IN THE HIGH COURT OF JUSTICE **CO/1968/2021**
QUEENS BENCH DIVISION
ADMINISTRATIVE COURT
PLANNING COURT

B E T W E E N:

THE QUEEN on the application of
ASHCHURCH RURAL PARISH COUNCIL

Claimant

- and -

TEWKESBURY BOROUGH COUNCIL

Defendant

REPLY

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1. This short Reply is prepared in order to assist the Court and to clarify certain matters in response to some points raised in the summary grounds of resistance filed by the Defendant ("**SGOR**"). It is not intended to be comprehensive and does not respond to all points raised. A lack of response to any point does not indicate acceptance. The abbreviations in the SFG are continued in this Reply.

2. In relation to the grounds of challenge, the Claimant considers the SGOR only demonstrate the arguability of the claim for the following reasons:

    a. The SGOR demonstrate the clear relationship between ABoR and the wider development. The Defendant does not deny, as set out in the decision making documentation and quoted in the SFG, that the ABoR is "necessary" for the further development, and that "826 houses are expected to come forward"; and that it is spending £8.1 million on a bridge that serves no purpose except for this.

    b. In relation to Ground 1, the Defendant has failed to address the key points of (a) how a lawful decision could have been reached when the Planning Committee were told in terms it was not entitled to consider future development; and (b) despite the Defendant not disputing that the benefits of the development were considered but the harms discounted, how such "cherry picking" could be lawful. The lack of response demonstrates the arguability of this ground.

c. In relation to Ground 2, the response does not demonstrate how the Defendant considered what the "project" was to determine whether its impact. This was itself unlawful. However, any in any event, the Defendant has failed to demonstrate how it could be said that the ABoR was an isolated project.

d. In relation to Ground 3, the Defendant does not dispute the Executive Committee were responsible for promoting policy in relation to the Masterplan Scheme. In light of this, it is hard to see how it could be appropriate for the Chair and Vice Chair of that Committee to determine the Defendant's own planning application to enable development in accordance with the Masterplan Scheme. Further, the Defendant misconstrues the EIA Regulations in arguing that the Committee did not perform a function under those regulations, and in any event, does not even seek to argue that the functional separation required by regulation 64 was in place.

The relationship between the ABoR and wider development.

3. The Defendant does not deny there is a clear relationship between the ABoR and future development. It instead highlights the fact there is no planning permission application for further development, nor any allocation for wider development within the development plan (SGOR §4-10). It does though say the Claimant is "irrational" to suggest that future development is inevitable (SGOR §40). In relation to the relationship, the Claimant notes:

    a. The entire Masterplan Scheme, including the ABoR, is outside the development plan.

    b. The Defendant does not dispute, as reflected in its own decision making documentation, the ABoR is a "necessary" development to enable phase 1 development to occur [CB/284]. Phase 1 envisages, amongst other things, 3,180 new hmes and 46 Ha of new employment land. Further, "the northern development plots rely on the provision of a northern link over the main rail line" [CB/292]. This area includes 826 new homes [CB/137/4.1]. The EIAR describes the "826 houses expected to come forward" [CB/32/4.2.3].

    c. The Defendant further does not dispute that the wider development, at least of the 826 homes expected to come forward, is *at least* of sufficient certainty that the Defendant is spending £8.1 million on a bridge that serves no other purpose.

4. The clear relationship between the ABoR and the 826 developments is further demonstrated by the fact that the Homes England's grant funding for the ABoR is conditioned on the Defendant using its "best endeavours" to commence development of 826 residential units in 2021. The evidence for this is set out in the Second Witness Statement of Anthony Davies, the Claimant's Vice Chairman, dated 13 July 2021.

Ground 1: failure to consider the harm arising from the Masterplan Scheme / inconsistent approach in dealing with the Masterplan Scheme.

5. The Defendant has not engaged with the crux of this ground of challenge. In particular:

    a. It does not address how a lawful decision can have been taken where the Planning Committee were told *in terms* that it was not entitled to consider future development or the impacts thereof, including the 826 dwelling development the ABoR was enabling (SFG §30-31). The SGOR do not even address this point.

    b. The Defendant does not dispute that the benefits of the development were considered but the harms discounted. But it provides no answer as to how this can be lawful. This "cherry-picking" is particularly stark in relation to heritage (see SFG §27(b)) but applies also in relation to access and highways and the overall scheme (see SFG §27).

6. The points the Defendant makes do not come close to showing the ground is unarguable.

7. **First**, the Defendant states enabling other development to proceed is capable of being a material consideration (SGOR §29-34). The Claimant does not dispute this. However, it is the lack of consistency in how this was considered that was unlawful, and in particular the failure to consider the harms from the development that is enabled, while taking into account the purported benefits.

8. **Second**, the Defendant attempts to rely on the fact the Officer Report "identifies the possibility" of "impacts arising from future development" (SGOR §39). This is simply wrong. The Defendant refers to [CB/189] but this only demonstrates the Claimant's ground of challenge. There, it states (emphasis added):

> "In terms of the operational phase of the development, the proposed scheme is to construct the ABoR and leave it in place but it does not include the future highway that would utilise the bridge as part of the future development of the area, nor the associated planned housing to come forward. Therefore, at this stage of the ABoR Scheme, there are no operational effects to assess in respect of noise, vibration and emissions. The effects of the operational phase of the development would therefore be considered when future applications come forward enabling the operational phase."

