Neutral Citation Number: [2023] EWCA Civ 101

Case No: CA-2022-000371

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT
MR JUSTICE LANE
[2022] EWHC 16 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/02/2023

Before :

LADY JUSTICE ANDREWS
LADY JUSTICE ELISABETH LAING
and
LORD JUSTICE WARBY

- -

Between :

THE KING (on the application of ASHCHURCH RURAL PARISH COUNCIL)	**Claimant and Appellant**
- and –	
TEWKSBURY BOROUGH COUNCIL	**Respondent**

- -
- -

Paul Brown KC and Leon Glenister (instructed by **Richard Buxton Solicitors**) for the **Appellant**
James Pereira KC and Horatio Waller (instructed by **One Legal**) for the **Respondent**

Hearing date: 13 December 2022

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Approved Judgment

Lady Justice Andrews:

INTRODUCTION

1. This is an appeal against the decision of Lane J [2022] EWHC 16 (Admin) ("the Judge") dismissing the claim by the Appellant ("ARPC") for judicial review of the decision of the Respondent's ("TBC") Planning Committee on 22 April 2021 to grant planning permission for:

> "Development of a road bridge over the Bristol to Birmingham mainline railway north of Ashchurch, Tewkesbury. The proposal includes temporary haul roads for construction vehicles, site compounds, security fencing, surface water drainage channels and attenuation points."

The development was referred to in the application as "Ashchurch Bridge over Rail" or "ABoR" but I shall refer to it simply as "the bridge".

2. ARPC has raised three grounds of appeal, although, as will become apparent, there is a degree of overlap between Grounds 1 and 2. These both relate to the Planning Officer's Report to the Planning Committee which informed its decision ("the OR"). Ground 1 is that the Judge erred in his interpretation of the OR, which on ARPC's case advised the Planning Committee to take into account the public benefits of the development facilitated by the bridge but directed them to leave out of account the concomitant harms. Ground 2 is that the Judge fell into error in his application of the principle in *R (Samuel Smith Old Brewery) v North Yorkshire CC* [2020] UKSC 3, [2020] PTSR 221 ("*Samuel Smith*").

3. Ground 3 is that the Judge erred in his consideration of whether TBC unlawfully considered that the "project" for the purposes of the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 ("the EIA Regulations") was the subject-matter of the planning application, i.e. the bridge, looked at in isolation. It is contended that the Judge (1) failed to address ARPC's argument that TBC applied the incorrect legal test and (2) erred in finding that the development of the bridge and its supporting infrastructure for which permission was sought and granted was a single project for the purpose of the EIA Regulations, given that the bridge had no purpose of its own but was to be built solely to serve future development.

4. The Court was greatly assisted by the able and succinct submissions of counsel, Paul Brown KC and Leon Glenister on behalf of ARPC, and James Pereira KC and Horatio Waller on behalf of TBC.

5. For the reasons set out in this judgment, I would allow the appeal on all three grounds, quash the decision of the Planning Committee, and remit the application for reconsideration.

BACKGROUND

6. In March 2019, Tewkesbury and its surrounding area was awarded Garden Town status for a potential development of up to 10,195 new homes, around 100 ha of employment land, and related infrastructure. This was based on the Tewkesbury Area Draft Concept

Masterplan Report ("the Masterplan"), which sets out potential largescale development over an area described as the "North Ashchurch Development Area". TBC is the "lead authority" for the Garden Town.

7. The Masterplan is not a development plan document, but it provides a foundation for the formulation of such a plan in due course. The proposals for the Garden Town are not, as yet, supported by any allocation or policies in the Joint Core Strategy ("JCS") adopted in 2017 by TBC and two other local planning authorities, Gloucester City Council and Cheltenham Borough Council, working in partnership.

8. By the time the JCS was adopted, Tewkesbury Borough had an identified shortfall of 2,455 dwellings measured against the housing needs identified in the JCS. The challenge of meeting that shortfall was exacerbated by the decision of the Ministry of Defence ("MOD") to retain for operational purposes the whole of a site which had been expected to be released for development and to deliver most of the requisite housing.

9. Although in 2017 TBC considered it had identified sufficient sites to deliver housing in the short to medium term, it regarded it as critical to address the shortfall over the period of the JCS (to 2031). The three JCS authorities intended to do so in a strategic and plan-led way. They therefore decided to undertake a review of Tewkesbury's housing supply immediately after the adoption of the JCS. The aim of the review was to identify and allocate sites that would deliver housing and employment growth.

10. The Masterplan was drawn up in January 2018 to inform the JCS review. It provides a spatial growth strategy in order to meet the shortfall in the JCS requirements to 2031 and beyond. However, at the time that planning permission was granted for the bridge, the JCS review was not expected to be completed and submitted until the Spring of 2023, and no action would be taken on it until, at the earliest, later that year.

11. The Masterplan contemplates that the development of the Garden Town would be delivered in phases. Phase 1 concerns an area to the north of MOD Ashchurch which straddles the Bristol to Birmingham railway line, though the largest part of that area is to the east of the railway line ("the Phase 1 area"). The Phase 1 area is bounded to the north by a brook known as Carrant Brook, and to the south by existing development on the edge of the town. Phase 1 envisages that by 2031 around 3,180 new homes would be built in that area, as well as the delivery of 46 ha of new employment land, a local centre with retail services, a new primary school and a new Green Infrastructure corridor. The Masterplan states that: "Road transport upgrades would be required to deliver this growth in capacity terms."

12. In the section of the Masterplan entitled "phasing principles" it is explained that the Masterplan concentrates on developing land to the eastern side of the railway tracks first, with the aim of creating a compact community with walkable neighbourhoods that eliminate fragmentation. However, in order to achieve any of the identified objectives it would be necessary to build a new link road across the railway line to which existing roads would be connected, thereby relieving pressure on the A46 corridor. This in turn required the construction of a new railway bridge.

