



Neutral Citation Number: [2024] EWHC 2107 (Admin)

Case No: AC-CDF-2023-000108

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
PLANNING COURT

Southampton Combined Justice Centre
London Rd, Southampton, SO15 2XQ

Date: 23/08/2024

Before :

HIS HONOUR JUDGE JARMAN KC

Sitting as a judge of the High Court

Between :

THE KING

**(on the application of GREENFIELDS (IOW)
LIMITED)**

Claimant

- and -

ISLE OF WIGHT COUNCIL

Defendant

-and-

WESTRIDGE VILLAGE LIMITED

**Interested
Party**

Mr Charles Streeten and Mr Brendan Brett (instructed by **Richard Buxton Solicitors**) for
the **claimant**

Dr Ashley Bowes (instructed by **Isle of Wight Council Legal Services**) for the **defendant**

Mr Andrew Byass (instructed by **Lester Alridge LLP**) for the **interested party**

Hearing dates: 1-2 July 2024

Approved Judgment

This judgment was handed down remotely at 10.30am on [date] by circulation to the parties
or their representatives by e-mail and by release to the National Archives.

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HIS HONOUR JUDGE JARMAN KC

HHJ JARMAN KC:

Introduction

1. By a notice dated 4 August 2023 issued to the agent of the interested party (Westridge) the defendant as local planning authority (the authority) granted conditional planning permission for development of agricultural land south of Appley Road, north of Bullen Road and east of Hope Road (West Acre Park), Ryde, Isle of Wight. The permitted development includes 473 new dwellings (with 35% affordable housing), café, doctors surgery, office space and associated site infrastructure.
2. The process leading to the grant was long and controversial. The claimant (Greenfields) now seeks to challenge the grant by way of judicial review on five grounds which may be summarised as follows: 1. the meeting of the authority's planning committee on 27 July 2021 which resolved to grant permission was procedurally improper and/or unfair which vitiated the eventual grant; 2. the grant was also vitiated by the appearance of bias on the part of the chair of the July 2021 meeting, Ian Brodie, and/or the exercise of his functions for an improper purpose; 3. the authority failed to publish a draft and a completed planning obligation in breach of Article 40(3)(b) of the Town and Country Planning (Development Management Procedure) Order 2015 (DMPO); 4. the authority unlawfully deferred consideration of whether or not a financial contribution towards highways improvements complied with regulation 122 of the Community Infrastructure Levy (CIL) Regulations 2010 until after the grant; and 5. the authority took into account an immaterial consideration, and/or acted irrationally and/or was materially misled by officers in relying upon financial contribution towards highways improvement proposals as mitigating an identified adverse impact of the development.
3. Each of those grounds is denied by the authority, with the support of Westridge. In respect of grounds (i) (ii) and (iii), they submit that the essence of these challenges relates to the July 2021 meeting and are accordingly out of time and/or rendered academic by subsequent resolutions of the authority. They submit that in any event none of the grounds are in substance made out.
4. I heard the challenges at a rolled up hearing, at which the question of permission was dealt with at the same time as the substantive issues. After dealing with the facts and legal principles I will set out the parties' respective submissions and then come to conclusions on the issue of permission and the substantive issues.
5. The application for planning permission was made in 2019 and submitted with an environmental impact statement. The authority regarded it as a major application with island wide significance. It was validated in April 2020. Because of the nature and timescale of the challenges it will be necessary to deal with the factual background in some detail. Consideration of the application divided the elected members, and at various stages of the process, the authority's monitoring officers, solicitors and the Local Government Association became involved. Complaints were made by elected members about the conduct of others, some of which the authority dealt with. However, the focus of this court is upon whether the decision making process leading to the grant of planning permission was legally flawed, applying well established principles of public law. It is no part of the function of this court to make determinations or observations about the conduct of members, save where such conduct is relevant to the determination of whether the process was legally flawed.

6. Westridge engaged consulting engineers to carry out a traffic assessment in respect of the proposed development, and they reported in July 2020. The proposed construction period was over a period of nine years, and so the analysis was undertaken for 2029 future year scenario without and with the proposed development and additional committed development vehicle movements added to highway network. The assessment concluded that the proposed development would not have a severe traffic impact on the surrounding road network, but that where junctions experienced queuing and delay as a result of the development proposals in addition to committed development sites in the area, proposed junction improvements were identified.

The July 2021 meeting

7. The application was referred to the authority's planning committee which dealt with it at a meeting on 27 July 2021. A detailed officer's report was prepared for that meeting which ran to nearly 80 pages. It referred to over 500 objections and a petition with over 4000 signatures against the application. One of the objections was recorded from Cllr Lilley, the elected member for a ward where the site is located, and then chair of the planning committee. The report set out some 10 main headings for consideration, including the principle of development and highway matters. There was also reference to some 20 policies of the Island Plan Core Strategy, including SP7 on travel. The scheme included three points of access and egress for vehicular traffic from the roads referred to in the description of the development.
8. The report set out in detail what was proposed in terms of highway improvement in and around those points, and the consultation response of the authority's highway engineer. That response was to recommend conditional approval, subject to the authority being satisfied that offsite highway works could be secured under an agreement between the authority and the developer under section 106 of the Town and Country Planning Act 1990 (the 1990 Act). The report set out the heads of terms to be covered by such an agreement, including financial contributions for the necessary road junctions and the securing of other highway improvements. The report concluding by recommending conditional approval.
9. In the days approaching the meeting, Westridge became concerned about certain comments which some elected members were making publicly about the application, in particular Cllrs Adams and Jarman, and whether these showed predetermination. The site fell partly in the ward represented by Cllr Adams.
10. A decision may be vitiated by predetermination where there is a real risk that minds were closed, but in assessing that question in the planning context, "the courts must recognise that councillors are elected to provide and pursue policies" and "would be entitled, and indeed expected, to have and to have expressed views on planning issues": In *R (Lewis) v Redcar and Cleveland Borough Council* [2008] EWCA Civ 746, [2008] 2 P&CR 21 Pill LJ said at [63]:

“Councillors are elected to implement, amongst other things, planning policies. They can properly take part in the debates which lead to planning applications made by the Council itself. It is common ground that in the case of some applications they are likely to have, and are entitled to have, a disposition in favour of granting permission. It is possible to infer a closed mind, or

the real risk a mind was closed, from the circumstances and evidence. Given the role of Councillors, clear pointers are, in my view, required if that state of mind is to be held to have become a closed, or apparently closed, mind at the time of decision.”

