Neutral Citation Number: [2022] EWHC 16 (Admin)

Case No: CO/1968/2021

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

Bristol Civil and Family Justice Centre
2 Redcliff Street, Bristol BS1 63R

Date: 07/01/2022

Before :

THE HON. MR JUSTICE LANE

- -

Between :

The Queen on the application of (Ashchurch Rural Parish Council)	**Claimant**
- and -	
Tewkesbury Borough Council	**Defendant**

- -
- -

L Glenister (instructed by **Richard Buxton Solicitors**) for the **claimant**
J Pereira QC and H Waller (instructed by **One Legal**) for the **defendant**

Hearing dates: 21 and 22 October 2021

- -

Approved Judgment

Mr Justice Lane :

1. On 22 April 2021, the defendant, as local planning authority, granted planning permission for the development of a road bridge over the Bristol to Birmingham mainline railway, north of Ashchurch, Tewkesbury. As well as the construction of the bridge, the permission covered temporary haul roads for construction vehicles, site compounds, security fencing, surface water drainage channels and attenuation points.

2. In this judgment, references to the bridge are references to the road bridge over the railway just mentioned.

THE CHALLENGE

3. By this judicial review, the claimant challenges the lawfulness of the grant of planning permission in respect of the bridge. It does so on three grounds, which can broadly be categorised as follows. The defendant's Planning Committee was wrongly informed by the planning officer's report that the Committee could, on the one hand, take into account the benefits of the bridge, as facilitating proposed large-scale development (in particular, the construction of 826 homes) but that, on other hand, it was not to take into account any harms that might arise from that proposed development. The claimant contends that this legally erroneous advice vitiates the granted permission (Ground 1).

4. The claimant further contends that the defendant failed to comply with its obligations under the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 ("the 2017 Regulations"), in that the Screening Report of May 2020, which concluded that the bridge (as development falling within Schedule 2 to the 2017 Regulations) would not be likely to have significant effects on the environment by virtue of factors such as its nature, size or location, did not consider the environmental effects of the wider, large-scale development. As a result, the defendant reached an unlawful decision, based on the Screening Report, that an Environmental Impact Assessment ("EIA") was not required (Ground 2).

5. Finally, the claimant contends that involvement of certain Members and Officers of the defendant in the development and implementation of a proposed Tewkesbury Garden Town, which the bridge will help to facilitate, constituted a breach of the defendant's EIA duties regarding objectivity and bias; and was also such as to lead a fair-minded observer to conclude that there was a real possibility of bias (Ground 3).

BACKGROUND

6. The background to the challenged grant of planning permission for the bridge is essentially as follows. In December 2017, the defendant adopted a Joint Core Strategy ("JCS") with Gloucester City Council and Cheltenham Borough Council. The JCS had identified land within the site of MoD Ashchurch for employment and residential use. Uncertainty regarding the release of this land, however, meant that there would be a shortfall of about 2450 homes and 20 hectares of employment land. At the time of the grant of permission for the bridge, a review of the JCS was not expected to be submitted

for examination until the Spring of 2023, with adoption not expected until many months thereafter.

7. In order to inform the JCS review, the Tewkesbury Area Concept Masterplan ("the Masterplan") was drawn up in January 2018. The Masterplan sets out potential large-scale development across the area, described as the "North Ashchurch Development Area ("NADA"). The Masterplan provides a spatial growth strategy in order to meet the shortfall in the JCS over that plan's period (2031) and beyond. The Masterplan identifies a capacity of 8,000 homes and 120 hectares of employment land, coming forward in four phases. Only phase one is envisaged within the JCS plan period. Although the Masterplan accepts there is no transport solution so far identified for the quantum of development envisaged, the Masterplan nevertheless identifies the need for a northern link road to cross over the mainline railway so that existing roads can be connected, thereby relieving pressure on the A46 corridor.

8. The Masterplan envisages development being delivered in phases. Phase 1 (to 2031) envisages the development of the areas north of the MoD base, delivering, inter alia, 3,180 new homes.

9. The Masterplan is not part of the defendant's adopted development plan; nor even is it (yet) part of any emerging development plan. Mr Pereira QC describes it as the first step in considering options for growth.

10. As part of the plan-making process, the defendant will need, in due course, to comply with the Environmental Assessment of Plans and Programmes Regulations, 2004 (SI 2004/1633). Amongst other things, the 2004 Regulations apply to local plans that are subject to preparation or adoption by an authority. Such plans include ones that are prepared for the purposes of town and country planning or land use (regulations 2(1) and 5(2)). Where the plan sets the framework for future development consent of certain projects (which would include the Tewkesbury Garden Town, if within the scope of the defendant's proposed development plan), regulation 5 requires the authority to carry out or secure the carrying out of an environmental assessment. The scope of the ensuing report is required, by regulation 12, to identify, describe and evaluate, the likely significant effects on the environment of implementing the plan or programme; and reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme (regulation 12((2)).

11. From what I have said so far, it might have been thought that any planning application for the bridge would be unlikely to be made for some time. However, in July 2017, the Ministry of Housing, Communities and Local Government launched a £2.3 billion Housing Infrastructure Fund, in order to support housing delivery through the funding of vital physical infrastructure, such as roads and bridges, with the opportunity to facilitate the development of some 100,000 homes in England. The fund was split into two key areas: forward funding (for larger schemes up to £250 million) and marginal funding (for schemes up to £10 million). Applications were sought from councils to bid by 28 September 2017.

12. In order to support delivery of the JCS and the work being undertaken on the Masterplan, the defendant submitted a marginal funding bid of £8,132,465 to deliver the bridge, which, in turn, would facilitate the development strategy of the wider Ashchurch area. According to the Report of the Deputy Chief Executive to the

Executive Committee of the defendant (12 June 2019), the fund would unlock "a number of sites and forms an early phase of the development strategy to realise the Garden Town".

13. In February 2018, the defendant was informed that its bid had been successful. Discussions then continued with Homes England concerning delivery dates and other contract details.

14. What became an agreement between the defendant and Homes England was described by the Deputy Chief Executive in his Report as follows:

> "The Homes England documentation splits the project into the main project comprising the bridge and a wider project which includes the link roads and the housing development unlocked by the funding - detailed as 826 residential units. Homes England has accepted that delivery of the wider project is outside of the control of this project (i.e. the granting of planning permission) and have agreed a 'best endeavours' approach to delivery of this wider project."

15. Having entered into the agreement, the defendant set about obtaining planning permission for the bridge. On the issue of the EIA, Paul Skelton, the defendant's Development Manager, wrote in an email for 4 September 2019 to Atkins Global:-

> "[as] discussed at the meeting, you should also submit an Environmental Impact Assessment Screening Opinion to establish whether the proposed is "EIA" development. My gut feeling is that it probably is given that it can't be divorced from the future development it is intended to serve."

16. As Mr Skelton says at paragraph 7 of his witness statement, he subsequently changed his mind on this issue. Adam White, a contract planner, who was working in the defendant's development management team at the time, recommended that a submission of an environmental statement was not required, given the development's size and nature. On reflection, and in the light of the information submitted in the Screening Report of May 2020, Mr Skelton agreed with the recommendation of Mr White; in particular, that any future contemplated development could not be assessed at the time, for the reasons Mr White gave.

17. The EIA Screening Report of May 2020 explained, in its introduction, that the planning application for the bridge is "being sought only to construct the bridge structure and leave it in place until future development comes forward to make it operational". The Report described the bridge as "essentially enabling works for future development of sites proposed for new residential and community development within the [Masterplan]. In that Masterplan, an area north of Ashchurch is highlighted as phase one of an area for future housing development (the north Ashchurch development area").

18. The Screening Report continued: -

> "In accordance with this approach, the bridge will not be connected to the public highway... and will not be provided with its final road surfacing. After construction, the bridge will remain fenced off from use until future development linked to the [Masterplan] (which currently has no formal planning status, but is being prepared for potential adoption into the relevant Local Development Plan) gains planning permission for a future highway through the north Ashchurch area. Consequently, the "operational" stage for the purposes of the [bridge] scheme is restricted to the physical presence of the bridge as a feature within the landscape - use as an operational highway will be a matter for a future planning application".

19. The Screening Report explained that:-

> "The [bridge] is being advanced prior to the formalisation of site allocations within planning documents in recognition of the considerable lead in time and constraints associated with working on railway assets. Design and construction on Network Rail assets are required to follow Network Rail's Governance for Railway Investment Projects (GRIP) process, and, due to the intricacies of these activities, are often seen as blockers to onward development. In particular, constructing bridges over Network Rail assets is complicated by the requirement for "possessions" on the railway asset for parts of the construction, which involves undertaking certain works only in the infrequent periods in which the railway is non-operational or in reduced operation".

20. At paragraph 1.3 ("Need for the Scheme"), the Screening Report noted how Gloucester City Council, Cheltenham Borough Council and Tewkesbury Borough Council had worked in partnership to prepare a Joint Core Strategy, describing how the area will develop between 2011 and 2031. Owing to the shortfall which I have described earlier, the Masterplan was produced "as a first step in the process of reviewing development opportunities at the town of Ashchurch, as part of the JCS review, which is now underway".

21. In March 2019, the defendant was awarded Garden Town status for Tewkesbury at Ashchurch. The Screening Report states that this "brought forward plans for major residential and housing development along the A46 East of M5 Junction 9", as identified in the Masterplan.

22. At 1.4.2, the Screening Report addressed the housing shortfall identified in the JCS:-

> "Given this shortfall, the Council is in the process of evaluating the development potential in the Ashchurch area, and it is intended that a strategic, comprehensive and plan-led approach will be adopted. This approach is to be informed by the [Masterplan] ... This document is a first step in the process of reviewing future development opportunities at Ashchurch and has already started to inform the review of the JCS, with a view

> to contributing to the identification of strategic allocation sites for the Borough".