13. The Masterplan expressly recognises that delivery of the northern development plots for Phase 1 development relies on "the provision of a northern link over the main rail line, overcoming severance and completing the link between existing local roads". It

identifies the bridge as one of the "short-term enabling interventions". The bridge is therefore an essential prerequisite to the delivery of *any* housing development in the Phase 1 area. It is common ground that the sole purpose of its construction is to facilitate such development.

14. The construction of the bridge was described in the Planning Statement submitted in support of the application for planning permission as:

> "Critical to the success of the overall development plan in the area to unlock parcels of land to the east of the railway through improving east-west access".

15. In the normal course of events, one might have expected any application for planning permission to be made only after the JCS review and the adoption of a local plan, and for TBC to seek permission for the Phase 1 development of which the bridge would form an integral part, including the link road and any other vital transport infrastructure. Instead, the application was made, and granted, for the bridge alone.

16. Mr Brown told the Court that the bridge is known locally as "the bridge to nowhere," because after it has been constructed, the temporary haul roads will be removed and there will be no connecting roads on either side, just a bridge in the middle of a field, which will be fenced off. Without a functioning highway unlocking the land within the Phase 1 area on the eastern side of the railway, the bridge will serve no useful purpose.

17. This unusual state of affairs has arisen because TBC wished to avail itself of funding from the Government which was only available for a limited period. In July 2017, the Government launched a £2.3 billion Housing Infrastructure Fund ("HIF") 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, namely, forward funding (for larger schemes up to £250 million) and marginal funding (for schemes up to £10 million). The deadline for applications was September 2017.

18. TBC made a marginal funding bid for just over £8.1 million to deliver the bridge on the basis that this, in turn, would facilitate the development strategy of the wider Ashchurch area. In February 2018, TBC was informed that its bid had been successful. TBC subsequently entered into discussions with Homes England regarding the terms of the funding agreement. The Deputy Chief Executive of TBC, in a Report to the Executive Committee recommending approval of the proposed terms, said that the funding would "unlock a number of sites and forms an early phase of the development strategy to realise the Garden Town".

19. TBC approved the funding conditions and authorised entry into a formal agreement with Homes England on the proposed terms at its meeting on 19 June 2019. The funding agreement subsequently entered into between TBC and Homes England included a requirement that the funds be drawn down by 31 March 2022 (though that deadline has since been extended because of this litigation).

20. Given that the express purpose of the HIF was to support the delivery of housing, Homes England understandably required TBC to make a commitment to deliver the housing which the vital physical infrastructure to be built with the assistance of the

funding would facilitate. The Homes England documentation split the project into the "main project" (comprising the bridge) and a "wider project" which included the link road and the housing development unlocked by the funding, detailed as 826 residential units. Homes England accepted that delivery of the "wider project" was outside the control of the "main project". It therefore agreed to accept a "best endeavours" obligation from TBC in respect of the development unlocked by the funding. TBC agreed with Homes England that it would use its best endeavours to build 826 residential units and commence the construction of those units in 2021, with the wider project being completed by 31 March 2030.

21. It follows, therefore, that at the time when the application for planning permission for the bridge was considered, there was a clear expectation that the bridge would serve at least 826 houses, to be built within the Phase 1 area on the eastern side of the railway track, and the road infrastructure, including the link road over the bridge, would need to cater for at least that number.

22. Prior to making the application for planning permission, TBC commissioned an Environmental Impact Assessment Screening Report, for the purpose of determining whether an Environmental Impact Assessment ("EIA") was required. The Screening Report was produced in May 2020. The Judge quotes relevant extracts at paras 17 to 26 and para 33 of his judgment. The Screening Report noted that the bridge would not be used until future development came forward to make it operational. It recorded that the current proposals identified that the development area was anticipated to provide 826 new houses. Nevertheless it treated the bridge as a stand-alone "project", to be considered independently from any environmental assessment of the highway and residential elements of the development that it was envisaged the bridge would facilitate. It noted that an assessment of those elements would be carried out in future, as and when it was envisaged that any development under Phase 1 of the Masterplan would be implemented.

23. The Screening Report recognised that the bridge was Schedule 2 development under the EIA Regulations, but concluded that, looked at in isolation, it was not likely to have significant effects on the environment. It was therefore unnecessary to carry out an EIA. TBC issued its Screening Opinion to that effect, adopting the conclusions of the Screening Report, on 22 June 2020.

24. A Transport Assessment was also commissioned by TBC. This was produced on 11 September 2020. It specifically confined itself to consideration of the bridge proposal, focusing primarily on the transport impacts of its construction. However, "for information", it also considered:

> " the potential impacts of an associated link road that would connect Hardwick Bank Road with the B4079 via the ABoR and the development of 826 residential dwellings that could achieve access via the ABoR and associated link road. It is important to note that the associated link road and 826 residential dwellings will be supported by separate future planning applications that will include further assessments."

25. The authors of the Transport Assessment indicated the approximate alignment of the link road, which closely mirrored the intended location of the haul road. They were also

able to model the likely traffic flows on that link road and surrounding road network from the link road and anticipated residential development.

26. A Heritage Assessment, which was also produced on 11 September 2020, identified "the Scheme" as "just the construction of the bridge," and considered the potential impacts of what the authors termed the "construction phase" and the "operational phase" of the Scheme (as so defined). It identified the closest listed buildings to the site as two Grade 2 listed buildings, Northway Mill and Northway Mill House, 90m to the north of the site of the bridge. The impact on them was assessed from a purely visual perspective, and the conclusion was reached that the bridge would cause a minor adverse impact on the setting of those heritage assets. Because the assessment was confined to the impact of the bridge alone, it did not take into account the impact on those assets or their setting that the link road over the bridge might have. Looking at the geographical layout on the plan, irrespective of its precise configuration, any link road would have to run to the west of the railway line and below the brook, and, as Mr Brown pointed out, it would necessarily be closer to the heritage assets than the bridge itself.