11. At [68-69] he continued:

“...The court, with its expertise, must take on the responsibility of deciding whether there is a real risk that minds were closed.”

Central to such a consideration, however, must be a recognition that Councillors are not in a judicial or quasi-judicial position but are elected to provide and pursue policies. Members of a Planning Committee would be entitled, and indeed expected, to have and to have expressed views on planning issues...

12. As Cranston J put it in *Bishops Stanford Civic Federation v East Hertfordshire DC* [2014] EWHC 348 (Admin) at [41]:

“More importantly, planning committees comprise democratically elected politicians, seeking to respond to their local communities and ultimately answerable to them. The job is not easy, especially when passions on an issue are high and rational argument is squeezed. Large numbers of the public may attend committee meetings to voice their concerns. ... To my mind the taking of statements when councillors are asked to explain their voting, is especially to be deplored. Prudence is the sensible judicial approach in this context.”

13. In the present case, Westridge instructed solicitors to write to the legal services manager of the authority which they did by letter dated 22 July raising these concerns. In a reply the next day, it was accepted on behalf of the authority that predetermination, as opposed to predisposition, was objectionable and that it was important for members to approach decision making with an open mind and to consider all material before them and be prepared to change views if persuaded that they should. It was stated that the solicitors’ letter had been passed to the vice chair of the planning committee and the monitoring officer, and that members had been briefed on their obligations and an opportunity given to have discussions with the monitoring officer if needed. The same day Westridge’s solicitors wrote again referring to part 5 of the authority’s constitution which prevents any member taking part in the decision making process who has expressed “an unequivocal opinion about the merits of an application” and saying that this would be breached if Cllrs Adams or Jarman were allowed to take part in the decision making process.

14. The chair of the authority and vice chair of the planning committee at this time was Cllr Brodie. He was due to chair at the forthcoming meeting because Cllr Lilley represented a ward in which the site was situated. He had conversations with various members of the committee about the application before the meeting, most notably Cllrs Lilley and Jarman. Cllr Lilley denies any predetermination and says that he was following his residents’ wishes.

15. Cllr Brodie thought that Cllr Jarman had probably predetermined the application and would risk that allegation if he attended the meeting and told him this. Cllr Adams says that Cllr Brodie told him, forcefully, much the same thing, but that the application would probably be refused anyway, as a result of which he did not attend.
16. Cllr Churchman was not a member of the committee but asked Cllr Brodie if she could attend the meeting. She recalls that he told her she could not because the site was not in her ward. She says that she raised this again at a meeting of the full authority on 21 July and Cllr Brodie said she could only do so if she spoke in favour of the application. She referred to this in terms in a contemporaneous email to Cllr Jarman. Cllr Brodie does not expressly deny this, but says that she told him she intended to speak against it and as she failed to identify any material consideration which was not already identified in the information to be put before the committee he told her that he would not invite her to attend.
17. A site visit was held on 23 July. Cllr Price attended most of that visit, but left before the end as he had a family commitment. Before he did so, Cllr Brodie took him and another member, Cllr Medland aside, and indicated how he thought other members were likely to vote at the forthcoming meeting saying that he thought it was on a knife edge and that he would be reserving his position. Later he emailed Cllr Price saying that as some of the site visit was missed he would take advice but that it would be his, Cllr Brodie's, decision. In a following email he said he could not let him take part in the meeting as he had missed so much of the site view, suggesting about an hour or so. Other evidence suggests it was more like 20 minutes.
18. Between the publishing of the officers' report and the meeting, the National Planning Policy Framework (NPPF) was revised and further objections were received. These were detailed in an updated report dated 27 July 2021 produced by Ollie Boulter, the strategic manager for planning and two planning team leaders, Sarah Wilkinson and Russell Chick.
19. There were email exchanges between the monitoring office and Cllr Lilley just before the meeting in which he was told that he could not speak at the meeting but could do so virtually. However, after taking external legal advice the latter opportunity was withdrawn, on the grounds of predetermination, in an email in which the monitoring officer, unusually, is described as "solicitor." Cllr Lilley in his replies indicated that he had no choice but to accept what he describes variously as "this ruling," "recommendation" and "advice." In a witness statement dated November 2021, Cllr Lilley describes the officer's report as "one sided" with "specific errors." He refers to the "excellent quality filed objections" and the petition opposing the application, and says that that was his "election mandate."
20. The meeting duly took place with nine members of the planning committee present. Cllr Lilley did not attend. The officers attending included Messrs Boulter and Chick and Ms Wilkinson. It was commented that as Cllr Price had not completed the site visit he should not take part in the debate or the vote. In these proceedings, witness statements have been filed by all parties. Some of these are made by members present who are critical of how the meeting was conducted by Cllr Brodie and indeed some of the officers. The statements are dated in late 2021 or in 2022. I need not refer to these in detail, as Greenfield makes its own detailed criticisms in these proceedings of the conduct of the meeting which I will need to deal with. However, from the language

used in some of these statements it seems likely that some of these members were predisposed against the application.

