respondent against the backdrop of that lease, which required public access to the football pitch to be made available through the mechanism of local community groups. In taking the decision, the respondent was aware of the existence and terms of the lease. It was also fully aware of the nature of the proposal and

the fact that some public access to the football pitch might be restricted if and when the fence was erected. The report to committee noted: "[i]n siting the proposal, the applicant has ensured that public access is still maintained around the pitch, and the adjacent terraces". In such circumstances, the respondent was aware of the differing potential effect on public access to the playing surface of the football pitch, as opposed to the wider site leased, and to the remainder of Cathkin Park. The decision was not based on misunderstanding or an error of fact.

***Development plan***

[17] The petitioner contended that, in taking its decision, the respondent failed to have regard to Policy 20 of the National Planning Framework 4 (NPF4) and Policies 1 and 6 of and guidance SPG1 and IPG6 to the Glasgow City Development Plan (CDP), and accordingly failed to comply with sections 25(1) and 37(2) of the 1997 Act. In accordance with section 24(1)(a) of the 1997 Act, NPF4, the CDP and the statutory supplementary guidance were all composite parts of the single "development plan" for the purposes of section 25(1). In determining planning disputes:

> "the courts are concerned only with the legality of the decision-making process and not with the merits of the decision. 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." – *Tesco Stores Ltd* v *Secretary of State for the Environment* [1995] 1 WLR 759 per Lord Hoffmann at 780H.

It followed that:

> "[p]rovided that the planning authority has regard to all material considerations, it is at liberty (provided that it does not lapse into *Wednesbury* irrationality) to give them whatever weight the planning authority thinks fit or no weight at all." – *ibid*. at 780F.

In this context it was important to appreciate that it was for the planning decision-maker, having regard to the development plan and the relevant proposal, to decide what the determining issues were, the evidence that was material to those determining issues and the conclusions to be drawn from the evidence. It was for the planning decision-maker, applying its expertise and judgment, to resolve the determining issues: *Moray Council* v *the Scottish Ministers* [2006] CSIH 41, 2006 SC 691 at [29] and [30]. Planning policies were not statutory or contractual provisions and should not be construed as if they were. The proper interpretation of planning policy was ultimately a matter of law for the court. The application of relevant policy was for the decision-maker. Statements of policy were to be interpreted objectively by the court in accordance with the language used and in their proper context. A failure properly to understand and apply relevant policy would constitute a failure to have regard to a material consideration, or would amount to having regard to an immaterial consideration: *Tesco Stores* v *Dundee City Council* [2012] UKSC 13, 2012 SC(UKSC) 278, 2012 SLT 739, per Lord Reed at [17] - [22].

[18] When considering compliance with the development plan, the decision-maker required to consider that plan, identify any provisions in it which were relevant to the question before him, and make a proper interpretation of them. His decision would be open to challenge if he failed to have regard to a policy in the development plan which was relevant to the application or failed properly to interpret it. He would also have to consider whether the development proposed in the application before him did or did not accord with the development plan. There might be some points in the plan which supported the proposal and some considerations pointing in the opposite direction. A decision-maker required to assess all of these and then decide whether in light of the whole plan the proposal did or did not accord with it: *City of Edinburgh Council* v *Secretary of State for*

*Scotland*. The fact that a particular decision was not in accordance with a certain policy did not matter per se; the approach properly called for was holistic in nature.

[19] Decision letters were written principally for parties who knew what the issues between them were and what evidence and argument had been deployed in relation to those issues. A decision did not need to "rehearse every argument relating to each matter in every paragraph": *Seddon Properties* v *Secretary of State for the Environment* (1981) 42 P&CR 26, per Forbes J at 28. When it was suggested that a decision-maker had failed to grasp a relevant policy, it was necessary to look at what he thought the important planning issues were and decide whether it appeared from the way he dealt with them that he must have misunderstood the policy in question: *South Somerset District Council* v *Secretary of State for the Environment* (1993) 66 P&CR 83, per Hoffmann LJ at 85.