9. The Committee were told both in the Officer Report, and at the meeting (see SFG §30-31) that such potential effects were not relevant and could not be considered. This is both wrong as a matter of law, and irrational when enabling the wider development was the sole benefit of the ABoR. It had no benefit on its own, but gave rise to significant harms, including, for example, acknowledged harm to listed heritage assets [CB/198-199] and "significant harm" to the landscape [CB/187-188].

10. **Third**, the Defendant argues that the time to consider the impact of the further development is at the application stage for that development. It argues that until that time, any harm is "entirely speculative" (SFG §40). That is divorced from all reality. TBC is spending £8.1 million on a bridge which leads to nowhere. Its grant funding is conditioned on the Council using best endeavours to commence building 826 dwellings in 2021. It is obviously not speculative to suggest there will be the further development that the ABoR has been built to specifically enable. Moreover, this just further begs the question regarding the inconsistency with which the benefits and harms of the development were treated: if it was "entirely speculative" that any enabling development would arise, it is hard to see how the Council can argue it was lawful to take benefits of enabling the development into account.

11. **Fourth**, the Defendant places some focus on the conclusions in respect of traffic modelling. It cites that "either a roundabout or a signal-controlled junction would offer a suitable connection between the link road and the surrounding highways network" [CB/185]. This simply refers to how the bridge may be connected to the network; the Defendant does not address the high level analysis in relation to a 826 dwelling residential development which found "a reduction in network performance" [CB/149]. Moreover, no response is given in relation to other harms likely to result from operational impacts of the ABoR (e.g. from traffic on the setting of designated heritage assets) which would arise if the ABoR is ever connected to the highways network (see SFG §23-24, 27(b))

12. In summary, the Defendant has not addressed the crux of this ground, and this demonstrates its clear arguability.

Ground 2: failure to consider Phase 1 of the Masterplan Scheme in considering whether the ABoR constituted EIA development.

13. There is no dispute that the EIAR does not consider any impacts other than those arising solely from the ABoR. It does not consider the impacts of the associated development of 826 dwellings that were expected (at a minimum) to come forward.

14. The Defendant asserts that this was a planning judgment, i.e. it considered what the "project" was for the purposes of the EIA Directive and EIA Regulations and decided it was the ABoR in isolation. However, this is simply not borne out by the documents. In the SGOR, the Defendant relies solely upon the conclusions of the Screening Opinion [CB/122] (see SGOR §47). That document states because further development has "no formal planning status…potential for significant cumulative effects to arise cannot therefore be considered as logical reasoning to conclude that the ABoR is EIA development". This is circular and answers the wrong question. It attempts to answer what the "project" is by considering the effects of the project. It does not demonstrate that the Defendant has considered what the project is.

15. For this reason, and as set out in SFG, the ground is primarily not one on rationality, because the Council failed to ask itself the question of what the project actually is.

16. However, the Defendant's response to the rationality of the project provides no answer to this part of the ground either. Its response hinges on the assertion that the ABoR was an "isolated project" (SGOR §49). This does not engage with the fact it is development that costs £8.1 million and which gives rise to harms without any practical benefit except if the further development comes forward, which is "expected" to be at least 826 dwellings, and has grant funding on that basis. The ABoR on its own has no use whatsoever.

17. As noted in R(Squire) v Shropshire Council, [2019] EWCA Civ 888, at para. 14

"*In Case C-2/07 Abraham v Wallonia [2008] Env LR 32, the European Court of Justice emphasized (in paragraph 26 of its judgment) that an EIA 'must, in principle, be carried out as soon as it is possible to identify and assess all the effects which the project may have on the environment …'. In her opinion in that case Advocate General Kokott said (at paragraph 75) that 'the aim of [EIA] is for the decision on a project to be taken with knowledge of its effects*

on the environment and on the basis of public participation'; that '[investigation] of the environmental effects makes it possible … to prevent the creation of pollution or nuisances where possible, rather than subsequently trying to counteract them'…".

18. It is for this reason this case is one of salami-slicing. The effect of the Council's approach is to prevent a full and reasoned consideration of the environmental impacts of the bridge and the housing it enables at the stage at which it would inform the decision about whether to proceed with the overall project.