21. For example, Cllr Medland describes the decision regarding Cllr Price as “scandalous” and the conduct of Cllr Brodie and the officers as “dismissive” and “humiliating.” He describes the application as “hideous.” Cllr Jarman also refers to Cllr Brodie’s conduct of the meeting as “belittling.” Cllr Cook describes the language used by Ms Wilkinson as “dismissive” “intimidating” and “quite scary.” Cllr Adams refers to Cllr Brodie telling him forcefully before the meeting that he was predetermined against the application. He also sets out that in a meeting of the planning committee in August 2021 to consider the minutes of the meeting, Cllr Brodie at one point proposed that he should leave the meeting, but this was not supported by anyone else and he, Cllr Adams, remained. In his statement Cllr Adams says that all of this shows that “planning staff have conspired with legal staff.”
22. There is a full transcript of the meeting in the hearing bundle, and whilst this cannot convey the tenor of the meeting, it is at least an accurate record of what was said. After some preliminary and introductory remarks by Cllr Brodie, Ms Wilkinson went through the details of the proposed development at length. Cllr Brodie then invited three objectors to speak, and then two speakers associated with the proposals who spoke in favour. He then invited Mr Boulter to read out a statement by Cllr Lilley which made a number of points why the application should be refused. Cllr Brodie then invited questions, which came from about six or so members. These were answered by the officers. He himself asked questions about affordable housing and the percentage of this which would be rented. Ms Wilkinson replied that such percentage was a matter of negotiation but that the Core Strategy indicated that discussion should start at 70% of rented accommodation.
23. Cllr Brodie then invited a debate. Some four members spoke against the application, including Cllr Jarman, who said that he had publicly stated that he was disappointed with the loss of greenfield land involved in the proposal and that local people would not be able to afford dwellings but that he had not predetermined the application and would listen to all comments and vote with a clear mind. He added that he had taken advice from the monitoring officer to the effect that he had not predetermined the application. He then spoke of his concerns and indicated that he was against the proposal.
24. Cllr Brodie invited any other contributions, and when no more were forthcoming indicated that he would like to comment. He said that it was one of the most difficult applications he had seen in all his years on the committee. He referred to a previous significant housing development on the island which he had concerns about but which had 80% of affordable rented housing. He continued that one of the main reasons he had become a councillor was the deficiency of affordable housing on the island and people living in parents’ homes and sleeping on sofas and who could not afford private rent. He said that as chair he was going to vote in favour because of the affordable housing provision which he felt was much needed. He then invited any other contributions but there were none. It is likely that because of his view on affordable housing that Cllr Brodie was predisposed to favour the application.
25. One of the members then proposed to accept the recommendation to grant conditional permission and that was seconded. Three voted in favour and four against with one

abstention. Cllr Brodie declared the vote lost and invited a proposal to refuse. This was forthcoming and seconded. Another member then pointed out that officers would need to give reasons for refusal and Cllr Brodie then said this:

“Because this is against officer recommendation, you will need to come up with a reason for why this should be refused. I think in the past there has been a bit of an approach that we’ll let the Officers sort that out, but I think we’ve all had recent training. Do you have any proposal, any reasons for why you wish to refuse it...?”

26. There then followed a general discussion with members and officers contributing. Ms Wilkinson pointed to those reasons which went against policy or standard modelling of traffic generations, and those where she needed a greater understanding of what was being said. Two members, including Cllr Jarman, responded and made reference to the Emerging Island Planning Strategy. Mr Boulter pointed out that was at an early stage and had not then been put out to consultation and that reliance upon it was not sustainable and might even amount to unreasonable behaviour. The import of that reference was that the authority may be ordered to pay the costs of any appeal. Ms Wilkinson added that there is a presumption in favour of development and she was still unsure of where she was with reasons for refusal with the exception, potentially, of a heritage issue.
27. Cllr Brodie indicated that as the meeting had been ongoing for over two hours, he was going to have a ten minute comfort break and invited members to discuss reasons with the officers, having said this:

“...I’m entirely comfortable with whatever you propose, provided it is sustainable. You can’t just be against it... you can’t sit there and just expect the Officers to make up something that they’re going to have to defend if they don’t think it’s defensible.”
28. On resumption, Ms Wilkinson highlighted some paragraphs of the officer’s report and invited members to re-read parts of it, and Cllr Brodie gave a few minutes for that to be done. Ms Wilkinson then indicated that the only reason she could put forward for refusal was the loss of historic landscape character the significance of which is considered to be substantial, contrary to policy DM11. There then followed extensive discussions between members and officers on this issue. Cllr Brodie repeated that he was relaxed whatever decision was made, as long as it was made on planning grounds. Further discussion followed, and then Cllr Jarman proposed that the application be refused for the reason suggested by Ms Wilkinson, and that was seconded by Cllr Critchison. She and other members spoke further on the proposal. This was then voted upon, with four supporting the proposal and four against it, including Cllr Brodie. The legal advisor then indicated that Cllr Brodie as chair had a second casting vote in the event of a tie. He cast that vote against the proposal which therefore failed.
29. He then pointed out that as the meeting had been ongoing for three hours, an extension was needed and proposed half an hour. He asked if everyone was okay with that and said “all right, thank you.” There then appears to have been an unrecorded response by Cllr Critchison, to which Cllr Brodie said “sorry.” Cllr Critchison then appears to have

said something more, to which Cllr Brodie replied “No. Not if you want to vote. You have to stay. Sorry, Claire. Okay, just for half an hour, but hopefully quicker.”

30. One of the members who had abstained on a previous vote, Cllr Oliver, then said this:

“Thank you, Chair. Yeah, the first time round, I’ve abstained on the application. It’s a difficult one, you know, my heart is telling me to do one thing and I was waiting for an argument to overrule my head, but to be honest I haven’t found it. We cannot just ignore Officer recommendations, I’m sorry, we – there is a presumption to support the application and I was – I really was hoping that there would be a good enough point to refuse the application, but due to the material facts not being strong enough, I’m proposing that the application be accepted, Chair.”
31. That proposal was seconded and Cllr Brodie proposed that the affordable housing be amended to 70% of rented accommodation, before it was pointed out that he could not do that as a proposal had already been defeated on that basis, so he amended his proposal to 71%. Four members voted in favour and two against with two abstentions. Cllr Brodie declared that the application was approved and thanked everyone for their endurance through “a long and difficult meeting.”