[20] Contrary to what was suggested by the petitioner, the report to committee identified CDP Policies 1 and 6 and guidance SPG1 and IPG6 as relevant to the proposed development and went on to give reasons in support of its conclusion that the proposed development was not contrary to such policies. That conclusion was one which the respondent was entitled to reach in the exercise of its planning judgment. The respondent was entitled to rely on the conclusions of the report to it in taking its decision: *R (Plant)* v *Lambeth London Borough Council* [2016] EWHC 3324 (Admin), [2017] PTSR 453. The petitioner's argument that the respondent failed to consider CDP Policies 1 and 6 and guidance SPG1 and IPG6 was ill-founded. The core of the petitioner's challenge appeared to be that the respondent did not apply these policies "properly". The application of such policies was a matter for the respondent, as planning authority. In assessing the proposed development against CDP Policies 1 and 6 and guidance SPG1 and IPG6, the respondent lawfully exercised its planning judgment, and did not act irrationally.

[21] The report to committee did not explicitly consider NPF4 Policy 20, but rather considered Policy 21. NPF4 Policy 20 related to "blue and green infrastructure". Policy 20(a) stated that:

> "[d]evelopment proposals that result in fragmentation or net loss of existing blue and green infrastructure will only be supported where it can be demonstrated that the proposal would not result in or exacerbate a deficit in blue or green infrastructure provision, and the overall integrity of the network will be maintained. The planning authority's Open Space Strategy should inform this".

NPF Policy 21 related to "play, recreation and sport". Policy 21(a) stated that:

> "[d]evelopment proposals which result in the loss of outdoor sports facilities will only be supported where the proposal: i. is ancillary to the principal use of the site as an outdoor sports facility; or ii. involves only a minor part of the facility and would not affect its use; or iii. meets a requirement to replace the facility which would be lost, either by a new facility or by upgrading an existing facility to provide a better quality facility. The location will be convenient for users and the overall playing capacity of the area will be maintained; or iv. can demonstrate that there is a clear excess of provision to meet current and anticipated demand in the area, and that the site would be developed without detriment to the overall quality of provision. This should be informed by the local authority's Open Space Strategy and/or Play Sufficiency Assessment and in consultation with sportscotland where appropriate".

The fact that a particular policy was not mentioned in a planning decision did not necessarily mean that that policy had been unlawfully ignored: *St Modwen Developments*. The report to committee referred to the list of policies specifically considered by officers as being the policies within NPF that were "considered particularly relevant" to the assessment of the application; that did not mean that no consideration was given to Policy 20. In the circumstances, Policy 21 was clearly the more relevant policy. Cathkin Park was designated in the respondent's Open Space Map as "PG030 primary land use - 6.1 public park and garden", with an area of 43,748 square metres. However, the football pitch was designated primarily as "6.51 Sports Areas - Playing Field" with an area of 8,971 square metres (which was a subset of the 43,748 square metres). As the development related to a designated football pitch, the respondent's planning officers were entitled to conclude that the more

specific Policy 21 concerned with "play, recreation and sport" was material to the planning application, whereas the more general Policy 20 was not relevant. That was a conclusion which the officers were entitled to reach. In taking its decision, the respondent had regard to the relevant planning policies within the development plan, properly interpreted them and determined that the proposed development was in accordance with the plan.

[22] In any event, even if the respondent had explicitly considered Policy 20 of the NPF4, the decision would not have changed. The respondent did not consider that the development would result in the loss of open space. The petitioner's assertion that the proposed development was contrary to Policy 20 was ill-founded. Even if it were to be regarded as contrary to Policy 20, there was no real possibility that any non-compliance with that policy would lead to a conclusion that the proposed development did not comply with the development plan as a whole given that it was found in the exercise of the respondent's planning judgment to be in accordance with the more relevant policies within the development plan.

[23] If the court were to conclude that a matter such as Policy 20 was unjustifiably left out of account, the petitioner would require to show that it was fundamental to the decision or that there was at least a real possibility that consideration of it would have made a difference to the decision. If the court was uncertain about whether the matter would have had that effect, or was of such importance in the decision-making process, then it did not have the material necessary to conclude that the decision was invalid: *Bolton*. If the court were to find that Policy 20 ought to have been taken into account and had not been, the petitioner had not demonstrated that there was any real possibility that the decision would have been different. The respondent had had regard to all the other more relevant policies within NPF4 (including Policy 21) and the local development plan, and concluded that overall the

proposed development complied with the development plan. The petitioner had not demonstrated that that conclusion was likely to have been altered if further specific consideration had been given to Policy 20.