19. The Defendant cites three cases which are wholly distinguishable and in fact support the Claimant's argument:

    a. Preston New Road Action Group v SSCLG [2018] Env LR 18 involved an application for exploration and monitoring of shale case. It was lawful not to consider subsequent commercial production which "would be the subject of a second, distinct and a different project – if, but only if, the exploration project proved the existence of a viable resource gas" (§63). As such, the second project was contingent on a certain result in the first project, and the purpose of the exploration was partly to determine whether a second project would be sensible at all. This case is entirely different. Here, (1) the Council has clearly indicated that development of at least 826 dwellings is "expected" and was granted funding on that basis, and (2) the ABoR's purpose is solely to enable the housing development – it is not to explore whether a second project for the housing will be commercially viable. There is thus no distinction between the projects.

    b. R (Save Britain's Heritage) v SSCLG [2014] Env LR 9 involved the demolition of a chapel which was seriously damaged by a fire which was considered apart from further development in Phases 2 and 3 of the development. This was lawful – the Court relied upon "the fact that the project or developments for which permission is sought can go ahead irrespective of the future wider proposals" which could be contrasted "with a development which is in truth one integrated development with a wider or existing future scheme". The present case clearly falls into the latter category. The ABoR is a bridge to nowhere without the wider scheme. The dicta of in this case positively supports the Claimant's case.

c. R (Littlewood) v Bassetlaw [2009] LR 21 involved the grant of planning permission of a manufacturing facility which was the first phase of wider redevelopment. Unlike the present case, the other phases did not depend on the permission granted; and further, the Council had included a s106 obligation to provide a masterplan. Neither applies in the present case.

20. For these reasons, the Claimant maintains that the Defendant unlawfully failed to consider what the "project" was; and, to the extent there was any judgment, it cannot rationally be said that, in the circumstances, the ABoR was not part of the wider development of developing 826 dwellings.

Ground 3: lack of objectivity / apparent bias.

21. In relation to apparent bias, the Council do not dispute that the Executive Committee had responsibility to "develop and monitor" the promotion of the Masterplan Scheme (SFG §35); nor that the Executive Committee "is responsible for oversight of the development of the Garden Town" (SFG §36). Given this, it is hard to see how it could possibly be appropriate for both the Chair and Vice Chair of the Executive Committee, charged with driving forward the Masterplan, to determine a planning application which would enable the Masterplan to continue. The Porter test is plainly satisfied (or, at least for present purposes, arguably so).

22. R (Lewis) v Redcar and Cleveland BC [2009] 1 WLR 83 does not assist the Claimant, not least because it did not involve an application by the Council itself. The test set out in the case is whether the Court could infer a real risk of a closed mind from the circumstances and evidence (§63). Unlike in Lewis, this was the Council's own application, and it pursued a policy which the Executive Committee was charged with developing.

23. The Council cites in its favour that these Councillors declared that they were members of the Reference Panel (§67). However, what is crucial here, is that they did not declare they were members of the Executive Committee and the responsibilities of that Committee. The lack of such a declaration weighs very heavily in demonstrating apparent bias.

24. The Claimant also notes the Councillor Bird is "Tewkesbury Garden Town Lead" (SFG §78, see further Lead Member Portfolios [CB/262]). This would appear to be a role which requires promotion of the Garden Town. At SFG §78, the Claimant specifically sought confirmation of

what this role entails. This has not been provided by the Defendant. The Claimant invites the Court to draw an appropriate inference.

25. In respect of regulation 64(2) of the EIA Regulations, contrary to the assertion by the Defendant, the Committee were "performing a duty under" the EIA Regulations. The duty was not to grant planning permission for EIA development unless an EIA has been carried out in respect of that development pursuant to regulation 3. The Committee were exercising that duty on the basis of the information provided to it at paragraph 7.0 of the Officer Report [CB/180] which recorded the screening opinion that had been issued. As such, regulation 64(2) applies. The Council has notably defended this point solely on the basis regulation 64(2) does not apply; it does not offer any other defence. This is therefore obviously an arguable ground.

26. Further or alternatively, to the extent that the Defendant asserts its duty was *only* being discharged when it issued the screening opinion, the Defendant entirely fails to demonstrate that the functional separation required under regulation 64(2) was in place at that time. No other evidence exists that the Claimant is aware of that the Defendant met the requirements of regulation 64(2). Therefore, on this basis too, the ground is arguable. As an aside, the Defendant takes no point in relation to timing, and it is well established that a screening decision can be challenged following the grant of permission: R(Catt) v Brighton & Hove City Council [2007] EWCA Civ 298 at §47-49.

27. In relation to the Code of Conduct, the Council makes an assertion that the Executive Committee is not a "body" for the purposes of the Code. This is not explained by reference to any definition and it is unclear why this is said. It makes a similar assertion that the Chair and Vice Chair of that committee do not "manage" it. It is plainly arguable that, at a minimum, the Councillors should have declared their interests, and probably further left the meeting and not voted according to the terms of the Code of Conduct. This weighs heavily in demonstrating apparent bias.

28. It cannot be said that had Councillors Bird and Mason abstained then the permission would still have been granted. They both argued in favour of the proposal. This clearly may have influenced other Councillors' consideration of the application, in particular considering their roles as Leader and Deputy Leader of the Council. Without their votes the overall vote would have been 8 to 7, a difference of only one vote.

Overall.

29. The Claimant submits this claim is plainly arguable and asks the Court grant permission on all three grounds.

30. No objection is taken to the Aarhus costs cap, and the Claimant invites the Court to make an order limiting its liability to £10,000.

LEON GLENISTER

LANDMARK CHAMBERS

13 July 2021