27. On 22 September 2020 TBC, as developer, sought planning permission for the bridge. They did not seek permission for the roads which would inevitably serve as a connection to the existing highway network, nor for any development arising from Phase 1 of the Masterplan, including the 826 homes to which TBC had committed. This was made clear in the Planning Statement.

28. The OR is dated 16 March 2021. It is a detailed report which runs to 43 pages, excluding the appended plans. The Judge quotes extensively from the OR in paras 28 to 48 of his judgment. I shall consider the content in more detail when addressing Grounds 1 and 2. Suffice it to say, at this juncture, that it identifies the main issues to be considered 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."

It then goes on to address each of those issues before reaching a conclusion and making a positive recommendation.

29. The "Overall Balance and Recommendation" was expressed in these terms:

> "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." [Emphasis added].

30. At the meeting of the Planning Committee on 16 March 2021 there was an oral presentation by TBC's Development Manager. This largely repeated and reinforced what was said in the OR. The Minutes record that among the things he said were that:

> "whilst clearly the bridge was intended to serve a particular function in the future, at this stage it was not certain what level of development it would serve, although Phase 1 of the masterplan would deliver over 3,000 homes…"
>
> "Impacts related to the wider Garden Town proposals would be considered in any future planning applications for that development."
>
> "… issues related to the wider development that the bridge was intended to serve were for another day."
>
> "There were significant benefits arising from this development in enabling the delivery of the Masterplan and Garden Communities programme and ensuring that the necessary infrastructure was in place to achieve well planned development and that the delivery timescale of the Masterplan was maintained. There were also benefits arising through job creation during the construction."

(Later, in the course of the discussions following his presentation):

> "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."

31. After extensive debate, the application was "permitted in accordance with the officer recommendation" by ten votes to seven, with one abstention.

GROUNDS 1 AND 2

32. A Planning Officer's Report serves two main purposes: providing information to the decision maker (in this case, TBC's Planning Committee), and making a recommendation as to how they should deal with the planning application. It must not be construed as if it were a statute, but approached from the perspective of how it would be understood by those for whose benefit it is prepared, and read with what Lindblom LJ described as "reasonable benevolence": *R (Mansell) v Tonbridge & Malling Borough Council* [2017] EWCA Civ 1314, [2019] PTSR 1452 at [42](2). The Planning Officer is likely to express personal opinions, for example, as to the weight to be attributed to various factors for or against the proposal, but the decision maker is not bound to agree with those views. They are free to accept or reject the recommendation made; but if they accept it, without expressing any further reasons, they will be taken to have adopted the reasoning in the OR.

33. Subject to any matter which they are legally obliged to take into account, materiality (i.e. relevance) is something for the decision-maker alone to determine. If something is capable of being regarded as relevant to the decision on a planning application, but the planning authority does not take it into account, their decision can only be challenged on an irrationality basis, i.e. on the basis that that factor was "so obviously material"

that no reasonable decision-maker could have failed to consider it. That principle is established by a long line of authority including *Samuel Smith*, in which at [30] Lord Carnwath JSC adopted verbatim a passage from his earlier judgment in *Derbyshire Dales District Council v Secretary of State for Communities and Local Government* [2009] EWHC 1729 (Admin), [2010] 1 P& CR 19. See also the helpful exposition of the principle by Lord Hodge and Lord Sales JJSC in *R (Friends of the Earth) v Heathrow Airport Ltd* [2020] UKSC 52, [2021] PTSR 190 at [116]-[121].

34. Ground 1 is founded upon a rationality challenge to the approach adopted in the OR which, on ARPC's case, treated certain identified benefits as material, but left out of consideration the concomitant harms.

35. It is common ground, and indeed is clear from the OR, that no account was taken of any adverse impact that any development in accordance with Phase 1 of the Masterplan would have (not even the impact of the construction of the link road across the bridge, or of the minimum development in fulfilment of TBC's "best endeavours" commitment to Housing England to build 826 homes).

36. Indeed, the Committee was told in no uncertain terms that the assessment of harm was to be confined to the bridge structure. For example, in a section headed "Access and Highway Issues" the OR stated as follows:

> "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 roads/compounds etc.*" [Emphasis added].

37. Later, the OR said:

> "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." [Emphasis added].

38. When dealing with heritage issues, the OR stated that:

> "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 on the land. However, at present, the application should be judged on its own merits*."

> [Emphasis added. The rather clumsy syntax in the penultimate sentence is in the original text and was corrected by the Judge in para 41 of his judgment to "additional development on the land within the setting of the listed buildings"].

39. Yet only two paragraphs later, the OR stated that:

> "It is the case that *there would be public benefits arising from this 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…* officers consider that *the substantial public benefits arising from the proposal outlined above* would outweigh the identified harms [i.e. harms to the setting of heritage assets of high significance caused by the impact of the bridge alone] in this instance and that there is *a clear and convincing justification for the proposal.*" [Emphasis added].

The "substantial public benefits" identified in that passage are the housing and associated infrastructure that would be delivered under Phase 1.

40. In the "Conclusion and Recommendation" section, under the heading "Benefits", the OR states that:

> "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 2005 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.*" [Emphasis added].

41. This section of the OR then goes on to address the benefits of progressing the application proposals at the present time, which it characterises as "substantial". It states that this would:

> "ensure the delivery timescale of [the Masterplan] is maintained seeking to achieve the aspirations and timelines of [the Masterplan] in the context of achieving the JCS and JCS Review Strategic Objectives and to meet the HIF funding deadline…"

42. Before the Judge, ARPC submitted that the Committee acted irrationally by taking into account the benefits of the wider development that the bridge would facilitate, but not considering the harms, because the benefits could not be realised without the harms.