***Land Reform (Scotland) Act 2003***

[24] The petitioner contended that, in taking its decision, the respondent acted in breach of its duty under section 13(1) of the Land Reform (Scotland) Act 2003. That challenge was premature. The decision merely granted planning permission that permitted the erection of a fence and lockable gate and did not necessarily unjustifiably impede or otherwise affect the responsible exercise of the rights referred to in section 1 of the 2003 Act. The football pitch to which the decision related had been "developed or set out as a sports or playing field". The pitch was used by the Trust "for the purpose for which it has been developed or set out", namely for the playing of football games. It was leased to the Trust for that very purpose. In such circumstances, access rights under the 2003 Act were not necessarily exercisable over the football pitch. Reference was made to section 7(7)(b) of the Act. It was apparent that the petitioner's challenge related to a perceived loss of the right to "be" on the football pitch, rather than the right to cross the football pitch. Irrespective of the development, the surrounding parkland would remain accessible, whether by walking around the football pitch or otherwise. The decision to grant planning permission for the erection of a fence and lockable gate did not necessarily unjustifiably impede the exercise of access rights over the football pitch and would not necessarily result in any obstruction or encroachment because the responsible exercise of access rights might still be permitted notwithstanding the existence of the fence and gate. If, upon erection of the fence and gate, the petitioner considered that the responsible exercise of access rights (to the extent that

access was lawfully exercisable) was being curtailed, he had an alternative remedy in the form of a summary application to the sheriff court in terms of section 28 of the 2003 Act. It would be premature and wrong in principle for the respondent, acting as planning authority, to pre-judge the outcome of any such dispute by pre-emptively refusing planning permission. In terms of section 13(2), that would be to require the respondent to do something in pursuance of the duty imposed by subsection 13(1) which would be inconsistent with the carrying on another of its functions.

[25] Section 6(1)(e)(i) of the 2003 Act provided that access rights were not exercisable in respect of land "which has been developed or set out as a sports or playing field". Section 7(7) of the 2003 Act qualified the application of section 6(1)(e). Section 14 of the 2003 Act prohibited the owner of land from *inter alia* putting up a fence or wall for the main purpose of preventing or deterring any person entitled to exercise access rights from doing so and for the local access authority to take action if it believed there had been a contravention of that provision. However, a landowner might have a defence to such action if it was seeking reasonably to manage or protect the land in question, see as illustrative examples *Tuley* v *Highland Council* 2009 SC 456, 2009 SLT 616, and *Forbes* v *Fife Council* 2009 SLT (Sh Ct) 71. It would be premature for the respondent, acting as planning authority, to pre-judge the outcome of any such dispute by refusing planning permission for the erection of a fence.

[26] The respondent acted lawfully in taking the decision and the petition accordingly ought to be dismissed.

**Decision**

***Material error of fact***

[27] The 20-year lease entered into between the Trust and the respondent with effect from 27 March 2023 contains the following provisions:

> "8. COMMUNITY SPORTS GROUPS
>
> 8.1 The Tenants shall be required to allow local Community Sports Groups to access and use the Subjects during periods outwith the periods which the Subjects are either being used for The Jimmy Johnstone Charitable Trust (in terms of Clause 7.1) or are in the course of being repaired or maintained by the Tenants, DECLARING THAT:
> …
> 8.1.3 the Tenants shall be entitled to recover payment from the Local Community Sports Groups as a direct or indirect consequence of the use of the Subjects by the Local Community Sports Groups, of all reasonable costs and expenses incurred by the Tenants in permitting access and use of the Subjects by the Local Community Sports Groups.
>
> 8.2 The Tenants shall record the details of the Local Community Sports Groups which use the Subjects, including the name of the Local Community Sports Group, and the dates and times of usage, and provide such records to the Landlords' upon reasonable request."

"Local Community Sports Group" is defined by the lease as meaning:

> "a group, organisation or club based and/or operating in the area local to the Subjects which provides non-commercial sporting opportunities for the local community and has as one of its primary aims to better advantage sport in the area, or such other group, organisation or club which the Landlords consider to be a local community sports group".