23. At 1.5 ("The Need for Environmental Impact Assessment) the Screening Report described EIA development as falling into two Schedules. Schedule 2 developments require EIA if they would be "likely to have significant effects on the environment by virtue of factors such as its nature, size or location".

24. At 2.2 ("The Scheme Description") the Screening Report said:-

> "The current proposals identify that this North Ashchurch Development Area is anticipated to provide 826 new houses, but it is recognised that this development would not occur unless further crossings of the railway are provided… The [bridge] scheme relates exclusively to the construction of the bridge structure and associated embankments over the railway. This will facilitate future development of the North Ashchurch development area, enabling the requisite crossing structure for a future road to be provided, recognising that the design and delivery of any such road will form part of the masterplanning exercise for the future housing development".

25. At 14 ("Summary and Conclusions"), the Screening Report noted that although the bridge scheme does have potential impacts, these are generally temporary in nature, arising and lasting for the duration of the construction period only, which was anticipated to be about 8 months. There was no intention for the bridge to be connected to the operational highway at this stage. Accordingly, consideration of operational impacts and environmental effects was based on the structure being present and visible in the landscape but not available for human use and not requiring maintenance. Part 14 continued:-

> "It is noted that the [bridge] is essentially advance works for anticipated future growth to the north of Ashchurch, providing a crossing point over the railway line that could, in the future, be connected into the highway network to provide additional network capacity. However, the planning policy context for the growth of this part of Tewkesbury is not yet fixed within adopted policy documents; and no planning applications have been submitted to date in respect of sites directly to the North or East of the proposed…[bridge] (specifically the North Ashchurch Development Area). Consequently, the preparation of a robust assessment of cumulative effects of the [bridge] in light of a future baseline scenario incorporating growth in the North Ashchurch development area is not possible, and any attempt to prepare such a document would arguably be premature - the developments would fall outwith the usual definition of reasonably foreseeable future projects on the basis of their lack of formal planning status".

26. The Screening Report concluded that there was "no need to submit an Environmental Statement as part of the planning application", since the development did not meet the screening criteria set out in schedule 3 to the EIA Regulations.

27. The Report of the Planning Officer to the Planning Committee, written by Paul Instone, is dated 16 March 2021. Excluding annexed plans, it runs to 43 pages.

28. At section 4.0, the report described the result of consultations on the planning application for the bridge. Ashchurch Rural Parish Council had objected, noting that although the application referred to a potential roadway and potential housing development "there is no application for either of these options at this time and thus they cannot be considered". The objection went on to question the use of public funds "to build what is in effect a 11m high concrete monolith in the middle of a field that harms the landscape. It assumes that permission will subsequently be given to construct a link road and the 826 dwellings". The objection ended in similar vein:-

> "Overall, this application assumes that any future applications for the remaining development will be approved irrespective of any reasons why they should not be so. In isolation the project can only be considered a waste of public funds and thus should be resubmitted with the missing applications for a road link and housing".

29. Bredon Parish Council also objected, stating that there was "a danger that the housing will not be delivered, and the project will end up being a 'bridge to nowhere' if improvements to the Strategic Road Network particularly the A46 are not delivered".

30. Amongst the other objectors were Kemerton Parish Council, which considered that there was no "proper justification for the construction of the bridge, and there is a considerable uncertainty about future residential development", in the light of which "the bridge is an improper use of scarce public funds".

31. At 7.0, the Report referred to the EIA Screening Opinion, stating that, on 22 June 2020, the local planning authority "issued an adopted screening opinion in respect of the proposed development which was that the submission of an Environmental Statement in connection with this development was not required".

32. Under 8.0 (Analysis), the main issues to be considered were described as "the principle of the proposed development and phasing, design and visual impact including landscape impact and impact on AONB, highway matters, flood risk, impact on amenity, impact on ecology and trees, and impact on heritage assets".

33. Having described the JCS and the Masterplan, the Report stated that the latter:-

> "is not a development plan document; It is part of the evidence base to support work on the review of the JCS providing a spatial growth strategy for the area that will contribute towards meeting both the housing shortfall for the Borough up to 2031 as well as the longer term growth needs beyond. As a planning document it carries very little weight although it does form part of the plan-led approach".

34. The Report stated that an area to the north of Ashchurch, including the development site, is highlighted as Phase 1 in the Masterplan and that the Masterplan includes a transport strategy, which explores a number of highway infrastructure scenarios to serve Phase 1. The Masterplan identifies there is no transport solution yet for the quantum of development in Phase 1 but the Masterplan nevertheless identifies "that a northern link … is needed crossing over mainline rail joining up existing roads". To deliver the Masterplan, the Transport Strategy identifies short, medium and long term enabling interventions. The northern access road is identified as a short-term enabling intervention, "which is required for the delivery of the northern development plots, which rely on the provision of a northern link over the rail line, overcoming severance and completing the link between existing local roads".

35. The Report described the award by the Ministry of Housing, Communities and Local Government of £8.1m through the Housing Infrastructure Fund to deliver the bridge "that would unlock parcels of land to the east of the railway line. The HF Funding Financial modelling obligation is for the delivery of 826 new houses, albeit the [Masterplan] identifies the delivery of more houses".

36. The Report then told Members why the planning application for the bridge was being made this time:-

> "The applicant advises that the planning application for the [bridge] is submitted in advance of other associated infrastructure or land use developments due to a spending deadline associated with HIF Funding. It is necessary for the HIF Funding to be spent by the end of 2022 and the submission documents indicate the construction period would be circa 12 months.
>
> The applicant also advises that this [bridge] is being advanced prior to the formalisation of site allocations within planning policy documents in recognition of the considerable lead in time and constraints associated with working on rail assets. Design and construction on Network Rail assets are required to follow Network Rails Governance for Railway Investment Projects, and, due to the intricacies of these activities, are often seen as delaying factors to onward development. In particular, constructing bridges over Network Rail assets is complicated by the requirements to undertake certain works only in the infrequent periods in which the railway is non-operational or in reduced operation.
>
> The application is therefore being progressed at the current time to deliver these Short-Term Enabling Intervention timescales of the [Masterplan] and to meet the HIF Funding deadline.
>
> …
>
> Infrastructure can be the key to unlocking land for development to enable comprehensive well- planning (sic) development solutions. In the case of the current application, the construction

> of the bridge is identified as a Short Term Enabling Intervention to deliver the First Phase of the [Masterplan] by 2031, to ensure the proposed development is facilitated and supported by the necessary infrastructure and facilities and to accord with the requirements to the HIP Funding (sic).
>
> Nevertheless, it is the case the HIF Funding, the inclusion of the wider application site in the garden communities programme and the identification of the wider area for development in the [Masterplan] does not prejudice or presuppose the planning system, including the plan-led approach.
>
> Therefore, the principle of progressing with the [bridge] application at the current time, is a matter of planning balance. There are substantial benefits of seeking to achieve the aspirations and timelines of the [Masterplan] in the context of achieving the JCS and JCS Review Strategic Objectives, and ensuring that necessary infrastructure is [in]place to achieve well planned development. This weighs in favour of the principle of progressing the application at the current time. However, weighing against the principle of progressing with the application at the current time, is that the [Masterplan] is an evidence base document which carries very little weight in the decision-making process".

37. Dealing with access and highway issues, the Report said:-

> "Significant concerns have been raised by the local community both in relation to traffic impacts during the construction period and those related to potential future development in the area, enabled by the proposed bridge. Whilst concerns in relation to the latter are understandable, as set out above, those matters are not material to this application, the assessment of which relates solely to the construction of the bridge structure and related haul road/compounds etc."

38. Also on highways, the Report said-

> "The highways authorities advise that their consideration of the current proposals does not provide any pre-determined view on the acceptability of a future proposed link road, the bridge's connection to the existing highway network and associated development proposal. The impacts of these proposals would be considered separately in the future."

39. The Report then dealt with landscape and visual impact, including impacts on AONB, residential amenity, ecology and biodiversity, and heritage assets.

40. So far as the last of these is concerned, the Report acknowledged that two historic buildings, Northway Mill and Mill House, are located approximately 400 metres from the embankments and the compounds connected with the bridge and that the temporary

access and haul road would be located within approximately 50 metres of these buildings.

41. In this regard, the Report said:-

> "It is acknowledged that the impact of the bridge is not likely to be in isolation. The bridge is part of the Garden Town initiative, which would result in additional within the setting of the listed buildings. development of the land (sic) [presumably "additional development on the land within the setting of the listed buildings."] However, at present, the application should be judged on its own merits."

42. Having concluded that less than substantial harm would be caused to the setting of the cluster of heritage assets north west of the bridge, including Northway Mill and Mill House, the Report stated that the visual impact of the bridge would have a medium to low harmful impact on the setting of designated heritage assets of high significance. However, this harm could be mitigated to some extent by a programme of planting to provide visual screening in the vicinity of Northway Mill.

43. The Report then concluded its consideration of heritage assets as follows:-

> "It is the case that there would be public benefits arising from the proposal, which is the first phase of the Garden Communities programme which would deliver housing and associated infrastructure. It is also considered that there is a clear and convincing justification for the proposed bridge to facilitate the Garden Communities Programme.
>
> In this instance harm to the heritage assets is identified and considerable importance and weight should be afforded to this harm in the decision-making process. However, officers consider that the substantial public benefits arising from the proposal outlined above would outweigh the identified harms in this instance and that there is a clear and convincing justification for the proposal."

44. At 9.0 (Conclusion and Recommendation) the Report brought together the identified benefits and harms, before arriving at an "overall balance and recommendation".