43. The Judge (rightly) did not take issue with the proposition that if that is what the Committee did, it would have acted unlawfully. He rejected APRC's submission on the basis that on an appropriately benevolent reading of the OR, the benefits that were being considered were not the benefits of any future development that the bridge was enabling, but rather, the benefits of granting permission for the construction of the bridge *at that time*, instead of waiting for proposals for the wider development to be brought forward.

44. In my judgment, in so finding, the Judge misinterpreted the OR. The question of timing was undoubtedly one matter which the OR addressed, but the public benefits to which the Planning Officer referred were not confined to the benefits of allowing the bridge to be built in advance of the rest of Phase 1.

45. The principle of the development was addressed in a section of the OR which preceded the "phasing" section, and which was devoted to the Masterplan. The level of detail in that section goes well beyond anything that would be needed to explain why it was important to keep the Masterplan on track. After correctly stating that the Masterplan is not a development plan document and that "as a planning document it carries very little weight" the OR elevated its importance by describing it as "part of the plan-led approach" and identifying a number of benefits that were integral to it. The OR explained how an area to the north of Ashchurch, which includes the application site, is highlighted as Phase 1, to be delivered by 2031 according with the timeline of the JCS requirement to deliver the shortfall of jobs and homes identified. It stated that:

> "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".

46. There is then a description of the Transport Strategy included in the Masterplan, and it was noted that the Masterplan identifies that there is no transport solution yet for the quantum of development in Phase 1. In this context the bridge across the railway, and the road over it, were treated as part of an integrated means of delivering Phase 1:

> "However, the [Masterplan] identifies that a northern link (Northern Access Road link) is needed, crossing over mainline rail, joining up existing roads….

47. This section of the OR went on to state that to deliver the Masterplan, the Transport Strategy identifies Short-Term, Medium-Term 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."

48. As the Planning Officer clearly recognised, and as is further demonstrated by the following section of the OR dealing with phasing, the bridge was an integral component of Phase 1 of the Masterplan and had no function other than to facilitate development in the Phase 1 area. At the start of that section, the OR identifies delivery of a new garden community as "*a* complex long-term *project*" (singular, emphasis added). There

is then an explanation of why the planning application for the construction of the bridge was being made at that particular time, and why it was being made in advance of other associated infrastructure or land use developments notwithstanding that the bridge, on its own, served no purpose.

49. The Planning Officer identified the two reasons as being:

> "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 that the construction period would be circa 12 months.
>
> The applicant also advises that the ABoR 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 railway assets….
>
> The application is therefore being progressed at the current time to deliver the Short-Term Enabling Intervention timescales of the Masterplan and to meet the HIF funding deadline."

Thus the OR made it clear that the bridge was never intended to be a stand-alone development. It was perceived to be necessary to give an explanation for splitting it out from the rest of the project of which it formed an integral part.

50. The Planning Officer concluded that section of the OR as follows:

> "Therefore the principle of progressing with the ABoR 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 SCS 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."
>
> [Emphasis added].

51. The Judge said, at para 74, that two related benefits were identified, namely "to ensure the delivery timescale of the [Masterplan] is maintained… 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".

52. He identified that the OR also made the point that construction of a bridge over a railway would take a considerable time, because it could only take place during periods

when the railway was not in use, and that it was therefore sensible to bring forward the bridge proposal at the present time. The Judge said at para 79 that:

> "this approach 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."

53. That analysis, with respect to the Judge, fails to grapple with the point that there would be no benefit in keeping the Masterplan "on track," nor in hiving off and accelerating the delivery of part of a wider project, unless it was envisaged that the wider project was in principle desirable and that Phase 1 would be, or was at least very likely to be, carried out - in other words, that there *would* be a link road over the bridge and a housing development of at least 826 new homes in the "unlocked" area - since that was the sole justification for building the bridge in the first place. If that did not materialise, the bridge would serve no purpose, and in addition, as identified in the OR, it would cause some harm to the setting of two Grade II listed buildings.

54. It is noteworthy that when addressing the pros and cons of dealing with the application for the bridge, no account is taken in the OR of the prospect that the wider development envisaged by the Masterplan would not be permitted, leaving a useless bridge standing in the middle of a field. That point is only mentioned in the OR in the context of summarising the objections to the application. In the passages containing the advice and recommendations, there is an inherent underlying assumption that if the bridge is built, the road over it will be built in due course, and that some development will take place in the Phase 1 area. That is understandable, given that the time-limited funding from Homes England which was the impetus behind the timing of the application was linked by contractual condition to the development of at least 826 new homes. So too were the milestones agreed by TBC.

55. It is important in this context to maintain the distinction between two related, but separate concepts: whether in principle this bridge should be built, and whether it should be built *now*. The Planning Officer, and the Committee, had to deal with both (as the OR expressly identified at the start of section 8) and, contrary to the Judge's findings, that is what they did. Read as a whole, the public benefits identified in the OR were <u>not</u> confined to the benefits of granting the application at the current time so as to allow potential future development to be planned and delivered in a timely way, or, as Mr Pereira put it in his oral argument, keeping the planning options open. They included the benefits to be achieved by constructing the bridge at all.

56. This is clear from the first paragraph of the conclusions and recommendations. The public benefits identified there include "enabling the delivery" of the Masterplan itself, and "ensuring the necessary infrastructure is in place" [to achieve this], as well as "seeking to achieve the aspirations and timelines of" the Masterplan. They are not confined to ensuring that the delivery timescale of the Masterplan is maintained and that the HIF funding is achieved. Meeting the HIF funding deadline was just another of the identified benefits. The short-term job creation during the construction phase, a

further identified benefit, was plainly a makeweight, which by itself would not have outweighed the identified harm to the heritage assets acknowledged in the OR, let alone the (unacknowledged) harm of building what could become a white elephant.