Events after the July 2021 meeting

32. On 3 August 2021, solicitors on behalf of residents wrote to the authority setting out what were said to be several serious procedural concerns about the way in which the meeting some six days previously had been carried out. These included that the conduct of Cllr Brodie and Ms Wilkinson “bordered on badgering and/or bullying of Cllrs Critchison, Drew, Medland and Jarman irrespective of the Councillors reiteration of justifiable planning arguments throughout the meeting and emphasis on different planning considerations to those of Planning Officers.”
33. After a further planning committee meeting on 24 August 2021, Cllr Brodie emailed Cllr Lilley referring to his behaviour as “cowardly” and “pathetic.” This led to a formal complaint by the latter against the former, which was not in the event investigated by the authority on the basis of proportionality.
34. After a holding reply, and after viewing the video recording and hearing the audio recording of the meeting, the principle lawyer of the authority replied on 21 September 2021 saying that it was not considered that there was any breach of legislation or procedure which required the matter to be reverted to the planning committee for a further resolution. It was further indicated that the authority would be moving to implement the resolution by granting planning permission subject to the negotiation of the planning obligation.
35. By letter dated 8 December 2021 the solicitors wrote again, having taken counsel’s advice saying the resolution was fundamentally unsafe because of procedural irregularity, misdirection as to legal basis of part of the decision, and apparent bias. Detailed particulars were given of these, and a request was made that the application should be returned to the planning committee for reconsideration in a lawful manner,

failing which the right was reserved to challenge the decision by way of judicial review “when the planning permission is granted.”

36. There was no substantive response, although the authority repeated a request that the residents for whom the solicitors acted be identified so that standing could be considered. In response the solicitors notified the authority by letter dated 14 January 2022 that Greenfields had been set up by the Elmfields Residents Association, and repeated the request for the application to be returned to the planning committee.
37. Some members remained discontented with the decision and the manner in which it was reached. Motions were submitted to the committee in January 2022 and March 2022 asking that the committee be given the opportunity to reconsider its decision. The January motion was not put because the tenant farmer on the site had withdrawn their objection, and the latter motion was put on the agenda for the meeting of the 29 March 2022.
38. That meeting was preceded by a report of the authority’s chief executive which set out the basis on which the application was being taken back to the committee. It was explained that the planning permission was ready to issue in accordance with the decision of the committee taken on 27 July 2021, subject to obtaining signatures to the section 106 agreement. Normally the head of planning would issue the decision notice, provided there are no material planning changes, but the application had been difficult to manage, and officers did not consider it appropriate to exercise the delegation granted to them by the committee in July 2021 but instead asked that the committee confirmed its decision and that the planning permission would be issued as soon as the section 106 agreement was signed.
39. Twelve members were present at that meeting, which was chaired by Cllr Lilley after he explained that he had taken advice from officers. Cllr Jarman put the motion that the head of planning should refrain from issuing a grant of planning permission following the July 2021 meeting but should instead prepare an updated report which should be reconsidered by the committee at a future meeting as soon as practicable. The motion was seconded and four members, including Cllr Medland voted in favour. Six members, including Cllrs Brodie and Price voted against and Cllr Lilley abstained. The item regarding the chief executive’s report was withdrawn. It appears not to be disputed that a political whip was applied at that meeting, contrary to the authority’s constitution that whips should not be applied at planning committee meetings.
40. At a meeting of the planning committee on 21 March 2023, the application was on the agenda in light of further comments from Natural England for members to consider the heads of terms for the section 106 agreement regarding additional curlew mitigation land, but was deferred. There appears to have been some confusion about whether the application as a whole was to be reconsidered, or just in relation to mitigation land. By an email on 23 March 2023, the strategic manager for planning emailed Cllr Brodie and said that in the officer’s opinion, all other matters (save one which is not here relevant) considered in the original determination remained unchanged, but that that determination would be a material consideration and it was ultimately a matter for the committee to decide how to proceed.

41. On the 21 April 2023, the authority refused reserved matters approval of another large development known as Pennyfeathers. The permission, which was also conditioned to secure financial contributions to improvement to the highway network, then lapsed.

The meeting of April 2023

42. By a further report dated 25 April 2023 by the strategic manager for planning, reference was made to the deferral from the 21 March meeting and to two further comments in respect of the doctor's surgery in support of the application. The recommendation was for conditional approval with amended heads of terms for the 106 agreement to include habitat mitigation. The original officer's report was appended. At the meeting of the planning committee the same day, four members declared an interest, having contributed to crowd funding of a claim for judicial review in connection with the application. One of them, Cllr Medland, left the meeting, but the others remained. Cllr Stuart was voted as chair for that item. Cllr Price asked for advice as to whether he could vote, having been excluded from the July 21 meeting, and was informed by the officers that it was a matter for him whether he felt he had sufficient information about the site.
43. There then followed quite an extensive debate about whether to discuss the whole application or just the issue of curlew habitat mitigation. Ms Wilkinson said that no permission had been issued and that a substantial period of time had elapsed since the July 2021 decision and as there had been a change in planning committee membership there would be a full presentation of the application but it was a matter for individual members as to the breadth and length of the debate, adding that officers did not require a debate on all issues but did not want to stifle debate either. Cllr Stuart indicated that he would take the issue of curlew habitat mitigation first, but that he "would not restrict discussion on the whole application." Ms Wilkinson gave a lengthy presentation of the application. Objectors and supporters were given a chance to speak. Various members were then called upon to speak, including Cllrs Lilley, Jarman, Brodie and Price. Some spoke to wide issues on the application, others like Cllr Brodie indicated that the debate should be limited to the issue of habitat mitigation land. Cllr Price said that had been allowed to speak at the July 2021 meeting, the outcome would have been "entirely different" but that there had been changes since. He mentioned that the site was no longer being farmed, and that there had been a reduction in rental properties. The debate continued up to the three hour mark, and a vote to extend time by an hour was carried.
44. Cllr Adams said he did not believe that the whole application should be considered, but only the habitat mitigation land, adding that he had read an email from the monitoring office earlier in the week who said he was happy that the July 2021 was all in order. Cllr Adams added "... if he's happy with it, I was happy with that". A proposal was put by Cllr Jarman to reject the application on the basis that mitigation measures were unsatisfactory. Five members voted in favour of the proposal, and six, including Cllrs Brodie and Price, voted against. A further proposal was put to agree the officer's recommendation subject to the inclusion of 71% of affordable housing for rent and amendments to the section 106 agreement for mitigation land. Six members voted in favour, including Cllrs Brodie and Price, and five voted against.
45. That decision was implemented by the strategic manager of planning who issued a formal notice granting conditional permission dated 4 August 2023.