45. Under the heading "Benefits" the Report said:-

> "Whilst it is recognised of course that the [Masterplan] is an evidence base document which carries very little weight in the decision making process the application proposals are a first stage Short-Term Enabling Intervention within the [Masterplan] and Garden Communities Programme. There are significant benefits arising from this development in enabling the delivery [of] the [Masterplan] and Garden Communities programme and ensuring that necessary infrastructure is [in] place to achieve well planned development. The application site itself spans

> across land parcels 14 and 15 which are identified to have an indicative capacity for 2055 homes within the [Masterplan] which would make a significant contribution to housing land supply. The HIF Funding financial modelling obligation is for the delivery of 826 new houses. There are substantial benefits with progressing the application proposals at the current time to ensure the delivery time scale of the [Masterplan] is maintained seeking to achieve the aspirations and timeline of the [Masterplan] in the context of achieving the JCS and JCS Review Strategic Objectives and to meet the HIF Funding deadline."

46. The Report also identified benefits through job creation during the construction process.

47. So far as harms are concerned, the Report stated that there would be significant harm to the landscape arising from the proposal, given the scale of the development. There would be detrimental impact on residential amenity during the construction phase. There would be some harm to ecology arising from the development and less than substantial harm to heritage assets.

48. Under the heading "Neutral", we find:-

> "At this stage of the [bridge] scheme, there are no operational effects to assess in respect of vehicle movements, noise, vibration, emissions and other matters. These would be considered when future applications come forward enabling the operational phase".

49. The "Overall Balance and Recommendation" was as follows:-

> "It is concluded that the benefits of the proposal, including the benefits of progressing the proposal at the current time, outweigh the identified harm. It is also concluded that the application is generally in accordance with development plan policy.
>
> It is therefore recommended that the application is **permitted"** (original emphasis).

50. The Planning Committee met remotely on Tuesday, 16 March 2021. The minutes recorded at 62.1 that the "Committee's attention, was drawn to the Tewkesbury Borough Council Code of Conduct, which was adopted by the Council on 26 June 2012 and took effect from 1 July 2012".

51. There followed at 62.2 the recording of a number of declarations. The following Councillors declared an interest in the application for the bridge. In each case and the nature of the interest was said to be as follows:-

> "is a member of the Tewkesbury Garden Town Member Reference Panel, but has not, either individually or as a member of the Panel, been directly or closely involved in the detail of the

> planning application. Neither had the application being discussed at the Panel."

52. The councillors who made this disclosure were Councillors Bird, Evetts, MacTiernan, Mason, Vines and Workman. Councillor Surman did not make a declaration in respect of the Garden Town Reference Panel.

53. The Minutes record that there was extensive debate on the application, with Members expressing views for and against. The Development Manager told Members that the impacts of the wider Garden Town proposals would be considered in any future planning applications for that development.

54. Concerns were said to have been raised regarding:

> "governance and whether the Council should be dealing with the application, the Development Manager advised that it was entirely appropriate and lawful for the Council to determine the application in accordance with the relevant statutory provisions. As with all applications considered by the Council, decisions must be made in an open and transparent way taking into account all material considerations".

55. Later in the Minutes, it was recorded that the Development Manager "advised that there were significant benefits arising from this development, in enabling the delivery of the Masterplan for and Garden Communities programme and ensuring that the necessary infrastructure was in place to achieve well planned development and that the delivery time scale of the Masterplan was maintained".

56. The applicant's agent was recorded as having addressed the Committee. She said that transport interventions and early investment in the associated infrastructure would enable the defendant to support its future growth more robustly, "whether associated with planned or speculative development. This would also enable the early phases of the growth management plan for the area and the emerging Tewkesbury Garden Town initiative, which was due to be promoted through the upcoming Joint Core Strategy Review. She reiterated that, as stated in the Planning Officer's Report, there were "substantial benefits in seeking to ensure the necessary infrastructure was in place, to achieve well planned development."

57. The agent told the Planning Committee that the defendant "had achieved a significant milestone in securing government support through the Housing Infrastructure Fund (HIF) for the delivery of the bridge, and this opportunity should not be lost." She said it was also important to grasp the opportunity to deliver the bridge early in the strategic development programme, so as to "secure the required possessions of the railway line well in advance". A strong working relationship had been established with Network Rail.

58. The Minutes record the Development Manager stating that:-

> "As members will be aware, the Tewkesbury Borough Plan was currently at examination, so was at an advanced stage and there was reference to Ashchurch as being a focus for new

> development within that plan but in terms of the [Masterplan] and the JCS Review little weight could be attributed to those documents in terms of the statutory weight to be applied. However, as Members had previously been advised with any material consideration or any consideration in determining planning applications the weight was for the decision-maker to decide as well as how much weight to give to any particular factor".

59. After recording a Member as describing the application as "the latest version of the Emperor's New Clothes and that it should be rejected", the Minutes said that the Development Manager:-

> "referenced the Councillor mentioning 826 houses and stressed that it was not clear what amount of development the proposed bridge would serve, but in any event the application before the committee currently was for the construction of a bridge and the impact of that construction. He understood that this was a difficult scenario considering a bridge structure which did not link to any of the surrounding road network but would in the future be enabling developments; this was about getting the infrastructure in early to deal with future development but that future development and the impacts of it were not relevant currently and could not be considered as part of the application before the Committee today".

60. At 64.7, there is the following:-

> "A debate ensued on why the application should be refused and particular reference was made to paragraph 8.27 of the Report which stated that points made by the local community were not material to the application; a Member completely disagreed with this statement as he felt on balance they were very relevant and he highlighted comments from the Bredon Hill Conservation Group in relation to a lack of sequencing, negative impacts on the highway network and poor use of public funds…"

61. At 64.11, another Member "maintained that the application was premature and the Planning Committee had a responsibility to ensure the safety of residents and traffic and that there would be no excessive flooding..."

62. At 64.12 it is recorded that "following further debate on the benefits and harms of the proposal" the request for a recorded vote was made, which was supported by the required number of members.

63. Councillors Bird, Evetts, Mason, Murphy, Reece, Smith, Surman, Vines and Williams voted in favour of the application. Councillors Gerrard, Harwood, Jordan, MacTiernan, Ockelton, Smith and Workman voted against Councillor RJG Smith abstained. The application was, therefore, said to be "permitted in accordance with the officer recommendation" by ten votes to seven.

DISCUSSION

Ground 1

64. For the claimant, Mr Glenister submits that the Planning Committee was told in terms in the Officer's Report that harms arising from the development which it was the purpose of the bridge to facilitate "could not be considered as part of the application before the committee today" (64.6 of the Minutes). Mr Glenister says that this element of Ground 1 therefore does not need to be founded on a "rationality" challenge. All the claimant needs to show is that the harms arising from future development were capable of being a material consideration, in the sense that it would have been rational to consider those harms. If they were so capable, then because the Committee was advised that they were not permitted to consider those harms at all, the resulting decision is necessarily unlawful.

65. The fact that the harms arose from the wider development (as a minimum, the 826 homes covered by the "best endeavours" obligation in the defendant's agreement with Housing England) was something that could rationally be considered by the Committee. The premise of the application for the bridge was that it would, in the words of the Screening Report "support future development referred to as the Tewkesbury Garden Town". As a matter of common sense, the application for the bridge, considered on its own, would merely amount to a " bridge to nowhere", costing £8.1 million. Therefore, the bridge would inevitably have to facilitate further development in order to be of any use.

66. Secondly and alternatively, Mr Glenister submits that it was irrational of the defendant's Planning Committee to take account of future development in relation to the benefits of the bridge, but to remove the issue of future development from consideration, when it came to the assessment of harm. The future development had to be treated consistently.

67. The fact that the two were not treated consistently was clear from the Officer's Report and from what the Development Manager said at the Planning Committee meeting, where, discussing the harm that would be caused to Northway Mill and Mill House, he "considered that these harms were clearly outweighed by the public benefits of the proposal."

68. Mr Glenister emphasises that the claimant does not dispute that the fact of the bridge enabling other development to proceed is capable of being a material consideration in favour of the grant of permission. The issue is the lack of consistency in how this matter was considered. It cannot, Mr Glenister says, be irrational for the claimant to suggest the bridge will inevitably lead to further development. The defendant is spending £8.1 million on a bridge which, currently, would lead to nowhere. The only purpose of the bridge is to facilitate housing development. That is plain from the officer's Report and from the terms of the agreement between the defendant and Homes England. In short, the defendant, says Mr Glenister, "cannot have it both ways".

69. In order properly to address the claimant's challenge under the heading of Ground 1, I consider it is necessary to address Mr Glenister's two sets of submissions in reverse order.

70. The starting point for the court's consideration of the Planning Officer's Report is the judgment of Lindblom LJ in R (Mansell) v Tonbridge & Malling BC [2019] PTSR 1452. Officers' reports to their Planning Committees are not to be read with "undue rigour, but with reasonable benevolence". Where the line is drawn between an officer's advice being significantly or seriously misleading - misleading in a material way - and advice that is misleading, but not significantly so will always depend on the context and circumstances in which the advice was given, and on the possible consequences of it. Unless there is "some distinct and material defect in the officer's advice, the court will not interfere" (paragraph 42).

71. On a proper reading of the Planning Officer's Report and the Development Manager's advice given at the Planning Committee's meeting, it is, I find, evidence that Members were not being told they could consider the supposed benefits of Phase 1 of the Masterplan (or the delivery of 826 homes) but not the harm that implementation would bring.

72. There were two elements to the Report's recommendation that planning permission should be granted for the construction of the bridge, rather than leaving the bridge to be considered at a later date, as part of an application that would include, at least, the new road that would be carried by the bridge across the railway. As is evident from the Report, the first element of benefit was that there was time-limited funding from the Ministry of Housing, Communities and Local Government (Housing England). Making use of that opportunity so as to have the bridge in place would, to use the words of the Report, confer the benefit "of seeking to achieve the aspirations and timelines of the [Masterplan] in the context of achieving the JCS and JCS Review Strategic Objectives, and ensuring that necessary infrastructure is in place to achieve well planned development".