[28] The grant of planning permission which is complained of does not affect those obligations, which remain incumbent on the Trust.

[29] The Design and Access Statement submitted on behalf of the Trust in connection with its application for planning permission for the erection of the fence contained the following statements germane to the access issue which is the subject of this dispute:

"3 DESIGN OVERVIEW

3.1 Facility Purpose
3.1.1 The Jimmy Johnstone Charitable Trust are looking to improve the playing facility by erecting a new fencing system to enclose the existing playing field.
3.1.2 The land outlined for the development area is an area of natural grass.

3.2 Site Description
3.2.1 The development area is located at Jimmy Johnstone Charitable Trust, Mount Florida, Glasgow
3.2.2 The existing site is currently used for football at junior club level and community use.

3.3 Site Dimensions
3.3.1 As shown in the general arrangement drawing (100) the proposed fencing system will be 3m twin wire rebound fencing at 102m X 67.5m. the pavilion building will have a 1.8m twin wire security fencing.
…

3.6 Benefits of the Development
3.6.1 The new fencing system will provide the facility with a way of protecting the playing surface from unauthorised use and non-permitted activities. These include bicycles use on the field of play, animal fouling and golfing. It is also an added level of security and way for the club to develop the facility. It also helps protect the parks historical sporting significance.
…

4.3 Opening Hours
4.3.1 It is proposed that the facility operates under the following hours; Monday to Sunday up to 17:00
4.3.2 The above hours shall allow use of the pitch during the evening and weekends thereby increasing the current provision from the pitch.
…

5 PROPOSAL SUMMARY

5.1 In view of the proposals outlined herein assessed against relevant planning policies and considerations, we request that the proposal be accepted with the following key points;

- The new fencing system will allow the academy to control the use of the pitch.
- Preserve the historical significance of the pitch/area.
- It will help prevent unauthorised used and damage to the surface, such as the following:
    - Dog fouling
    - Bicycles/Quad bikes on the pitch
    - BBQ and other social gathering damages
    - Golfing

- Use of unauthorised cars on the park causing damage with joy-riding

- It will help the area develop more community engagement
- The proposal would not result in an unacceptable impact to any residential amenity."

The report to committee dated 12 December 2023 contains the following observations relating to the access issue:

> "The main grounds of objection and support are summarised as follows, though these will be discussed in detail in the Assessment and Conclusions section of this report:
> Objection:
> • Object to the removal of public access to the existing sports pitch
> …
> The applicants have advised that, through their existing lease, while the use of the pitch would be intended for the use of the Jimmy Johnstone Football Academy (JJFA), it would also be available for wider community use. JJFA have used the park since 2010 and have recently secured funding of £500k to protect and re-lay the grass pitch. In 2022 they entered into a 20-year lease with the Council for use of the pitch, changing pavilion and multi-use games area.
> …
> Letters of Objection:
> • Object to the removal of public access to the existing sports pitch
> Response: Public access is not being removed altogether. As has been detailed in the above policy analysis, the proposed fence will protect the pitch for continued use as a sports pitch as designated in the City Development Plan.
> …
> Reason(s) for Granting this Application
> 01. The proposal was considered to be in accordance with the Development Plan and there were no material considerations which outweighed the proposal's accordance with the Development Plan."

That material provides no support for the suggestions that the respondent was unaware of the exact nature of the development proposed, or that the decision which is complained of was predicated on a material mistake as to fact which gave rise to unfairness. The access issue which is inherent in the erection of a perimeter fence was made clear to, and recognised by, the respondent. Its conclusion that public access would not be removed altogether by the proposed development was justified by the ongoing obligation on the Trust to allow local community sports groups to access and use the pitch when it is not

being used by the Trust or being repaired or maintained. This first ground of challenge to the decision fails.

***Development plan***

[30] As was made clear in the passages from the *City of Edinburgh* case set out above, the scope for challenge to the exercise of planning judgment by a local planning authority is limited. The decision complained of could be set aside by the court only if it was attended by:

(a) A failure to have regard to a relevant policy in the development plan;

(b) A failure properly to interpret a relevant policy in the development plan;

(c) A failure to take account of some consideration material to the decision;

(d) The taking into account of some consideration irrelevant to the decision; or

(e) An irrational assessment of the relevant considerations.