Delay

46. It will be apparent that although the challenge is made to that grant, the first three grounds are focussed upon conduct occurring before then as far back as July 2021. This has led the authority and Westridge to contend that grounds 1, 2 and 3 are substantially out of the six week deadline for challenging decisions and have become academic in view of the resolution passed in April 2023. If that is right then these grounds would fall away. Mr Streeten, for Greenfields, accepts that a resolution to grant planning permission, such as was made in July 2021, is an administrative act which could be challenged by way of judicial review. However he submits that all previous resolutions were steps in the decision making process which lead to the eventual grant, and it is clear that in the April 2023 decision, the July 2021 resolution was regarded as a material consideration. If that is vitiated on the basis alleged, then so too is the grant itself.
47. Although in general the legal principles to be applied were not in dispute before me, and were helpfully summarised in the skeleton arguments of counsel for all three parties, there was some difference between counsel as to the application of the House of Lords decision in *R (Burkett) v Hammersmith and Fulham London Borough Council* [2002]UKHL 23, [2002] 1 WLR 1593. In that case, the House considered whether the six week deadline for seeking a judicial review of the grant of planning permission ran from the date when the local authority resolved to grant permission or from the date of the grant itself.
48. Lord Slynn said this at [5]:
- “In my opinion, for the reasons given by Lord Steyn, where there is a challenge to the grant itself, time runs from the date of the grant and not from the date of the resolution. It seems to me clear that because someone fails to challenge in time a resolution conditionally authorising the grant of planning permission, that failure does not prevent a challenge to the grant itself if brought in time, ie from the date when the planning permission is granted. I realise that this may cause some difficulties in practice, both for local authorities and for developers, but for the grant not to be capable of challenge, because the resolution has not been challenged in time, seems to me wrongly to restrict the right of the citizen to protect his interests. The relevant legislative provisions do not compel such a result nor do principles of administrative law prevent a challenge to the grant even if the grounds relied on are broadly the same as those which if brought in time would have been relied on to challenge the resolution.”
49. Lord Steyn at [39] said;
- “As a matter of language it is possible to say in respect of a challenge to an alleged unlawful aspect of the grant of planning permission that “grounds for the application first arose” when the decision was made. The ground for challenging the resolution is that it is a decision to do an unlawful act in the future; the ground for challenging the actual grant is that an unlawful act has taken place. And the fact that the element of

unlawfulness was already foreseeable at earlier stages in the planning process does not detract from this natural and obvious meaning. The context supports this interpretation. Until the actual grant of planning permission the resolution has no legal effect. It is unlawful for the developer to commence any works in reliance on the resolution. And a developer expends money on the project before planning permission is granted at his own risk. The resolution may come to nothing because of a change of circumstances. It may fall to the ground because of conditions which are not fulfilled. It may lapse because negotiations for the conclusion of a section 106 agreement break down. After the resolution is adopted the local authority may come under a duty to reconsider its decision if flaws are brought to its attention: *R v West Oxfordshire District Council, Ex p C H Pearce Homes Ltd (1986) 26 RVR 156*. Moreover, it is not in doubt that a local authority may in its discretion revoke an outline resolution. In the search for the best contextual interpretation these factors tend to suggest that the date of the resolution does not trigger the three-month time limit in respect of a challenge to the actual grant of planning permission.”

50. At [42] he added:

“For my part the substantive position is straightforward. The court has jurisdiction to entertain an application by a citizen for judicial review in respect of a resolution before or after its adoption. But it is a jump in legal logic to say that he must apply for such relief in respect of the resolution on pain of losing his right to judicial review of the actual grant of planning permission which does affect his rights. Such a view would also be in tension with the established principle that judicial review is a remedy of last resort.”

51. At [51] he concluded:

“For all these reasons I am satisfied that the words “from the date when the grounds for the application first arose” refer to the date when the planning permission was granted. In the case before the House time did not run therefore from the resolution of 15 September 1999 but only from the grant of planning permission on 12 May 2000.”

52. Those principles have been considered in several subsequent cases, not all of which involve the grant of planning permission. In *R (Risk Management Partners Ltd) v Brent London Borough Council* [2010] PTSR 349 the defendant authority resolved in principle to participate in an indemnity mutual insurance scheme and at a later date resolved definitively to do so. It joined the scheme a couple of months later and it was a further couple of months before it started making payments. Pill LJ at [145-8] referred to *Burkett* and said that although the cases were different some of the same considerations applied and it was only when payments were made that the defendant was committed to taking policies.

53. In *R (Unison) v NHS Wiltshire Primary Care Trust* [2012] EWHC 624 (Admin) Eady J dealt with a process which a group of primary care trusts began with a view to entering into contracts to provide family health services. The trusts made decisions to proceed at various dates. At [43] the judge said this:

“The references to the Burkett and Risk Management cases were clearly helpful in identifying the principles but they cannot be dispositive in themselves. ... [M]uch may turn on the individual facts of the particular case. To what extent is it right on the evidence before me to regard the decisions as final?”

54. In *R (Nash) v Barnett LBC* [2013] EWHC 1067 (Admin) Underhill LJ, dealing with a process of public procurement, considered these cases and said this at [41-2]:

“I believe the true position to be as follows. If the earlier decision is no more than a preliminary, or provisional, foreshadowing of the later decision, Burkett does indeed apply so that the later, —final, decision falls to be treated as a new decision, the grounds for challenging which —first arise only when it is made. But if the earlier and later decisions are distinct, each addressing what are substantially different stages in a process, then it is necessary to decide which decision is in truth being challenged; if it is the earlier, then the making of the second decision does not set time running afresh. I accept that the distinction may in particular cases be subtle, but it is in my view nonetheless real and important.

This distinction is not explicitly made by either Lord Steyn or Lord Slynn in Burkett. But it did not need to be. The focus of their reasoning is on the particular situation with which the House was dealing, namely one where planning permission has been preceded by a resolution approving the award subject to certain conditions: the essential point made is that since the resolution was indeed only conditional it decided nothing. The House was not considering the case of staged decision-making. Likewise in Risk Management the essential point was that no actual decision had been taken before the beginning of March 2007.”