73. There is a crucial distinction between that benefit and any suggestion that permitting the construction of the bridge would necessarily lead to the construction of 826 homes, as part of the Phase 1 proposal in the Masterplan. Although realising the 826 homes or any other part of Phase 1 would be, at best, highly unlikely without the bridge, the converse is in no sense true. Any planning application for, say, the 826 homes and the related highway will need to be considered on its merits, having regard to all material considerations, including any material harms. It is not being suggested by the claimant in these proceedings that the balancing of benefits and harms in respect of any such future planning application, required by the legislation and the policy guidance, would be necessarily subverted or distorted by the mere existence of the bridge, let alone (as claimed by some who objected to the present application) that any such future residential and highway and related highway development would be inevitably approved. The Officer's Report was at pains to point out that, for example, little weight could be given to the Masterplan and that the impacts of any highway proposal would need to be considered in the future.

74. In particular, I note what is said under the sub-heading "Benefits" in the "Conclusions" section of the Report. The substantial benefits that resulted from progressing the bridge proposal at the current time were to "ensure the delivery timescale of the [Masterplan]

is maintained seeking to achieve the aspirations and timeliness of the [Masterplan] in the context of achieving the JCS and JCS Review Strategic Objectives and to meet the HIF funding deadline". In other words, constructing the bridge now would keep the aspirations of the defendant and the other local authorities for the Garden Town alive and on track.

75. In similar vein, the defendant's contract with Homes England to use its best endeavours to progress the construction of 826 houses cannot alter the defendant's obligations as planning authority. As Mr Pereira QC pointed out, there is not even any indication of where those houses would actually be sited within the Masterplan area.

76. It is in this light that the Report's reference to achieving "well planned development" needs to be read. The inconsistency in approach which Mr Glenister says was being recommended to Members was, in truth, not an inconsistency at all.

77. Mr Glenister mounted a particular attack upon two paragraphs of the Report where it appeared to be suggested that the facilitation of the "Garden Communities programme" outweighed the harm to heritage assets (Northway Mill and Mill House) and that "there is a clear and convincing justification for the proposal". It is, however, plain from what I have just said what "facilitate" means in this context.

78. There was, thus, no irrationality in what the Report and the Development Officer told the Members of the Planning Committee.

79. The second, related element of benefit was that construction of a bridge over an existing railway would take considerable time, given that some of the construction activities would not be possible whilst the railway was fully operational. It was therefore sensible to seek to bring forward the bridge proposal at the present time. I can see nothing irrational in this approach. It too did not involve an assumption that any part of the Phase 1 development 826 homes will come to pass. Rather, the point being made was that, if any such development were to be brought forward, the bridge would enable that development to take place in a timely manner. It went to the benefit of keeping the Masterplan on track, in that, should Phase 1 development be approved, the construction of the bridge would not be a delaying factor in seeing that development carried out.

80. In summary, the Report's articulation of the benefits of the construction of the bridge went no further than was appropriate in the light of the status of the Masterplan and the JCS, in the currently emerging development plan process. The articulation of the perceived benefit in terms of access to funding to construct the bridge and addressing the long lead-in time for its construction over a "live" railway is not to be confused with the actual Phase 1 development, as envisaged in the Masterplan. Accordingly, the Report and the Development Manager's advice were not irrational. The Committee was not being encouraged or advised to "cherry pick" or adopt an asymmetrical approach to the benefits and harms involved in the construction of the bridge. The fact that the bridge has a connection with possible future development did not mean that the application to build the bridge required the consideration of harms that might arise from that future development, were it ever to take place, even assuming any proper identification and analysis of them could be made at this stage.

81. Having made this finding on rationality, I turn to the first element of the challenge in Ground 1. As we have seen, this involves the submission that all the claimant needs to

show is that harms arising from the future development were capable of being a material consideration in the application for permission to construct the bridge.

82. Section 70(2) of the Town and Country Planning Act 1990 requires a planning authority in determining an application for planning permission to have regard to the development plan and "any other material consideration".

83. In R (Samuel Smith Old Brewery) v North Yorkshire CC [2020] PTSR 221, the Supreme Court considered a challenge to the grant of planning permission. The challenge was based on the contention that the planning authority had erred in failing to treat visual effects as a material consideration in relation to an application for planning permission in the Green Belt, on the basis that visual effects were not, in the planning officer's view and consequent advice, an essential part of the "openness" which Green Belt policy protected.

84. Giving the judgment of the court, Lord Carnwath said:-

> "30. The approach of the court in response to such an allegation has been discussed in a number of authorities. I sought to summarise the principles in *Derbyshire Dales District Council v Secretary of State for Communities and Local Government* [2009] EWHC 1729 (Admin) [2010] 1 P & CR 19. The issue in that case was whether the authority had been obliged to treat the possibility of alternative sites as a material consideration. I said:"
>
> "17. It is one thing to say that consideration of a possible alternative site is a potentially relevant issue, so that a decision-maker does not err in law if he has regard to it. It is quite another to say that it is *necessarily* relevant, so that he errs in law if he fails to have regard to it …
>
> 18. For the former category the underlying principles are obvious. It is trite and long-established law that the range of potentially relevant planning issues is very wide (*Stringer v Minister of Housing and Local Government* [1970] 1 WLR 1281); and that, absent irrationality or illegality, the weight to be given to such issues in any case is a matter for the decision-maker (*Tesco Stores Ltd v Secretary of State for the Environment and West Oxfordshire District Council* [1995] 1 WLR 759, 780). On the other hand, to hold that a decision-maker has erred in law by *failing* to have regard to alternative sites, it is necessary to find some legal principle which compelled him (not merely empowered) him to do so."

85. At paragraph 32, Lord Carnwath stated that the question was whether under the "openness proviso", visual impacts were expressly or impliedly identified in the 1990 Act or the relevant policy as considerations that were required to be taken into account by the planning authority "as a matter of legal obligation"; or, alternatively, whether on the facts of the case they were "so obviously material" as to require direct consideration.

86. At first instance, Hickingbottom J had held that the potential visual impact of the development fell "very far short of being an obvious material factor" and that "in circumstances of this case, the report did not err in taking into consideration any potential visual impact from the development" (paragraph 65 of his judgment).

87. Lord Carnwath agreed. At paragraph 39, he held that there "was no error of law on the face of the report" and that "the matters relevant to openness in any particular case are a matter of planning judgment, not law".

88. Despite the elegance of his submissions, I find Mr Glenister cannot make good the charge that, if harms arising from future development were capable of being a material consideration in deciding the application for the bridge, the advice to the Committee that they were not permitted to consider those harms rendered the resulting decision unlawful.

89. Mr Glenister cited R v Secretary of State for the Home Department, ex parte Venables [1997] AC 407. In that case, the House of Lords held that the Secretary of State had unlawfully adopted a policy which totally excluded from consideration, during the tariff period of a sentence, factors, such as progress and development, which were necessary to determine whether release from detention would be in the interests of the welfare of the persons concerned. In the planning context, however, Venables does not have much, if any, relevance, at least to the present question. Adopting the approach of Lord Carnwath at paragraph 32 of Samuel Smith, the claimant in the present case does not point to anything in the town and country planning legislation that expressly or impliedly requires consideration of harms that might be occasioned by future development, when considering an application for specific development. The claimant's case, must therefore, rest on the proposition that (as Lord Carnwath held), any such harms were "so obviously material" as to require consideration by the Committee. Using the language in paragraph 17 of Derbyshire Dales, those harms have to be shown to be "necessarily relevant", such that the Committee erred in law in failing to have regard to them.

90. Any challenge based on the contention that a matter was "so obviously material" or "necessarily relevant" as to demand consideration in deciding an application for planning permission must identify a public law error in order to succeed. Since I have found that the Report to the Committee and the advice of the Development Officer at the meeting were not irrational and no other public law error is identified, it follows that the claimant cannot make good this element of the Ground 1 challenge. The advice that any consideration of such harms must await a future application (or, I would add, the relevant point in the development plan process) was rational. To repeat, the benefits articulated in the Report were, in essence, to ensure that the JCS Review, whatever its outcome, could be kept on track. They were not the benefits of Phase 1 of the Masterplan.

91. Ground 1 accordingly fails.

Ground 2

92. Regulation 2 of the 2017 Regulations defines "EIA development" as development which is either (b) Schedule 1 development; or Schedule 2 development, which is likely

to have significant effects on the environment by virtue of factors such as its nature, size and location.

93. Regulation 3 provides that the relevant planning authority, the Secretary of State or an inspector must not grant planning permission or subsequent consent for EIA development unless an Environmental Impact Assessment (EIA) has been carried out in respect of that development.

94. Regulation 5 concerns general provisions relating to screening. Regulation 5(4) provides:-

> "(4) Where a relevant planning authority .. has to decide under these Regulations whether Schedule 2 development is EIA development, the relevant planning authority .. must take into account in making that decision –
>
> (a) any information provided by the applicant.
>
> …
>
> (c) such of the selection criteria set out in Schedule three as are relevant to the development."

95. It is common ground that the bridge is Schedule 2 development. Accordingly, an EIA was required if the development was likely to have significant effects on the environment by virtue of the stated factors. It is also common ground that, in the present case, the Screening Report of May 2020 comprises information within the meaning of regulation 5(4)(a).

96. In R (Bateman) v South Cambridgeshire District Council and another [2011] EWCA Civ 157, the Court of Appeal held that the expression "is likely to have" in paragraph (b) of the definition of "EIA development" in regulation 2 means that "something more than a bare possibility is probably required, though any serious possibility would suffice" (Moore-Bick LJ, at paragraph 17).

97. At paragraph 20, Moore-Bick LJ said that:-

> "… I think it important to bear in mind the nature of what is involved in giving a screening opinion. It is not intended to involve a detailed assessment of factors relevant to the grant of planning permission; that comes later and will ordinarily include an assessment of environmental factors, among others. Nor does it involve a full assessment of any identifiable environmental effects. It involves only a decision, almost inevitably, on the basis of less than complete information, whether an EIA needs to be undertaken at all. I think it important, therefore, that the court should not impose to higher burden on planning authorities in relation to what is no more than a procedure intended to identify the relatively small number of cases in which the development is likely to have significant effects on the environment, hence the term "screening opinion".