57. For the Planning Officer, the benefit which plainly tipped the balance in favour of granting the application was enabling the delivery of Phase 1 of the Masterplan, which could not happen unless there was a bridge over the railway line at that location. But even if the identified benefits *had* been confined to preserving the viability of the Masterplan, they cannot be artificially divorced from the public benefits of Phase 1 of the development envisaged in the Masterplan. As Mr Brown submitted, there is no inherent value in the timetable for delivery of the Garden Town on its own; the public interest lies in the substantive development for which the timetable sets the milestones.

58. The distinction drawn by the Judge between (i) the benefits of a form of development and (ii) the benefits of enabling or facilitating such development, is a fine one. There is a distinction between the two concepts, but they are inextricably linked. One can only attribute significant value to the latter if one attributes significant value to the former. Put very simply, one cannot rationally conclude that it is beneficial to facilitate or enable a development to be carried out in future (especially when the means of facilitation serves no useful purpose in itself) without forming the view that the putative development is in principle desirable. That in turn involves considering, even at a very high level, whether the benefits of the envisaged development outweigh the harms it is likely to cause.

59. This proposition can be tested by assuming that the development which the bridge unlocked was something that might be seen as objectionable – such as, for example, the development of agricultural land for industrial activity such as an abattoir or a tannery, which would lead to many heavy lorries using the access road. One could only reach the conclusion that the benefits of keeping the prospect of that development alive (and on track in accordance with an envisaged timescale) by building the bridge, outweighed the potential harms of building a bridge that would serve no purpose without the link road or envisaged development, if one considered and weighed up the benefits and detriments of building a tannery or abattoir in that location and concluded that on balance it would be beneficial.

60. Mr Pereira raised the objection that at the time of the OR and the Committee's decision there was not, as yet, any specific housing proposal on the table for the development within Phase 1, and (because there was as yet no local plan, even in draft form) no specific sites had been identified for the delivery of the housing that was the subject of the "best endeavours" commitment. He also contended that it would not be possible to assess the impacts on traffic from any road over the bridge servicing the proposed development without knowing more details about the proposed road development.

61. However, as the Transport Assessment indicated, there would be some inescapable impact from the minimum development of 826 homes envisaged at the time, and it was possible, through modelling, to assess what that impact might be. There would be no need to know the precise layout of the link road, although it would be possible to make educated assumptions about the route it would take (bearing in mind the existing geographical constraints, which are obvious from the plans).

62. As for the location of the 826 homes within the Phase 1 area, it was unnecessary to know this with any precision to work out the likely impact on traffic flows of servicing that number of additional houses. The authors of the Transport Assessment had already done this exercise "for information". The various potential sites for the Phase 1 development were identified in the Masterplan; all of them would need to use the envisaged link road over the bridge. The Planning Officer had drawn specific attention in the OR to Parcels 14 and 15, within which the site of the bridge falls, as being likely candidates for the location of more than twice the number of houses within Phase 1 than the 826 which TBC was committed to use its best endeavours to build within the timescales in the agreement with Homes England. Parcel 15, which is the larger of the two, falls on the eastern side of the railway, the part of the Phase 1 area which the Masterplan envisaged would be developed first.

63. It is clear from reading the OR as a whole that its author worked on the premise that the construction of a bridge facilitating Phase 1 of the Masterplan was a good thing, because achieving Phase 1 (including enabling TBC to honour its commitment to Housing England to start building 826 houses in that area by 2021) was a desirable objective. The OR rightly recognised that the public benefit to be gained by building the bridge was something different from the benefit(s) flowing from building it now. The Judge was wrong to conclude otherwise.

64. On a fair reading of the OR, the Planning Officer did place substantial weight on the contingent benefits that, in his assessment, would accrue from the development in Phase 1, and he invited the Committee to do the same. His overall approach was to invite the Committee to attribute substantial or significant weight to the prospective benefits of the wider development whilst directing them that they must leave out of account entirely any possible harms. Whilst it was open to the decision maker to treat the prospective benefits of the wider development as material factors, and it is understandable why they did, it was irrational to do so without taking account of any adverse impact that the envisaged development might have, to the extent that it was possible to do so, (which it was, albeit at a high level). The two go hand in hand; you cannot have one without the other. Ground 1 is therefore made out.

65. Ground 2 does not strictly arise in the light of my conclusion on Ground 1. I can therefore express my views on Ground 2 more succinctly.

66. There is a distinction between, on the one hand, the situation in which a Planning Officer expresses a view or gives advice with which the decision maker is free to disagree; and, on the other hand, the situation in which the Planning Officer misdirects the decision maker. The distinction between the two does not turn simply on the language or expressions used in an OR, but rather, upon the substance of the message being conveyed to the reasonable reader.

67. In this particular case, I am satisfied on an appropriately benevolent reading of the OR as a whole that the Planning Officer in substance directed the members of the Planning Committee that they could not or must not take account of the harms of the proposed development that the bridge would facilitate. That went beyond mere advice or the expression of a personal view about relevance. Those harms were at least *potentially* relevant: materiality was a matter for the Committee to determine, and they were being told that they must not consider something to be material which they might otherwise have regarded as material.

68. The fact that the members of the Committee may have regarded the harms as material is borne out by the fact that, as the Minutes of the Planning Committee meeting reveal, some Councillors raised the issues of traffic on the link road, and the 826 new homes, only to be advised by the Development Manager that "these impacts *were not relevant* currently and *could not be considered* as part of the application before committee today." That advice must have been based upon the Development Manager's understanding of the OR. His advice served only to confirm the impression of a legal direction which that document naturally conveyed.