55. *Nash* went to the Court of Appeal where it was dismissed ([2013] EWCA Civ 1004). Davis LJ giving the lead judgment at [75] agreed with Underhill LJs conclusion on the issue of delay.
56. In *R (Fylde Coast Farms Ltd) v Fylde Borough Council* [2021] UKSC 18. [2021]1 WLR 2794 Lord Briggs and Lord Sales JJSC, with whom the other JJSC agreed, said at [36]:.

“The act of a public authority is taken to be valid and effective unless it is challenged and quashed by legal action taken in proper time. However, where a public law measure is taken at the end of and on the basis of a series of steps and its lawfulness

is contingent on the lawfulness of each of the steps leading up to it, a question may arise whether the lawfulness of the final measure ...can be impugned by a claim brought within time assessed by reference to that measure by showing that an earlier step was affected by unlawfulness, even though the claimant would by then be out of time to challenge the lawfulness of the earlier step if taken by itself’.

57. In *R (Worcestershire Acute Hospitals 4 NHS Trust) v Malvern Hills District Council* [2023] EWHC 1995 (Admin) Holgate J, as he then was, dealt with an allegation of a breach of section 100D of the Local Government Act 1972 which requires local planning authorities to make open to inspection by members of the public the viability assessment referred to in the officers' reports. At [148], he dealt with the issue of delay in making this challenge:

“The Trust relies upon the principle in *R (Burkett) v Hammersmith and Fulham London Borough Council* [2002] 1WLR 1593 and submits that time ran from the date of the planning permission and not some earlier date. The defendants and interested parties argue that time should run from various earlier dates related to any breach of s.100D as a freestanding basis for seeking judicial review. If the effect of a breach of s.100D is to vitiate the related committee resolution (or in this case planning permission) because of, for example, procedural unfairness, I do not see how *Burkett* can be distinguished. In the present case the planning permission is not vitiated, but the court did not receive sufficiently full argument to justify taking the step of distinguishing *Burkett*. I am not prepared to refuse leave in relation to ground 2 on the basis of delay.”

58. Dr Bowes, on behalf of the authority, sought to distinguish *Burkett* on the facts of the present case. He submitted that although there were earlier resolutions before April 2023, there was in the meantime a change in circumstances. The grant of permission in August 2023 was not contingent on the July 2021 resolution and Greenfields are out of time to challenge that resolution. His submissions generally were adopted by Mr Byass for Westridge.
59. In my judgment the resolution of July 2021 was a decision which was preliminary to the grant of permission. It was not a distinct step in a multi stage process. In *Burkett* there were two preconditions to the grant, whereas here there was only one, but like *Burkett* the grant was conditional upon the signing of the section 106 agreement. The reason the officers did not issue the grant under delegated authority, which they could have done, was that it had been a difficult application to manage and they did not think it appropriate to do so. Instead, they asked the committee to reconsider. Then Natural England raised issues about curlew habitat mitigation land which the full committee did consider and which led to the resolution which authorised the grant. The July 21 resolution was considered by officers to be a material consideration in that grant. In my judgment, this challenge has been brought within time and properly includes within its compass the criticisms of procedural and other irregularities in respect of the July 2021 meeting. Whether subsequent events renders any such criticisms academic is another matter and will be dealt after the grounds have been considered in substance.

The authority's constitution

60. Before I turn to those I will set out the relevant parts of the authority's constitution, as it was in force as at July 2021, adopted under section 37 Local Government Act 2000 on 18 November 2020. Part 4B contains the procedure rules governing how full council, cabinet, committees, sub-committees and boards operate. Rule 6 provided that "all meetings will end after three hours of the advertised start time unless at least half the members in attendance vote to extend the meeting" and then makes provision for any business not dealt with to be dealt with at the next meeting. Rule 10 required so far as material that ordinarily any vote "will be by a show of hands or, if there is no dissent, by affirmation of the meeting". Rule 11 provides:

"Any member of the council may attend any meeting of a committee, including those parts of the meeting from which the public and press are excluded. They do not have a right to vote or move a motion or amendment, but may speak with the consent of the chairman (such consent to be sought before the meeting and should not normally be withheld)."

61. The constitution incorporates the code of practice for members and officers dealing with planning matters and materially provides:

"Any local member who is not a member of the Planning Committee is entitled to attend and speak in relation to any item on the agenda with direct impact on their electoral division, so long as they have given prior notice before the start of the meeting to Democratic Services of their wish to do so. [...] A local member can speak for five minutes at the end of public speaking unless the chairman agrees otherwise. Members of the Planning Committee who are determining applications that are within their electoral division should, by local convention, declare the fact and nature of the impact on their electoral division as a personal interest and may speak but will not vote on the issue [...]"

62. I now turn to deal with each of the grounds. Mr Streeten submits that some of the defendant's responses to the grounds do not properly fall within its pleaded case, but I am satisfied that my conclusions set out below are based on points which are properly pleaded.

Ground 1-procedural irregularity

63. Ground 1 contains several allegations of procedural irregularities. The first relates to the exclusion of Cllr Price from the meeting of July 2021, which is what the authority now accepts happened. In my judgment it is clear that this is a decision which was made by Cllr Brodie. In *(R (Ware) v Neath Port Talbot Council* [2007] EWCA Civ 1359; [2008] J.P.L. 854, the Court of Appeal considered allegations of procedural irregularities at a planning committee meeting including whether members who had been unable to attend a site visit should be able to vote at the meeting. The Court in rejecting the challenge found that the members had been left to make their own decision

and exercise their own judgments on such matters and had not been advised that failure to attend the site would disqualify them from voting.