98. In R (Larkfleet Ltd) v South Kesteven DC [2016] Env. LR. 76, the Court of Appeal held that the provisions in the 2017 Regulations implement Article 1(1) of the Environmental Impact Assessment Directive 2011/92/EU. Under that Directive, it is the effects of the "project" that must be assessed.

99. The question of when it is necessary to examine projects cumulatively can take one of two forms under the 2017 Regulations. The first is where, although there may be no doubt that an EIA is required, the question is whether the EIA should encompass more than one development project. The second is whether, in Schedule 2 cases in which the test is the likelihood of significant effects on the environment, the Schedule 2 development must be examined cumulatively with other proposed development in order to decide whether there is such a likelihood.

100. Larkfleet was a case involving the first form. At paragraph 35, Sales LJ held that "what is in substance and reality a single project cannot be "salami-sliced" into a series of smaller projects, each of which falls below the relevant threshold criteria according to which EIA scrutiny is required".

101. Larkfleet involved a challenge to the grant of permission, which followed the carrying out of an EIA in respect of the construction of a link road. The claimant contended that the EIA was defective in failing to make an adequate assessment of a proposed urban extension development, either jointly or cumulatively with the link road.

102. At paragraph 37 Sales LJ held: -

> "It is true that the scrutiny of cumulative effects between two projects may involve less information than if the two sets of works are treated together as one project, and a planning authority should be astute to ensure that a developer has not sliced up what is in reality one project in order to try to make it easier to obtain planning permission for the first part of the project and thereby gain a foot in the door in relation to the remainder. But the EIA Directive and the jurisprudence of the Court of Justice recognise that it is legitimate for different development proposals to be brought forward at different times, even though they may have a degree of interaction, if they are different "projects", and in my view that is what has happened here as regards the application for permission to build the link road and the later application to develop the residential site."

103. At paragraph 39, Sales LJ found that an evaluative assessment was required as to whether the construction of the link road was properly to be regarded as a distinct "project" or as an inherent part of the "urban development project" contemplated for the residential site. As a matter of language, it was capable of being either. He continued:-

> "40. Since an evaluative judgment is required on that issue, the question arises whether the proper legal approach is to say that the primary decision-maker to make that judgment is the relevant planning authority (which may, depending on the context, be a local planning authority, an inspector or the Secretary of State),

subject to rationality review by the court on *Wednesbury* principles, or to say that the court is itself the primary decision-maker on any appeal or judicial review application before it and should form its own judgment on that question. In relation to the closely related question, whether a project is "likely to have significant effects on the environment" (see the definition of "EIA development" in regulation 2(1) of the EIA Regulations and Article 1(1) of the EIA Directive) there is authority that the former approach is correct: see *Bowen-West v Secretary of State for Communities and Local Government* [2012] EWCA Civ 321, [39]-[41]; *R (Evans) v Secretary of State for Communities and Local Government* [2013] EWCA Civ 114, [30]-[43]. As regards the evaluative judgment whether a particular set of works constitutes one distinct "project" or part of another, wider "project" containing another set of works, I think there is a strong argument that, likewise, the former approach is correct. As Simon Brown J (as he then was) said in *R v Swale Borough Council, ex p. Royal Society for the Protection of Birds* [1991] 1 PLR 6, at 16B-C, in relation to the predecessor of the current EIA Directive,

"The decision is whether any particular development is or is not within the scheduled descriptions is exclusively for the planning authority in question, subject only to *Wednesbury* challenge. Questions of classification are essentially questions of fact and degree."

41. Sullivan J (as he then was) followed the same approach on the question of identification of the relevant project for the purposes of EIA scrutiny in *R (Linda Davies) v Secretary of State for Communities and Local Government* [2008] EWHC 2223 (Admin), at [48]. In my view, there is a great deal to be said for this, since the EIA Directive and EIA Regulations impose obligations on the relevant national planning authorities and it is they who have to apply the law in the first instance and bring their detailed knowledge and experience to bear to do so.

42. Against this, Mr Kingston said that the courts in *R (Candlish) v Hastings Borough Council* [2005] EWHC 1539 (Admin) and *Burridge v Breckland District Council* [2013] EWCA Civ 228 had made their own judgment regarding the identity of the relevant project for EIA purposes. However, it is not clear that the issue of approach was raised in *Candlish* and it did not matter, because the judge came to the same conclusion as the planning authority. In *Burridge* there was no debate regarding the choice of approach (as Mr Hobson, who was counsel in the case, informed us, and as the absence of reference to the relevant passage from the judgment of Simon Brown J in *Swale* quoted above bears out); and again it made no

> difference, because although the Court of Appeal reached a different conclusion from the planning authority and the judge below regarding the identity of the project, it was common ground in the argument before us that on the facts in *Burridge* there was only one possible conclusion which could rationally be arrived at regarding the identity of the project, which was that set out by the Court of Appeal.
>
> 43. Mr Kingston also submitted that the ECJ in Case C-227/01 *Commission v Spain* [2004] ECR I-8253 determined for itself what was the identity of the relevant project, and that this indicated that in the present context it is for the national court to do the same. But Laws LJ gave the answer to this argument in *Bowen-West* at [40]: *Commission v Spain* is an infringement case in which the Court of Justice must inevitably make all judgments of fact and law. Accordingly, it does not provide appropriate guidance for the approach which a national court should adopt when reviewing the lawfulness of a decision regarding EIA scrutiny taken by a planning authority within the national planning system.
>
> 44. Interesting though this debate has been, at the end of the day it is unnecessary to decide finally which approach is correct in law, since both lead to the conclusion that the appeal on this ground should be dismissed. I am of the view that the link road proposal is a "project" for EIA purposes which is distinct from the proposed development of the residential site. That view accords with the assessment made by SKDC. In this case, therefore, the position is the same in this court as it was in *Bowen-West*, in which Laws LJ decided with the agreement of the other members of the court that the relevant works in question constituted a self-contained "project" distinct from other proposed works, and said: "And I would so conclude whether the issue is one of law or one of judgment for the Secretary of State [i.e. the relevant planning authority] and in the latter case whatever the appropriate standard of review."

104. At paragraph 46, dismissing the claimant's challenge, Sales LJ held that "the most important feature of this case is that there is a strong planning imperative for the construction of the link road as part of the Grantham by-pass, which is nothing to do with the development of the residential site.

105. At paragraph 47, he held that although the grant of planning permission for development of the residential site would be dependent on construction of the link road "there are good grounds for granting planning permission for the link road which in no way depends upon the development of the residential site".

106. In R (Wingfield) v Canterbury CC and another [2020] J.P.L. 154, Lang J, citing Bowen-West, held that the question of what constitutes a "project" for the purposes of the 2017 Regulations "is a matter of judgment for the competent authority, subject to a

challenge on grounds of *Wednesbury* rationality, or other public law error" (paragraph 63). She held that relevant factors may include:

> "i) Common ownership - where two sites are owned or promoted by the same person, this may indicate that they constitute a single project (*Larkfleet* at [60]);"
>
> ii) Simultaneous determinations - where two applications are considered and determined by the same committee on the same day and subject to reports which cross refer to one another, this may indicate that they constitute a single project (*Burridge* at [41] and [79]);
>
> iii) Functional interdependence - where one part of a development could not function without another, this may indicate that they constitute a single project (*Burridge* at [32], [42] and [78]);
>
> iv) Stand-alone projects - where a development is justified on its own merits and would be pursued independently of another development, this may indicate that it constitutes a single individual project that is not an integral part of a more substantial scheme (*Bowen-West* at [24 - 25])."

107. Although, at paragraph 71, Lang LJ considered it was important to distinguish the case before her from one involving a challenge to a screening decision, "where an applicant avoids the EIA thresholds in the EIA directed by salami slicing a larger project into several smaller ones". In her case, both proposals had been subject to full assessment under the Regulations "with both projects assessing the cumulative effects of each with the other". There could therefore be no suggestion of artificial project-splitting in order to avoid EIA scrutiny.

108. It seems to me that Sales LJ in Larkfield considered the "salami-slicing" consideration could, in principle, apply to both types of case. Although, in a "Larkfield" case, treating the projects as different ones would not avoid the need for an EIA, it could, of course, affect the substance of that assessment, if one project were excluded from its scope.

109. Be that as is it may, the issue under Ground 2 is whether the 2020 Screening Report was unlawful because it did not consider Phase 1 of the Masterplan scheme, in assessing whether the bridge project constituted EIA development.

110. In support of his argument on Ground 2, Mr Glenister seeks to distinguish Larkfleet on the basis that Sales LJ found that there was an independent need for the link road. Likewise, he seeks to distinguish two other authorities, In R (Preston New Road Action Group) v SSCLG [2018] Env LR 18. In that case, the Court of Appeal held that an application for exploration of shale gas did not require consideration of the environmental effects of any subsequent commercial production, were such gas to be found in commercially viable quantities. Any such commercial exploitation was contingent on the results of the exploration. In R (Save Britain's Heritage) v SSCLG [2014] Env LR 9, the demolition of the Chapel that had been damaged by fire was lawfully considered apart from further development. Stadlen J held that there was no

impermissible "salami slicing", as it was possible to consider the proposal to demolish the Chapel on its own merits as a stand-alone proposal which could go ahead irrespective of any future plans for the redevelopment of the area.

111. These cases fall to be contrasted, according to Mr Glenister, because the defendant in the present case has indicated that the development of at least 826 dwellings is "expected" and has made a contractual commitment to use best endeavours to bring forward those units as a condition of receiving funding for the bridge. The whole purpose of the bridge is solely to enable the housing development.