69. The Judge erred in considering that the principle in *Samuel Smith* was applicable, because that principle arises when the decision-maker has itself determined whether a factor is material or not, and thereby exercised an unfettered discretion to leave something out of consideration. That was not what happened here. The effect of the instruction given in the OR that the harms had to be left out of account was the skewed approach complained of in Ground 1; the decision maker could not rationally treat the benefits of the development facilitated by the bridge as material without also treating the harms of the development as material. The direction by the Planning Officer could equally be characterised as a misdirection in law. Therefore, Ground 2 succeeds.

GROUND 3

70. This was the Ground of appeal which understandably occupied the most time in oral argument. The legal framework is uncontentious and can be summarised as follows.

71. Regulation 3 of the EIA Regulations provides that:

> "The relevant planning authority… must not grant planning permission or subsequent consent for EIA development unless an EIA has been carried out in respect of that development."

72. "EIA Development" is defined in regulation 2 as:

> " development which is…
>
> (b) Schedule 2 development likely to have significant effects on the environment by virtue of factors such as its nature, size or location."

The bridge was correctly identified in the OR as a Schedule 2 development.

73. These provisions implement article 1(1) of the Environmental Impact Assessment Directive 2011/92/EU ("the EIA Directive"). The Directive requires the effects of the "project" to be assessed; the reference in the EIA regulations to the assessment of the effects of the "proposed development" is intended to give effect to this: *R (Larkfleet) v South Kesteven District Council* [2015] EWCA Civ 887, [2016] Env LR 4 ("*Larkfleet").* As a general principle, if an EIA is required it should be carried out as early as possible.

74. "Project" is defined in art 1 of the Directive as "the execution of construction works or of other installations or schemes" and "other interventions in the natural surroundings and landscapes". The term has to be understood "broadly, and realistically." The decision-making authority should consider "the degree of connection… between the development and its putative effects" and whether a particular consequence is "truly an

effect": see *R(Finch) v Surrey County Council* [2022] EWCA Civ 187, [2022] PTSR 958 especially at [15](4), [33], [42] and [60].

75. "Likely" in this context means "possible", in the sense of "something more than a bare possibility, though any serious possibility would suffice": *R (Bateman) v South Cambridgeshire DC* [2011] EWCA Civ 157, ("*Bateman*") at [15]-[21]; *Bowen-West v Secretary of State for Communities and Local Government* [2012] EWCA Civ 321, [2012] Env LR 22 at [28].

76. Regulation 5 contains general provisions relating to screening: the Judge quoted relevant aspects in his judgment at para 94. The requirement in Article 5(2) to provide "information on the site, design and size of the project" is a flexible one, which enables the planning authority to provide more or less information on those factors depending on the nature and characteristics of the project to be assessed. In *R v Rochdale Metropolitan Borough Council ex parte Milne* [2001] Env LR 22, ("*Rochdale*") Sullivan J (as he then was) said at [H7] and [H8]:

> "If a particular kind of project was, by its very nature, not fixed at the outset, but was expected to evolve over a number of years … there was no reason why a "description of the project" for the purposes of the Directive should not recognise that reality….
>
> The Directive sought to ensure that as much knowledge as could reasonably be obtained, given the nature of the project, about its likely significant effect on the environment was available to the decision taker. It is not intended to prevent the development of some projects because, by their very nature, "full knowledge" was not available at the outset."

77. As Moore-Bick LJ pointed out in *Bateman* at [20], a screening opinion is designed to identify those cases in which the development (i.e. the project) is likely to have significant effects on the environment. That assessment is necessarily based on less than complete information. It is not intended to involve a detailed assessment of factors relevant to the grant of planning permission, nor a full assessment of any identifiable environmental effects.

78. The identity of the "project" for these purposes is not necessarily circumscribed by the ambit of the specific application for planning permission which is under consideration. The objectives of the Directive and the Regulations cannot be circumvented (deliberately or otherwise) by dividing what is in reality a single project into separate parts and treating each of them as a "project" – a process referred to in shorthand as "salami-slicing": see e.g. the observations of the CJEU in *Ecologistas en Accion-CODA v Ayuntamento de Madrid* [2008] ECR 1-6097 at [48] (adopting the approach taken in para [51] of the Advocate-General's opinion).

79. In *Larkfleet*, it was held that a proposed urban extension development and a link road were not a single project because despite the connections between them, there was a "strong planning imperative" for the construction of the link road as part of a town by-pass, which had nothing to do with the proposed development of the residential site. By contrast, in *Burridge v Breckland District Council* [2013] EWCA Civ 228, ("*Burridge"*) the Court of Appeal held that a planning application for a biomass

renewable energy plant and a planning application for a combined heat and power plant linked to it by an underground gas pipe were a "single project," on the basis that they were "functionally interdependent and [could] only be regarded as an "integral part" of the same development."

80. It follows that the identification of the "project" is based on a fact-specific inquiry. That means other cases, decided on different facts, are only relevant to the limited extent that they indicate the type of factors which might assist in determining whether or not the proposed development is an integral part of a wider project.

81. Lang J, in her judgment in *R(Wingfield) v Canterbury City Council and another* [2019] EWHC 1975 (Admin), [2020] JPL 154, ("*Wingfield"*) stated at [63] that the question as to what constitutes the "project" is a matter of judgment for the competent planning authority, subject to challenge on grounds of *Wednesbury* rationality or other public law error. At [64] she set out a non-exhaustive list of potentially relevant criteria, which serves as a useful aide-memoire. These include whether the sites are owned or promoted by the same person, functional interdependence, and stand-alone projects. In relation to the last of these factors she said:

> "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".

The reverse may also be true, and that reflects the position in this case.