64. In *R (The Spitalfields Historic Building Trust) v LB Tower Hamlets* [2023] EWCA Civ 917 the Court of Appeal held that it is lawful for a local authority's constitution to restrict voting by member of a deferred application for planning permission to those who had been present at meetings when the application had previously been considered. The Court referred to *Ware* and observed that was on a different point. Permission has now been given to appeal to the Supreme Court.
65. In my judgement the present case is very different to *Ware*. Cllr Brodie made the decision that Cllr Price should not attend, let alone not vote, rather than leaving it to Cllr Price's own decision, with advice if appropriate. That amounted to a procedural irregularity.
66. The next irregularity relied upon is the exclusion of Cllr Lilley. The overall tenor of his responses to the monitoring officer's emails prior to the July 2021 meeting was to accept the advice of the monitoring officer, albeit he thought he had no choice. Cllr Brodie was copied into this emails, and even if, as Mr Streeten submits, it is likely that he had some hand in the advice, in my judgment that does not amount to a procedural irregularity. The monitoring officer was clearly entitled on the facts as summarised above to take the view that there was a danger that Cllr Lilley would be seen as having predetermined the application and to advise accordingly.
67. Finally under this ground, it is said that the failure to take a vote to extend the time over three hours was a procedural irregularity. One councillor indicated at the three hour mark that she had another commitment and the exchange ended by Cllr Brodie saying "Okay, just for half an hour but hopefully sooner." There is no suggestion that a point of order was taken or a call for a vote made, and in my judgment the meeting proceeded by affirmation to continue for half an hour at the most and then to take the vote.

Ground 2- bias

68. The test for apparent bias is well established and the authorities are helpfully summarised in the skeleton arguments. The test for apparent bias is whether the relevant circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the decision-maker was biased, see *Porter v Magill* [2001] UKHL 68, [2002] 2 AC 357, at [103] and *R (United Cabbies Group (London) Ltd) v Westminster Magistrates' Court* [2019] EWHC 409 (Admin). The court must ascertain all the relevant circumstances; and ask whether those circumstances would lead a fair-minded and informed observer to conclude there was a real possibility of bias (*Bubbles & Wine v Lusha* [2018] EWCA Civ 468). A breach of an authority's code of conduct is a matter to be taken into account (see *R (CPRE (Somerset) v South Somerset DC* [2022] EWHC 2871 (Admin)). A decision which is materially influenced by an improper purpose is liable to be quashed (*R (Inner London Education Authority ex parte Westminster City Council* [1986] 1 WLR 28 at 49H).
69. Bias is a different, although related, concept to predetermination. I have already observed that Cllr Brodie is likely to have been predisposed in favour of the application, but in my there is no clear indication that he had predetermined it, and such indications as there are suggest otherwise. The classic basis for a finding of apparent bias is where

there is a personal or pecuniary interest in the outcome. That is not suggested here. Instead what is relied upon is what occurred in the run up and during the July 2021 meeting. I have already dealt with some aspects of the run up to the meeting under ground 1, and those are relevant to this part of ground 2.

70. In my judgment Cllr Brodie was, and was entitled to be, concerned as the meeting approached with the issue of predetermination which had been raised by Westridge. In the event, after the intervention of and advice by the monitoring officer, it was only Cllr Lilley who was advised that he may be seen as having predetermined the application. This intervention included advice to members of their obligations and the opportunity to speak with the officer if necessary. It is likely that that advice was heeded by some members.
71. As for the meeting itself Cllr Brodie and the officers were, and were entitled to be, concerned that if the application was going to be refused then it should be refused on planning grounds. To the extent that those members who were predisposed against the application found it humiliating to be reminded of this principle then that is a consequence of the tension which sometimes arises between the democratic process and the obligation on councillors to implement planning policies. This is neatly illustrated by Cllr Oliver's statement that he was hoping to find planning grounds to refuse the application but in the end accepted there was none. The observation of Cllr Lilley that the officers' report was one sided and full of errors was not justified. In my judgment it was full and balanced and came to a recommendation that was properly founded on planning policy and principle. The officers understandably found it difficult to see what justification on planning grounds could be made to refuse the application. It was at the end of the debate that the resolution to grant permission was passed.
72. Other criticisms were made of Cllr Brodie under his ground, including his refusal to allow Cllr Churchman to attend the meeting, his subsequent forceful criticisms of Cllr Lilley, his failed attempt to exclude Cllr Adams from a subsequent meeting, and what is said to be his reluctance to give disclosure of texts and emails in these proceedings. Whatever view is taken of this conduct, in my judgment it does not support a finding of apparent bias or that he proceeded for an improper purpose.

Ground 3- failure to publish the section 106 agreement

73. It is not in dispute that the authority was in breach of the statutory duty in article 40(3)(b) DMPO by not publishing the section 106 agreement, in draft or final form, until August 2023 after Greenfields referred to the breach in its pre-action letter.
74. In *Midcounties Cooperative v Wyre Forest DC* [2009] EWHC 964 (Admin), Ousley J held that publication of the heads of terms of a proposed section 106 agreement is not sufficient to comply with the duty. What is needed is at least one draft, as well as the final version, on the public register to enable meaningful public consultation. At [116], he said:

“In those circumstances I am satisfied that the claimant has suffered no prejudice at all in the breach of statutory duty and the legitimate expectation created by the Circular, and has suffered no substantive unfairness. Insofar as it becomes a matter of discretion because of the breach of duty rather than an

assessment of substantive fairness, I decline in the exercise of my residual discretion to quash the permission. Midcounties has not shown that it would have anything to say on the detail of the agreement for consideration by the Council. Quashing the permission for nothing to be reconsidered would be pointless.”

75. In that case a request was made for a copy of the agreement, but in the present case Greenfields did not make such request until its pre action letter.

76. Holgate J in *Worcestershire* said at [145]:

“..when it comes to material prejudice, a person who was aware of a reference in a committee report to a background paper but who has never shown or had any interest in inspecting the document is unlikely to get very far in a claim for judicial review.”

77. In *R(Davies) v Oxford City Council* [2023] EWHC 1737 (Admin), Knowles J held that placing the heads of terms on the planning register amounted to substantial compliance. At [132] he said:

“First, the substance of the s 106 agreements, as contained in the heads of terms, were placed on the Register via the ORs, which were published there. I think there was thus compliance in substance, if not in form, with the requirement to publish the s 106 Agreements.”