112. I have already mentioned the passage in the Screening Report, at section 14, where the bridge was described by Mr White as "essentially advance works for anticipated future growth to the north of Ashchurch". The Screening Report stated that the "planning policy context for the growth of this part of Tewkesbury is not yet fixed within adopted policy documents", with the result that "the preparation of a robust assessment of cumulative effects of the [bridge] in the light of a future baseline scenario incorporating growth in the North Ashchurch development area is not possible. Any attempt to prepare such a document would arguably be premature - the developments would fall outwith the usual definition of reasonably foreseeable future projects on the basis of their lack of formal planning status".

113. Mr Glenister seeks to counter that conclusion by invoking the authority of R v Rochdale Metropolitan Borough Council ex- party, Milne [2021] Env LR 22 and the resulting concept of a "Rochdale envelope". In that case Sullivan J rejected a challenge to outline planning permission for a business park and permission for a spine road to serve the business park. An environmental assessment had been required and the developer had provided an environmental statement, which was based upon an illustrative masterplan, and an indicative schedule of uses of the business park. Local residents contended that there had been a failure to provide the information required under the (then existing) Regulations dealing with environmental assessment. The residents argued that the requirements of the Regulations were such that the development proposed had to be described in such detail that nothing was omitted that could be capable of having a significant effect on the environment; and that since it was impossible to say that the ultimate treatment of any of the reserved matters in an outline application was incapable of having a significant effect on the environment, the outline application procedure was inconsistent with the requirements for environmental assessment.

114. Sullivan J refused the application. He held that what was important was that the environmental assessment process should take full account at the outset of the implications for the environment and that the requirements of the Regulations were intended to be sufficiently flexible to accommodate the particular characteristics of different types of project. It could be possible to provide more or less information on site, design and size, depending on the nature of the project to be assessed.

115. At paragraph 85, Sullivan J said that "saving an old style Soviet command economy, such as would not have been in the contemplation [of] the framers of the Directive, a substantial industrial estate development project is bound to be demand-led to a greater or lesser degree".

116. He continued:-

> "90. If a particular kind of project, such as industrial estate development project (or perhaps in urban development project) is, by its very nature, not fixed at the outset, but is expected to evolve over a number of years depending on market demand, there is no reason why a "description of the project" for the purposes of the directive she not recognise that reality. What is important is that the environmental assessment process should then take full account at the outset of the implications for the environment of this need for an element of flexibility. The assessment process may well be easier in the case of projects which are "fixed" in every detail from the outset, but the difficulty of assessing projects which do require a degree of flexibility is not a reason for frustrating their implementation. It is for the authority responsible for granting the development consent (in England the local planning authority or the Secretary of State) to decide whether the difficulties and uncertainties are such that the proposed degree of flexibility is not acceptable in terms of its potential effect on the environment.
>
> 91. In Tew 1 said at page 97C that projects such as industrial estate developments and urban development projects have been placed in a "legal straitjacket" by the assessment regulations, in transposing the requirements of the directive into domestic law. The directive did not envisage the straitjacket would be drawn so tightly as to suffocate such projects.
>
> 92. It has to be recognised even if it was practical (despite the commercial realities described by Mr Ward) to prepare detailed drawings showing sitting, design, external appearance, means of access and landscaping for every building within the proposed business park, the resulting environmental statement would be an immensely detailed work of fiction since it would not be assessing effect on the environment of any project that was ever likely to be carried out. All concerned with the process would have to recognise that in reality such details could not be known until individual occupiers came forward for particular plots."

117. Mr Glenister says that it would have been possible for Mr White, in the present case, to adopt Sullivan J's approach, and to have required a form of "Rochdale envelope", comprising what would inevitably have been somewhat generalised information about the Phase 1 project, so as to consider this in conjunction with the application for the bridge. Only in this way could the requirements of the 2017 Regulations be met.

118. Mr Glenister also relies on R (Champion) v North Norfolk District Council and another [2015] UKSC 52. There, the Supreme Court held that a screening opinion had to be taken early in the process and that a negative opinion might require a review in the light of later information. A legally defective opinion not to require an EIA could not be remedied by carrying out an analogous assessment outside the Regulations, as to do so would subvert the purposes of the Directive and the Regulations.

119. I find that the claimant has failed to show any public law error in the Screening Report. The claimant's attempt to invoke the "Rochdale envelope" principle is misconceived. In Rochdale, the planning permission, albeit outline, was for the totality of the relevant development. In the present case, the application was simply for the bridge. As we have already seen, the Phase 1 project is aspirational, despite the "best endeavours" obligation and its potential role in the emerging plan process. Although Phase 1 can, for convenience, be described as a "project," it is very far from being a "project" for the purposes of the 2017 Regulations.

120. This is not a case where it can properly be said that the defendant is seeking to compartmentalise or "salami-slice" elements within the Masterplan, in order to evade the environmental scrutiny demanded by the 2017 Regulations. If and when Phase 1 is brought forward for application, the 2017 Regulations will apply. There is no suggestion, so far as I am aware, that the defendant has any intention of making, or permitting, piecemeal applications. On the contrary, everything points to there needing to be an environmental assessment of the highway element, and likewise, of the residential element. In any event, the legal constraints within which the defendant must operate are plain. If an application were to be made for some part of Phase 1, the case law I have mentioned will govern the need for an EIA.

121. The government's guidance on screening opinions is also relevant. This makes it plain that there may be occasions "when other existing or approved development may be relevant in determining whether significant effects are likely as a consequence of a proposed development". Thus, the bridge, if constructed, may be taken into account in determining applications resulting from Phase 1 of the Masterplan or, indeed, any other application that has a relevant relationship with the bridge.

122. I have earlier mentioned the Environmental Assessment of Plans and Programmes Regulations 2004. The effect of these is that an environmental assessment is highly likely if the Masterplan/Joint Core Strategy were to become a "plan" within the meaning of regulation 5(2)(a) of the 2004 Regulations.

123. Ground 2 accordingly, fails.

Ground 3

124. Ground 3 is entitled "lack of objectivity/apparent bias". It has two elements. The first concerns regulation 64 of the EIA Regulations, which provides as follows:-

> **" 64 - Objectivity and Bias**
>
> (1) Where an authority or the Secretary of State has a duty under these Regulations, they must perform that duty in an objective manner and so as not to find themselves in a situation giving rise to a conflict of interest.
>
> (2) Where an authority or the Secretary of State, is bringing forward a proposal for development and that authority or the Secretary of State, as appropriate, will also be responsible for determining its own proposal, the relevant authority, or the Secretary of State must make appropriate administrative

> arrangements to ensure that there is a functional separation, when performing any duty under these Regulations, between the persons bringing forward a proposal for development and the persons responsible for determining that proposal."

125. The claimant submits that the defendant failed to comply with regulation 64 and that the grant of planning permission for the bridge, accordingly, falls to be quashed.

126. The second element of Ground 3 is that the defendant is said to have acted in such a manner in connection with the grant of permission, as would lead a fair-minded and informed observer to conclude that there was a real possibility that the defendant was biased: Porter v Magill [2001] UKHL 67.

127. In order to address Ground 3, it is necessary to examine, at some length, the way in which the defendant seeks to discharge its obligations as a local authority, with particular reference to the as yet unrealised Garden Town and the grant of planning permission for the bridge.

128. The position is as follows. At the apex of the structure is the full Council, comprising its elected Members. This is, of course, a decision-making body. Below this sits the Executive Committee, which has delegated decision-making powers.

129. According to the statement of Jonathan Dibble, the Garden Town Programme Director, the Executive Committee, on 4 September 2019, approved the formation of the Tewkesbury Garden Town Member Reference Panel. The Reference Panel is described as "non-decision making and advisory". Mr Dibble states the aims and objectives of the panel as "to provide a Member reference forum to have oversight over the programme", so as "to ensure that the needs and aspirations of the Borough's communities are fully considered as the programme evolves and develops". In a report to Executive Committee for its meeting on 3 February 2021, the Reference Panel is described as acting "as a sounding board for the Garden Town's workstreams ensuring that the needs and aspirations of the Borough's communities are fully considered as the programme evolves and develops".

130. Councillors Bird, Evetts, MacTiernan, Mason, Vines and Workman are members of the Reference Panel who are also members of the defendant's Planning Committee, which considered the application for the bridge on 16 March 2021. Councillors Bird, Evetts, Mason, and Vines voted in favour of the application, whilst councillors MacTiernan and Workman voted against.

131. Councillors Bird, Mason, Vines, MacTiernan and Harwood are members of the Executive Committee. Councillor Bird's Lead Member portfolio includes being Tewkesbury Garden Town Lead, which means, according to Mr Dibble, that Councillor Bird leads "on the Tewkesbury Garden Town as a strategic aim".

132. In the defendant's Constitution, the section headed "Lead Member Role Description" states that the Lead Member will, amongst other things, "act as ambassador for their portfolio and attend meetings with other partners or organisations". The Lead Member will also "review and monitor performance management reports on their portfolios and … oversee the achievement of performance targets".

133. Under the heading "Support Member Role Description" in the Constitution, we find that the Support Member will "assist the lead member in undertaking the above role and … act in accordance with the above in the absence of the Lead Member".

134. Councillor Surman is the Support Member for Councillor Bird's role as Leader, Economic Development/Promotion. As I have mentioned, Councillor Surman voted in favour of the application on 16 March 2021. Although it would appear that, as Support Member to Councillor Bird, Councillor Surman might have been expected to be involved with the Reference Panel, I was informed that he did not attend any meetings of the Panel and the defendant was not aware of him acting in any Reference Panel matters for Councillor Bird.

135. Neither Councillor Bird nor Councillor Surman declared an interest at the meeting of the Planning Committee on 16 March 2021 by reason of either membership of the Executive Committee or as Lead Member/Support Member.