82. Mr Brown contended that the Judge did not address ARPC's assertion that the wrong legal test was applied by TBC in the screening assessment, and that in any event he erred in finding that TBC lawfully considered the bridge was a single "project" for the purpose of the EIA Regulations. As to the first of these submissions, it is right that the Judge makes no mention in his judgment of ARPC's submission that the wrong legal test was applied by TBC (or, perhaps more accurately, that the correct legal approach was not adopted). He moved straight into consideration of whether there was a public law error in the Screening Report (at paras 119 and following). There is no mention in his analysis of an alleged failure by TBC to consider whether the bridge was an integral part of a wider project.

83. Mr Pereira's answer to this was that there is not a "legal test" as such, because, as Lang J held in *Wingfield*, the identification of the project is a matter of planning judgment for the decision maker. Whilst it is true that the identification of the project is a matter of planning judgment, an important aspect of ARPC's substantive complaint in the lower court, reiterated by Mr Brown in this appeal, was that nowhere in the Screening Report (nor the OR, nor the Minutes of the meeting) is there any indication that the question whether the bridge formed an integral part of a wider project for the purposes of the EIA Regulations was even considered by TBC, and therefore the relevant planning judgment was never exercised.

84. There is no reference in the Screening Report to *Larkfleet* or *Burridge*, nor to the factors identified in *Wingfield*. The author did not address the question whether the bridge and the highway that was envisaged to run across it were "functionally interdependent"; nor the question whether building a non-functioning bridge in the middle of a field was

justified on its own merits, as a stand-alone project, without regard to the development it facilitated; nor the question whether the application for permission would have been pursued in the absence of the proposed development of Phase 1 of the Masterplan.

85. The author of the Screening Opinion and the Screening Report provided a witness statement, but although that says that he was satisfied that the "project" in this case comprised the bridge only, he does not explain why, or identify what considerations led him to that conclusion. The nearest one gets to an explanation is in the passages in the Screening Report that perceive difficulties in carrying out a "robust" assessment of the environmental impacts of the wider Phase 1 development which had, as yet, no formal planning status. It could be inferred that these difficulties and/or the fact that the Masterplan had, as yet, no formal planning status were treated as a justification for concentrating on the bridge alone, leaving the environmental impacts of the link road and of the minimum of 826 houses to be built in the Phase 1 area to be considered on a future occasion as and when a planning application was made in respect of them.

86. Mr Pereira accepted that the Screening Opinion made it clear that the screening which had been carried out related to the bridge alone. He submitted that the Screening Report was not defective because it did consider whether the wider impacts of the development could be assessed, and concluded for valid reasons that they could not. He referred to a passage in the Summary and Conclusions of the Screening Report which said:

> "it is noted that the ABoR is essentially advance works for anticipated future growth to the north of Ashchurch, providing a crossing point over the railway 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 ABoR site (specifically the North Ashchurch Development Area). Consequently, the preparation of a robust assessment of cumulative effects of the ABoR 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."

87. Mr Pereira also submitted that there can be no question of "salami-slicing" in a situation where there is, as yet, no defined wider project for which planning permission has been sought or even contemplated, equating to the salami. The putative development under Phase 1 of the Masterplan was far too nebulous to be regarded in that way. There was no more than a draft concept masterplan which needed to go through a lengthy legal process before any permission would be granted for any part of that development.

88. I reject the proposition that in a case in which the specific development for which permission has been sought clearly forms an integral part of an envisaged wider future development, without which the original development would never take place, there can only be a single "project" for the purposes of the Directive and the Regulations if the contemplated wider development has reached the stage where an application has been made or could be made for planning permission. That proposition appears to me

to be antithetic to the approach taken in *Rochdale* and inherently illogical. The question "is this application part of a larger project?" can still be answered even if planning permission has not yet been sought for the larger project or the details of the larger project have not been finalised.

89. Taken to its logical conclusion, Mr Pereira's argument about what constitutes a "salami" in this context would leave it open to a developer to conceal his plans for a far larger development from the planning authority and only bring them forward in piecemeal sections, thereby defeating the purpose of the EIA Regulations. This is not such a case, but the example illustrates the flaws in Mr Pereira's argument.

90. Insofar as the author of the Screening Opinion, and the Development Manager, decided that the "project" must be confined to the bridge because "any future contemplated development could not be [robustly] assessed at the time of the screening decision", they fell into error by conflating two separate inquiries, namely, "what is the project?" and "what are the environmental impacts of that project?" The difficulty of carrying out any assessment of the impacts of a larger project which is lacking in detail, is a matter which is separate from and irrelevant to the question whether the application under consideration forms an integral part of that larger project.

91. In any event TBC did not conclude that it was impossible to carry out any assessment and, as the Transport Assessment demonstrated, it *was* possible to provide some high-level estimate of the likely effects on traffic on the basis of the link road and the minimum of 826 homes that TBC had promised to use its best endeavours to deliver as part of Phase 1 in order to secure the funding to build the bridge.

92. The Phase 1 project may not be easy to define in detail because it is at a relatively early stage, which explains why the Screening Report refers to a "lack of definition". That may affect the way in which the overall assessment of whether there is a significant impact on the environment is carried out – it would necessarily be based on less concrete information than an assessment at a later stage of the planning process would be. However, in my judgment it cannot affect the answer to the initial question at the screening stage, "is this application part of a larger project"? If and to the extent that TBC treated it as if it did, they fell into error.

93. The fact that the Planning Practice Guidance addresses the potential relevance of "other existing or approved developments" and tells local planning authorities that they should always have regard to the possible cumulative effects arising from any existing or approved development, should not be taken as restricting consideration of the impact of larger projects to "existing or approved" developments.