78. Greenfields has not shown that a copy of the section 106 agreement was requested on its behalf prior to the grant of planning permission or that it would have said anything on the detail of the section 106 agreement other than in terms of highway impact mitigation. I deal with this point under ground 5. As in *Davies* the heads of terms in the present case were set out in the officer’s report which was put on the website.

Ground 5- highway impact mitigation

79. Greenfields took this ground next and so do I. In the officer’s report for the July 2021 meeting, it was stated that there would be adverse impacts from the development on two highway junctions, but that mitigation measures could be undertaken and that the developer would make a financial contribution towards coherent and holistic junction improvement schemes which would be the result of a review of junction improvement options for the area and which would be the subject of a report in August 2021. It was said that this review would allow the authority to select suitable junction designs that would mitigate the impacts of new developments in the area.

80. The section 106 agreement provides for the payment of a financial contribution of £406,359 towards junction improvements and such other improvements as the authority should deem necessary as a result of the development. It was expressly required that such improvements would comply with regulation 122 of CIL.

81. Greenfields says that no such review has taken place and accordingly the officers report was materially misleading and the committee took into account an immaterial

consideration. To the extent that it relied on the financial contribution towards highways improvements without there being any suitable junction designs that would mitigate the impacts of new developments in the area it acted irrationally or inexplicably.

82. It also says that members were not told of the lapse of permission on the Pennyfeathers site, which was envisaged also to make contributions to highway impact mitigation.
83. The response of the authority is that the issue of highway improvement schemes and whether these should relate to individual sites or a more comprehensive approach has been and is an ongoing and developing process. Although the permission for the Pennyfeathers site has lapsed it remains an allocated site. It is for the planning officers to assess how much information should be included in their reports, see *R v Mendip District Council, ex parte Fabre* [2017] PTSR 1112, 1120C-D. 56. The issue is whether on a fair reading of the report as a whole members were seriously misled, see: *R (Watermead Parish Council) v Aylesbury Vale District Council* [2018] PTSR 43 at [22].
84. Ms Wilkinson has filed a witness statement to explain how the financial contribution was arrived at. In my judgment that evidence amounts to clarification and not to a fundamental alteration or a contradiction with contemporaneous evidence, see *R(Lanner Parish Council) v Cornwall Council* [2013] EWCA Civ 1290 at [60]-[64].
85. Officers were given delegated authority to carry forward schemes for highway impact mitigation. A formal review is not the only way that this could be done but in any event the approach which the officers took in calculating the amount of highway contribution was based upon costings of schemes of potential highways improvements.
86. Westridge points out that its transport assessment dealt with many different scenarios including whether or not any impact mitigation would be necessary with or without the Pennyfeathers development. In the event that that did not come forward, meaning that some mitigation and land acquisition may not be needed, the assessment concluded that junction 4 would operate with spare capacity.
87. I am not satisfied that in these respects members were misled or took into account immaterial considerations or acted irrationally.

Ground 4- deferral of consideration of CIL Regulation 122

88. This regulation provides so far as material:
 - “(1) This regulation applies where a relevant determination is made which results in planning permission being granted for development.
 - (2) A planning obligation may only constitute a reason for granting planning permission for the development if the obligation is—
 - (a) necessary to make the development acceptable in planning terms;
 - (b) directly related to the development; and

(c) fairly and reasonably related in scale and kind to the development.

(3) In this regulation—

“planning obligation” means a planning obligation under section 106 of TCPA 1990 and includes a proposed planning obligation...”

89. This ground is related to ground 5. Greenfields contends that the authority failed to have regard to regulation 122 when determining that the section 106 agreement which secured a financial contribution towards highway improvements could constitute a reason for granting planning permission and unlawfully deferred consideration of whether or not the highways improvement contribution complied with that regulation 122.
90. The original officer’s report indicated that the obligation was necessary to make the development acceptable in planning terms and to ensure compliance with the development plan (regulation 122(2)(a)), and that the obligation was directly related to the development (regulation 122(b)). Although regulation 122 was not expressly referred to, in my judgment the planning committee may be taken to be familiar with this particular provision.
91. In my judgment the calculation of the financial contribution was reasonably related in scale and kind to the permitted development, which involved a judgment as to the extent of that contribution on the available evidence. The definition for the contribution allows for other highways schemes coming forward in the future, but provides that any such scheme must be compliant with regulation 122.
92. I am not satisfied that ground 5 has been made out.

Relief

93. To the extent that there are or may be criticisms of the procedure at the July 2021 meetings, in my judgment those have been overtaken by events. It is clear that in that meeting there was a failure to identify sustainable grounds on which to refuse the application, as neatly shown by the words of Cllr Oliver. When the matter came back before the committee in April 2023, the members were advised that the July 2021 resolution was a material consideration but it was a matter for them individually as to the breadth and length of the debate. Whilst some of those who had previously voted in favour of the application were content to confine their contribution to the issue of curlew habitat mitigation, it is clear that some of those who had previously voted against the application debated its merits afresh. The officer’s report was presented in detail, with a recommendation that the application should be granted. In my judgment that was a proper process, with which this court should not interfere.
94. In the alternative, the authority and Westridge make various submissions in relation to some of the grounds that even if they are made out, the outcome was highly likely not to be substantially different within the meaning of Section 31 (2) of the Senior Courts Act 1981. That provides, materially:
“(2A)The High Court—”

(a) must refuse to grant relief on an application for judicial review, and

(b) may not make an award under subsection (4) on such an application,

if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.

(2B) The court may disregard the requirements in subsection (2A)(a) and (b) if it considers that it is appropriate to do so for reasons of exceptional public interest.”

95. Sub-section (3) (C and D) deals with similar considerations on the grant of permission. I accept the submissions of the authority and interested party in respect of that test in relation to the length of the 21 July 2021 meeting under ground 1, and in respect of grounds 3 and 5 and refuse permission on those grounds, but grant permission on the remainder.
96. However, given my conclusions above on the substantive issues, I dismiss the claim (and would even if permission were granted on the grounds specified in the preceding paragraph). The parties should agree a draft order as far as possible, and submit this with any written submissions on matters which cannot be agreed, within 14 days of hand down of this judgment.