136. Mr Dibble has this to say about the involvement of the Executive Committee:-

> "21. The Executive Committee was told in the meeting of 3 February 2021 of the progress of the planning application, which it noted. The planning application was brought forward by myself, the Garden Town Programme Manager and Atkins. The Executive Committee was not involved in the preparation of the planning application or the decision to submit the application which was submitted in September 2020".

137. Mr Dibble describes officer involvement in the following terms. A small team was set up, comprising Mr Dibble, the Deputy Chief Executive, representatives from the Communications Department and, in June 2020, a dedicated Programme Manager, Ms Claire Edwards. Support came from Gloucestershire County Council with their retained consultants, Atkins, supplying the technical work.

138. Mr Dibble also describes a "Project Board", established "to deliver the bridge project", which includes Councillor Bird, the Deputy Chief Executive, representatives of Gloucestershire County Council, Network Rail, the defendant's Communications Department, the Head of its Development Services, representatives of Atkins and the Garden Communities Team (which includes Mr Dibble, the Programme Manager and the Programme Coordinator). The Project Board and the Garden Communities Team are said by Mr Dibble to be "informal teams that are not specifically referred to within the Corporate Governance Structure", although they would forward in the Garden Community Team.

139. According to the defendant's Governance Structure Organograms, the Garden Community Team is described as "non-decision making and delivery focused".

140. Meetings of the Reference Panel took place on 21 November 2019, 11 June 2020 and 16 July 2020. On 21 November 2019, those present, who included Councillors Bird, MacTiernan and Mason, received an update from Atkins on the "Ashchurch Bridge Project". Amongst other things, it was noted that the planning application for the bridge was scheduled for submission in spring 2020. At 4.6, it was recorded that "Members worked in two smaller groups to consider the location of the bridge and Link Roads,

potential traffic effects of the bridge and wider development, sustainable transport ideas and potential hotspots". The two groups then provided feedback.

141. On 11 June 2020, the Reference Panel received a further update on the Ashchurch Bridge project, being told, amongst other things, that the planning application, including Screening Reports and all relevant documents, would be submitted by the end of July "and it would then be confirmed when it would be going to Planning Committee". The Panel also was informed that long responses had been received from Northway and Ashchurch Rural Parish Councils. It was agreed that the Garden Town Programme Director should feed any issues raised back to the Reference Panel.

142. At the same meeting, there was a presentation of the Ashchurch Bridge Transport Assessment.

143. Councillors Bird, Evetts, MacTiernan, Mason, Vines and Workman were present at the 11 June 2020 meeting.

144. The meeting of the Reference Panel on 16 July 2020 was told that 436 responses had been received to letters sent out in connection with a "share event", of which 233 included the bridge, whereas others spoke more widely about the Garden Town. The "share event", however, had "been specifically for the bridge".

145. At item 4(b), headed "the status of planning submission" the Programme Manager explained how the transport assessment would feed into the planning application and that the Gloucestershire County Highways representative was in attendance to provide information. So far as ecology was concerned, there was discussion regarding wildlife at Northway Mill Farm.

146. Towards the end of the minutes of the 16 July 2020 meeting, there is the following:-

> "Some Members expressed the hope that the application could be dealt with quicker than anticipated, but it was pointed out that the Council's application could not be treated differently to any other application and there was sometimes a delay due to information required from other parties."

147. Amongst those present at the 16 July 2020 meeting were Councillors Bird, MacTiernan, Mason, Vines and Workman.

148. Appended to a witness statement of Daisy Freeman, a solicitor employed by One Legal (to provide legal services to a number of local authorities, including the defendant) is a screenshot from the defendant's planning website. This shows that the planning application for the bridge was received on 22 September 2020 and validated on 30 September 2020.

149. The minutes of the Reference Panel meeting held on 22 September 2020 record the following, under item 5, "Bridge Planning Permission":-

> "5.1 The Chair reminded Members that the planning application for the Ashchurch Bridge was now in progress and would most likely be submitted to the Planning Committee in December. As

> there were some Members of the Panel, who were also on the Planning Committee, they would need to remember their obligations in avoiding pre-determination. The main purpose of the current meeting was to inform the Panel of the status of the planning application and to impart relevant information rather than to discuss the detail of the planning application itself."

150. The minutes then record the Programme Director giving details about the bridge project, including information about the planning application such as that it "included a lot of documents as it was a thorough application".

151. The final factual matter concerns the involvement of Mr Skelton. As we have seen, he is the defendant's Development Manager. We have seen that, in 2019, he opined that the proposal for the bridge might be EIA development but later changed his mind, following a discussion with Mr White, who produced the Screening Report. A letter from Daisy Freeman to Matthew McFeeley of Richard Buxton Solicitors, dated 11 October 2021, states:-

> "The officer briefings that Claire Edwards, who had only joined the Tewkesbury Garden Team in June 2020, referred to were meetings that were started from June 2020 and ran monthly to June 2021. These briefings included officers from different departments in the Council including planning and were high level awareness briefings. Mr Skelton had invites for all the briefings, with the only one prior to 22 June 2020, being 12 June 2020. Whilst it appears that Mr Skelton accepted invitations to briefings, he only remembers actually attending the meetings very occasionally. Indeed, there were occasions when he accepted an invitation to a briefing but then did not attend. He accepted the meeting request for 12 June 2020, but it is uncertain whether he attended that briefing as, although the invite was accepted, it hasn't been able to be established whether he attended, and Mr Skelton does not recall being in attendance on that date."

152. Of relevance in this regard is an email from Claire Edwards to Paul Skelton and others dated 8 July 2020 concerning "Garden Town Briefings". In this email, Ms Edwards says, "Thanks for your time this morning for our introductory call - was nice to put names to faces".

(a) Regulation 64

153. In support of his submission that the defendant breached regulation 64 of the 2017 Regulations, Mr Glenister seeks to contrast what happened in the present case with the findings of Holgate J in London Historic Parks and Garden Trust v The Secretary for Housing Communities and Local Government J.P.L. 2021, 5, 580-611. In that case, Holgate J was concerned with whether Directive 2011/92 had been correctly transposed

in regulation 64. He held that it had. However, he concluded that the handling arrangements put in place for dealing with the called-in application for the construction of a Holocaust Memorial in the Victoria Tower Gardens, London SW1 failed to comply with regulation 64(2).

154. At paragraph 94 of his judgment, Holgate J, having considered case law of the Court of Justice of the European Union, set out what he considered "independence requires in the present context" (that is to say, the Holocaust Memorial project/fund):-

> "(i) The functions of the competent authority under the EIA Directive be undertaken by an identified legal entity within the authority (including any officials assisting in those functions) with the necessary resources and acting impartially and objectively;
>
> (ii) The prohibition of any person acting or assisting in the discharge of those functions from being involved in promoting or assisting in the promotion of the application for development consent and/or the development;
>
> (iii) The prohibition of any discussion or communication about the Holocaust Memorial project or fund, or the called-in application for planning permission between, on the one hand, the Minister of State determining the application and any official assisting him in the discharge of the competent authority's functions, and on the other, the Secretary of State or any official or other person assisting in the promotion of the project or the called-in planning application or any other member of the government; and
>
> (iv) The prohibition of any person involved in promoting or assisting in the promotion of the application for development consent and/or the development from giving any instructions to, or putting any pressure upon, any person acting or assisting in the discharge of the functions of the competent authority, or from attempting to do so, in relation to those functions".

155. Although the requirements set out in paragraph 94(i) to (iv) were articulated in the context of the Holocaust Memorial Project/Fund, Holgate J was alive to the fact that some of them might have relevance to the development control functions of local authorities. This is plain from paragraph 95 of his judgment:-

> "95. An "entity" under point (i) need not be a formal body or structure. Such an "entity" may be a single person. It suffices that the person or persons comprising the entity or working for it, together with the purpose of the entity are identifiable. Points (i) and (ii) give effect to the requirement that the administrative entity should have its own resources so that it may act independently in discharging the functions of the competent authority. I have not received any detailed submissions on the implications of the second limb of Art. 9A for the functioning of

> local planning authorities and their officers. Accordingly, the formulation in (ii) above may need to be considered further in an appropriate case. For the avoidance of any doubt, point (iii) does not impede the provision of information on an application for development consent through the formal channels appropriate to whichever application process is being followed."

156. I do not accept the claimant's submission that regulation 64 had any material bearing, as at 16 March 2021, when the Planning Committee considered the application for the bridge. The defendant was not, at that point, "performing any duty under [the EIA Regulations]".

157. The defendant's duty under those Regulations ceased at the point when, on 22 June 2020, Mr White formally decided (placing a copy of the decision on the appropriate register in due course) that the bridge project was not EIA development, as it was not Schedule 2 development likely to have significant effects on the environment. For the reasons I have given, the claimant has not shown that the Screening Report, which led to this decision, was unlawful.

158. The second aspect to this head of challenge concerns Mr Skelton. Drawing upon paragraph 94 of Holgate J's judgment in London Historic Parks and Gardens, Mr Glenister submits that it "cannot get worse" than for the official with overall responsibility for the Screening Report, which Mr Skelton was, to be invited to meetings with "the developer", in the shape of the Garden Town Team. So far as Daisy Freeman's letter of 11 October 2021 is concerned, Mr Glenister says that it is simply not good enough for Mr Skelton to say that he has no recollection of meeting the Team on 12 June 2020, which was some ten days before Mr White's letter of 22 June 2020, issuing the screening opinion.

159. As I have already noted, Holgate J was at pains to emphasise that, insofar as his list of requirements in paragraph 94 of the judgment might have relevance beyond the Holocaust Memorial issue, further consideration might be needed. I respectfully agree. In deciding what the requirement of functional separation entails, it is important not to lose sight of reality. What is required of central government may not be the same as what is required of a body, such as a Borough Council, given the difference in resources, including access to relevant professional expertise, and the need in smaller authorities, at least, for Members to have a number of different roles.