94. I accept that there was no evidence of any deliberate attempt by TBC to "salami-slice" in the present case. There were cogent justifications provided for hiving off and accelerating the application for the bridge, which had nothing to do with a wish to avoid the impacts of a full EIA assessment. But it does not follow from the fact that the application for the bridge was hived off in that way that its relationship to Phase 1 of the Masterplan, which provided the sole underlying justification for its existence, could be lawfully ignored when deciding on the identity of the "project".

95. The developer's lack of nefarious intent in accelerating one aspect of a development in advance of the rest is irrelevant; the question is whether, on an objective analysis of the

facts, the "project" for the purpose of the EIA Regulations would be too narrowly confined if the screening authority looked at the subject of the application in isolation, with the upshot that the environmental impact of the wider project would be looked at piecemeal instead of as a whole.

96. I accept Mr Brown's submission that in deciding not to carry out an EIA Assessment, TBC did not consider, as it was legally obliged to, whether the bridge application was an integral part of a larger project. The evidence that TBC ought to have taken into consideration provides strong support for ARPC's case that it was, though ultimately that will be a matter for the planning judgment of TBC when they come to consider the matter afresh, approaching the issue in a legally correct manner.

97. The Screening Report described the bridge as "essentially enabling works for future development of sites proposed for new residential and community development within [the Masterplan]". Consistently with the explanation given by the Planning Officer in the OR, it said that the bridge was "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." As I have already observed, the necessary implication is that it would otherwise have been advanced at the same time (as is confirmed by the OR itself, see paras 48 and 49 above).

98. The bridge serves no purpose other than to unlock the sites to the east of the railway line for development, and is of no use at all without a functioning highway running across it. As Mr Brown submitted, there would be no rational justification for building a non-functional bridge over the railway line in that location, particularly if it would harm the setting of Grade 2 listed buildings, unless it was intended to serve at least the minimum of 826 new homes within the Phase 1 development which the HIF funding was designed to facilitate. In short, there could be no Phase 1 development without the bridge, and the bridge served no purpose in the absence of the Phase 1 development, including the functioning link road which would run across it. None of this information appears to have been taken into consideration by TBC when determining the identity of the "project" for screening purposes.

99. The Judge never addressed those objections, which are well-founded, and that is enough to allow this appeal on the first aspect of ARPC's case on Ground 3.

100. I also accept Mr Brown's further submission that in any event the Judge erred in finding that TBC lawfully considered the bridge was a single "project" for the purpose of the EIA Regulations. This is not a rationality challenge to that conclusion, but a challenge to the way in which TBC arrived at it. However, Mr Brown did submit that if the author of the Screening Report had addressed the right question, it is hard to see how he could have reached any conclusion other than that the bridge was integral to other development, at the very least as regards the roads serving it. I have already indicated that there is powerful support for that conclusion in the evidence, but as Mr Pereira stressed in the course of his oral submissions, it is not the function of this Court to usurp the planning judgment of the relevant authority. At most, it can indicate to TBC how it should have gone about the identification of the "project" and what factors are and are not relevant to that assessment.

101. Regrettably, none of the justifications provided by the Judge for his conclusion that there was no error of law in the Screening Report withstand scrutiny. In para 119, he

appears to have regarded it as conclusive of the question whether Phase 1 was a "project" for the purposes of the 2017 Regulations that the application was simply for the bridge and not for the totality of the relevant development. Insofar as he did so, he erred in law. That would be true in any "salami-slicing" case, which necessarily concerns a situation in which the application is confined to one aspect of a larger development. Moreover, in para 120, he appeared to consider that the lack of any intention to "salami-slice" was conclusive of the question whether considering the bridge in isolation would be tantamount to "salami-slicing". As explained above, it is not relevant, let alone conclusive.

102. The Judge also appeared to consider that because the EIA Regulations would apply in future when Phase 1 is brought forward for application, or when the Masterplan is given formal planning status, they cannot apply now. That is not a test set out in the case law and, indeed, appears to me to be contrary to the decision of the Supreme Court in *R(Champion) v North Norfolk District Council* [2015] UKSC 52, [2015] 1 WLR 3710. In that case it was held that a legally defective opinion not to require an EIA at an appropriate stage cannot be cured by carrying out an EIA at a later stage (nor even by carrying out an equivalent assessment outside the Regulations at the correct stage). As that case makes clear, it is entirely possible for there to be a series of EIA assessments over time, as the details of a project are fleshed out.

103. The Judge appeared to accept at para 121 that the bridge, if constructed, may be taken into account in determining applications resulting from Phase 1 of the Masterplan when assessing whether "significant effects are likely as a consequence of a proposed development" but gave no cogent explanation for why the reverse is not true. Insofar as he was relying on the Planning Practice Guidance, the approval of the bridge is not a matter which makes all the difference to whether that structure is or is not to be regarded as an integral part of a more substantial project.

104. In conclusion on Ground 3, I am satisfied that TBC did not take a legally correct approach to the decision whether an EIA assessment was required. They never asked themselves the right questions. If and insofar as they justified treating the bridge as a stand-alone "project" by reference to (a) the difficulty of assessing the environmental impacts of the wider project (b) the fact that the Masterplan has no formal planning status or (c) the fact that EIA assessments will be carried out in future as and when Phase 1, or other aspects of it, become the subject of planning applications, they fell into error.

CONCLUSION

105. For those reasons, I would allow the appeal on all three Grounds, quash the decisions and remit the matters to TBC for reconsideration. I should make it clear, however, that nothing in this judgment is intended to influence the outcome of the future decisions that TBC will need to take as to whether to grant permission for the bridge alone, and as to whether the environmental impacts of the "project" (once it has been lawfully identified) are likely to be substantial so as to trigger a requirement for an EIA.

Lady Justice Elisabeth Laing:

106. I agree.

Lord Justice Warby:

107. I also agree.