In these respects, little has changed since the observations of Lord President Emslie in *Wordie Property Co Ltd* v *Secretary of State for Scotland* 1984 SLT 345 at 347 - 348, save that the concept of irrationality is nowadays perhaps attended by a rather greater degree of elasticity than was the case in the 1980s.

[31] The petitioner's first submission in this context amounts to a suggestion that Policy 20 of NPF4 was left out of account by the respondent in coming to its decision on the application. That submission was based on the fact that the report to committee already mentioned did not include that policy in the following passage:

> "**Policies**
> **National Planning Framework 4**
> The following policies are considered particularly relevant to the application assessment:
> **Policy 1** Tackling the climate and nature crises

**Policy 2** Climate mitigation and adaption
**Policy 21** Play, recreation and sport

Glasgow City Development Plan

**CDP 1**: The Placemaking Principle
**CDP 2**: Sustainable Spatial Strategy
**CDP 6**: Green Belt and Green Network

**SG 1**: The Placemaking Principle
**IPG 6**: Green Belt and Green Network"

The absence of NPF Policy 20 from the list of policies considered "particularly relevant" to the application does not provide a proper basis for a suggestion that that policy was not considered at all. In any event, I accept the submissions for the respondent (i) that it was a matter within the broad ambit of the respondent's planning judgment to determine that Policy 21, ie that which directs itself specifically to play, recreation and sport, was more relevant to the application than Policy 20 on green and blue infrastructure; (ii) that it was likewise within that ambit to reach the conclusion that the development would not result in a relevant loss of open space; and (iii) that the petitioner has failed to establish that there was a real possibility that specific and detailed consideration of Policy 20 would have resulted in a different decision being made.

[32] The petitioner's other criticisms of the respondent's treatment of the development plan, namely that there was a failure properly to apply Policy 20 of NPF4, a failure to apply CDP Policy 1 in accordance with the guidance in SG1, and a misinterpretation of CDP Policy 6, on analysis come to amount to nothing more than a disagreement with the planning judgment exercised by the respondent as planning authority in relation to the application of those policies to the situation at hand. The respondent was plainly aware of the terms and import of the relevant policies, and treated them in a way which could not properly be characterised as irrational even if there was scope for reasonable disagreement

about how they might apply to the proposed development. None of the petitioner's criticisms of the treatment of the development plan by the respondent meets any of the criteria which would justify the intervention of the court, and this head of challenge accordingly also fails.

***Land Reform (Scotland) Act 2003***

[33] In order to determine the potential impact of section 13 of the 2003 on the decision-making process complained of, it is necessary first to determine whether members of the public presently have a right of access for recreational purposes over the football pitch in issue. If they do not, then the respondent's duty in terms of section 13(1) of the Act to assert, protect and keep open, etc., any means by which access rights might reasonably be exercised would not be engaged. The submission for the respondent was that it was at least dubious whether such access rights existed, because the pitch had, in terms of section 6, been developed or set out as a sports or playing field, and was being used for that purpose, or else was an area similar to a "golf green, bowling green, cricket square or lawn tennis court" on which grass was grown and prepared for a particular recreational purpose, thus qualifying for exemption from public access rights in terms of section 7(7)(a) and (b). While I accept that there is no public right of access to the football pitch while it is actually being used as such (preferring the narrower available construction of the exemption in section 7(7)(a) as more consistent with the overall purpose of the 2003 Act to preserve and enhance public access to land in general), I do not consider that a pitch used for amateur football is sufficiently analogous to a golf green, cricket square or lawn tennis court to qualify for the further protection of section 7(7)(b). That subsection plainly directs itself to playing areas where a very high degree of groundsmanship is required for the purposes of

the sport in question, public access to which could reasonably be expected to cause damage to such an extent as to render the area unplayable. An amateur football pitch, although certainly qualifying as an area on which grass is grown and prepared for a particular recreational purpose, is in my view more analogous to the fairway of a golf course or the outfield of a cricket ground - areas which clearly are not protected by section 7(7)(b). It follows that section 13(1) of the 2003 Act is engaged *ratione materiae* in relation to the football pitch in Cathkin Park.