160. In any event, there is no evidence to compel the conclusion that – by reference to paragraph 94(ii) of London Historic Parks and Gardens – Mr Skelton was "involved in promoting or assisting in the promotion of" the bridge project. Conversely, as the word "briefings" indicates, there is no reason to suppose that the Garden Towns Team were, in this regard, involved in anything other than the provision of information on Garden Town matters. Whilst that information may well have included briefing on the application for the bridge, that is compatible with requirements articulated by Holgate J. The Garden Towns Team briefings constitute sufficiently "formal channels" and, to use a colloquialism, I have seen nothing that suggests that they were anything other than "above board".

161. For these reasons, I do not consider it matters whether Mr Skelton did or did not attend a briefing on 12 June 2020. But if I am wrong about that, the evidence shows that it is

highly unlikely that he did; otherwise he might have been expected to remember it. Accordingly, even if - contrary to my primary finding - the claimant could show a breach of regulation 68, it would, at most, be of the most minor kind and certainly would not make it appropriate for this court to exercise its discretion to quash the grant of planning permission.

(b) Apparent bias

162. It is now well-established that what the hypothetical well-meaning, informed observer expects of democratically-elected councillors making decisions on planning applications is fundamentally different from what is expected of those exercising traditional quasi-judicial functions: R (Lewis) v Redcar and Cleveland Borough Council [2008] EWCA Civ 746. In that case, Rix LJ held:-

> **"95.** The requirement made of such decision-makers is not, it seems to me, to be impartial but to address the planning issues before them fairly and on their merits, even though they may approach them with a predisposition in favour of one side of the argument or the other. It is noticeable that in the present case no complaint is raised by reference to the merits of the planning issues. The complaint, on the contrary, is essentially as to the timing of the decision in the context of some diffuse allegations of political controversy.
>
> **96**. So the test would be whether there is an appearance of predetermination in the sense of a mind closed to the planning merits of the decision in question…"

163. The Tewkesbury Borough Council Code of Member's Conduct, adopted on 26 June 2012 and taking effect on 1 July 2012, deals with the declaration of interests. Under the heading "Other interests", Members are required to disclose a relevant interest at the meeting. Amongst other things, they should leave the meeting and not vote on the matter if the interest in question affects their financial position or the financial position of an interest specified in Appendix B **and** a reasonable member of the public knowing the facts would reasonably regard it as so significant that it is likely to prejudice the Member's judgment of the public interest.

164. Under Appendix B we find a two-column list, in which the first entry is:-

"Management or Control	Any body of which the Member is in a position of general control or management and to which he/she is appointed or nominated by the Council".

165. The Local Government Association's document "probity in planning: the role of councillors and officers - revised guidance note on good planning practice for councillors and officers dealing with planning matters" formerly said this:-

> "5.4 Proposals for a council's own development should be treated with the same transparency and impartiality as those of private

> developers. A member whose cabinet/executive responsibility effectively makes them an advocate for the development in question almost represents the "internal applicant". In such circumstances, the appropriate approach is likely to be that the member is able to argue for the development but should not vote on the relevant applications."

166. In December 2019, the Local Government Association's Guidance was revised. The relevant passage now says just this:-

> "Proposals for a council's own development should be treated with the same transparency and impartiality as those of private developers."

167. As can immediately be seen, there is no longer any suggestion that the Member in question should not vote on the application concerned.

168. In support of the claimant's contention that the well-meaning, informed observer would be reasonably likely to have concluded that certain Members who voted in favour of the application on 16 March 2021 did so with a "closed mind", Mr Glenister draws attention to (i) the membership of Councillors Bird, Evetts, MacTiernan, Mason, Vines and Workman on the Tewkesbury Garden Town Member Reference Panel, in respect of which they all incorrectly stated, under "nature of interest", that the planning application for the bridge had not been discussed at the Panel; (ii) Councillor Bird's membership of the Executive Committee; (iii) Councillor Bird's role as Garden Town Lead; and (iv) Councillor Surman's role as Support Member in that regard to Councillor Bird.

169. Given the approach in the Redcar and Cleveland case, it has not been particularly easy to show apparent bias in the circumstances with which we are concerned. In R (Condron) v The National Assembly for Wales [2007] 2 P&C.R. 4, the Chair of the Planning Decision Committee of the Welsh Assembly told an objector to a planning application, which was due to be considered by the Committee on the following day, that the Chair was "going to go with the Inspector's Report". This recommended that conditional planning permission should be granted. The Court of Appeal held that, in making a judgment about what a fair-minded and informed observer would conclude, the court must look at all the circumstances. These included the fact that the members of the Committee had received relevant training and had agreed to be bound by a code of conduct.

170. In fact, even before Redcar and Cleveland, the courts were wary of such challenges. In R v Hereford and Worcester County Council, ex-parte Wellington Parish Council [1996] J.P.L. 573, Harrison J rejected a challenge to the grant of planning permission for a gypsy site, brought on the ground that several of the members of the planning sub-Committee who granted permission were also members of the Council's Gypsy Group, which had previously decided that a Gypsy site should be developed on the site concerned.

171. I deal first with the issue of the Tewkesbury Garden Town Member Reference Panel. As we have seen, this is described by Mr Dibble as "a Member Reference Forum". The organogram describes it as "non- decision making and advisory". The fact that

membership of the Reference Panel cannot reasonably be said to have predisposed its members towards support for the planning application for the bridge (let alone to have a closed mind on the subject) is strikingly demonstrated by the fact that several members of the Reference Panel voted against the application in the Planning Committee.

172. The claimant attempts to make much of the alleged inaccuracy in the declaration of interest, concerning the issue of whether the planning application had been discussed at the Reference Panel. I find there is nothing in this challenge. The planning application was not made until 22 September 2020. The declarations were, accordingly, entirely correct. As we have seen, at the Reference Panel meeting held on that very day, Councillor Bird reminded Members that now the planning application was in progress, Members who were also on the Planning Committee would need to remember their obligations to avoid pre-determination.

173. In this regard, it is necessary to refer to the defendant's Protocol for Councillors and Officers involved in the Planning Process (6 December 2016). This provides:-

> "3.2.8 Where a Council development is being considered, Councillors who have been involved in the decision to seek planning permission (e.g. Members of the Executive Committee) and who were also Members and of the Planning Committee should declare this at the Planning Committee when the planning application comes up for determination. In such cases, councillors are usually still entitled to take part in the debate and vote. The exception to this could be in the case of a councillor who has been closely involved in negotiations with developers working up a proposal that needs planning permission… "
>
> 3.3.1 Councillors must vote in the interests of the whole Borough. Their duty is to the whole community, rather than just the people living in their Ward.
>
> 3.3.2 Members of the Planning Committee must not declare which way they intend to vote in advance of the consideration of an application by the Planning Committee. To do so would, in effect, be pre-judging the application and expose the Council to the possibility of legal challenge or allegation of maladministration. Members must not make their minds up until they have read the relevant Committee Reports and heard the evidence and arguments on both sides at the Committee meeting".

174. What Councillor Bird said was, thus, entirely compatible with the Protocol. Bearing in mind that those who serve on the Planning Committee can generally be taken to be aware of their responsibilities, the Protocol would have been before their minds at the meeting on 16 March 2021.

175. For these reasons, I find it cannot be said that members of the Reference Panel were reasonably to be regarded as having closed their minds, when they came, as members of the Planning Committee, to consider the bridge application.

176. I do not consider that there is anything in the challenge concerning the membership of Councillors Bird and Mason (or anyone else) of the Executive Committee. Although the Protocol makes it plain that the Executive Committee can be actively involved in planning applications, there is no reason to doubt paragraph 21 of Mr Dibble's witness statement, where he says that the Executive Committee was not involved in the preparation of this particular planning application or the decision to submit the application in September 2020. That is supported by agenda item 11 of the Executive Committee meeting of 3 February 2021. This records that the Executive Committee was asked to note the progress made to date on the Tewkesbury Garden Town programme and to approve the Garden Town Governance Structure. At 2.3, the report on the "Ashchurch Railbridge" was merely informative.

177. Since there is nothing to demonstrate that, as members of the Executive Committee, Councillors Bird and Mason (and Councillor Vines) had been involved in the decision to seek planning permission for the bridge, there was accordingly, no requirement for them to declare their interest by reason of being on the Executive Committee, any more than there was such a requirement on Councillor MacTiernan, also a member of the Executive Committee, who voted against the application.

178. Standing back and considering the entire picture, I am entirely satisfied that the hypothetical observer would not be likely to conclude that anyone on the Planning Committee who voted on 16 March 2021 in respect of the application for the bridge did so with a closed mind.

179. By contrast, the claimants cannot successfully invoke the Code of Members' Conduct. I am far from satisfied that the entry in Appendix B, set out above, is intended to include (or would be regarded as including) membership of the defendant's Executive Committee. It is extremely difficult to see how the exhortation to leave the meeting and not vote on a matter, owing to financial issues, could encompass membership of the Executive Committee. This points against there being any obligation arising from the Code of Members' Conduct to disclose membership of the Executive Committee as an interest.

180. For similar reasons, I am not persuaded that Councillor Bird's Lead Member role required him to declare an interest as such, let alone to take no part in the decision on the bridge. The defendant's Constitution defines the Lead Member role in terms of giving advice, answering questions and acting as ambassador in respect of the portfolio in question. There is nothing to show that Councillor Bird's discharge of this role might have led him to adopt a closed mind in respect of the application for the bridge; or - which is the test - that he might be reasonably regarded by others as doing so. In this regard, the hypothetical observer would, I find, be likely to look at Councillor Bird's behaviour as a whole. He or she would observe the scrupulous care that Councillor Bird took with respect to the planning application, at the Reference Panel meeting on 22 September 2020. The hypothetical observer would draw the conclusion that Councillor Bird was cognisant of his responsibilities, stemming from his various roles on the Council.

181. In view of these findings, the claimant can draw no support from the position of Councillor Surman.

182. Ground 3 accordingly fails.

DECISION

183. The application for judicial review is dismissed.