[34] The next question is whether the duty on the respondent in terms of section 13(1) is excluded from the circumstances of this case by section 13(2), which makes it clear that subsection (1) does not require a local authority to do anything in pursuance of it which would be inconsistent with the carrying out of the authority's other functions. Would the furtherance of the subsection (1) duty be inconsistent with the discharge of the respondent's duties as local planning authority? In this respect it will be recalled that that section 25(1) of the 1997 Act provides that, where a determination under the planning Acts requires regard to be had to the development plan (as the decision complained of in this case did), it is to be made in accordance with that plan unless material considerations indicate otherwise, and that section 37(2) of that Act requires the local planning authority to have regard to the provisions of the development plan and to any other material considerations. Section 13 of the 2003 Act is one of a growing number of "general, almost abstract, duties on public bodies to behave in a particular manner" (*NLEI Ltd* v *Scottish Ministers* [2022] CSIH 39, 2023 SLT 149 at [60]). Many of those duties are unlikely to impinge very directly on the field of planning law, for example the general duty recently imposed on public authorities to act compatibly with the requirements of the UNCRC by section 6 of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024. Others have a

more foreseeably direct potential impact on planning decisions (such as, for example, section 1(1) of the Nature Conservation (Scotland) Act 2004, or section 44 of the Climate Change (Scotland) Act 2009, to select only provisions which have recently come to the attention of the courts). The duty imposed on the respondent by section 13 of the 2003 Act falls into that latter category and is, at least potentially, a material consideration capable of affecting a determination falling to be made by the respondent in the exercise of its functions as local planning authority in accordance, rather than in conflict, with the terms of sections 25(1) and 37(2) of the 1997 Act.

[35] It was further submitted on behalf of the respondent that the petitioner's concerns about the future of public access rights to the pitch could be dealt with in due course by a summary application to the Sheriff under section 28 of the 2003 Act for a declaration as to whether such rights are or are not exercisable there, that that represented an adequate alternative remedy for the petitioner, and that the present application to the supervisory jurisdiction of this court was accordingly incompetent. I reject that submission. The petitioner wishes this court to determine whether the respondent's grant of planning permission was lawful or not; a matter in respect of which the Sheriff has no jurisdiction whatsoever. He does not wish a determination of the nature and extent of any public access rights which might subsist in relation to the pitch as and when the permission for the erection of the fence is implemented by its erection. This court has had to form a view as to the incidence of the access rights currently enjoyed by the public in relation to the pitch in order to form a view as to whether the section 13 duty is engaged, but it was (I think rightly) not submitted on behalf of the respondent that the competency of an application to the Sheriff for a declaration as to access rights operated as a general exclusion of the jurisdiction

of this court to determine that matter as an incident of the exercise of its own powers. The present application is entirely competent.

[36] It was finally suggested on behalf of the respondent that it was, for the various reasons already set out, premature or otherwise inappropriate for it to have formed a view about the potential effect of the grant of planning permission on public access to the football pitch when considering the relevant application. The difficulty with that submission is that neither the report to committee nor the determination of the application itself contain any material suggesting that any consideration at all, at any stage, was given to the potential impact of the section 13 duty on the decision-making process, nor was any submission made that it had nonetheless actually been taken into account. Had the respondent considered the potential application of that duty to the proper determination of the application and noted its conclusions - whatever they might have been - in relation to that matter, those considerations and conclusions could have been examined in order to determine whether they reflected any error of law, a question which might very well have resolved itself into whether they betrayed any sign of irrationality in the relevant sense. However, the apparent failure of the respondent to give any thought to the matter at all inevitably involves the conclusion that it failed to take account of a consideration of at least potential materiality to the decision which it was called upon to take. It is not possible to conclude that, had it considered the potential impact of the section 13 duty on that decision, there would have been no real possibility of a different decision - perhaps involving conditions calculated to produce a more even balance amongst the various community interests engaged in the park and the pitch - being made. It follows that this ground of challenge to the respondent's decision succeeds.

**Conclusion**

[37] For the foregoing reasons, I shall sustain the petitioner's second plea-in-law and his third such plea insofar as it relates to the 2003 Act, repel his remaining pleas along with those of the respondent, find and declare that the decision complained of was predicated on a material error of law, and reduce it accordingly.