

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

Royal Courts of Justice
Strand, London, WC2A 2LL

09/10/2015

B e f o r e :

THE HONOURABLE MR JUSTICE CRANSTON

Between:

KELTON

Claimant

- and -

WILTSHIRE COUNCIL

Defendant

- and -

HPH LTD

HAB HOUSING

Interested Parties

**Mr John Hunter (instructed by Irwin Mitchell) for the Claimant
Mr Akhlaq Choudhury QC (instructed by Wiltshire Council) for the Defendant
Ms Justine Thornton (instructed by Tracey Merett Solicitors) for the Interested Parties
Hearing dates: 17/07/2015 and 16/09/2015**

Mr Justice Cranston:

Introduction

1. The claimant seeks to challenge the grant of outline planning permission by Wiltshire Council ("the Council") for a scheme of up to 35 custom built residential dwellings, including 9 affordable homes, on land near the River Wylye, Warminster, Wiltshire. There is to be a buffer zone of grassland between the scheme and the river, fenced, and at least 8 metres wide. The claimant is a riparian owner, living approximately 700 metres downstream from the proposed development. Apart from this, there have been many objections to the scheme. The interested parties are HPH Ltd ("HPH"), whose experience lies in commercial development, and HAB Housing; they were the applicants for planning permission. Also featuring in the case is

Selwood Housing Association (“Selwood”), a not for profit association based in Trowbridge, Wiltshire.

2. The site is on the southern side of Boreham Road, east of Warminster, with Boreham Mill to the southeast and adjacent to the River Wylfe to the south. The river and sections of its banks are part of the River Avon Special Area of Conservation (“the River Avon SAC”) and a Site of Special Scientific Interest (“SSSI”). The development does not lie within either, although the proposed buffer zone between it and the river, within HPH’s control, does. Nor does it fall within the Bishopstrow Conservation Area nearby, although it is within its setting. A Grade II listed milestone is located at the existing entrance to the site, which is proposed to be relocated to accommodate the new access. There is also a Grade II listed stone arched bridge adjacent to the site, another located approximately 90 metres away, and two Grade II listed dwellings approximately 126 metres north of the site. A bus depot, not far from the site, is marked for housing development.
3. The judicial review is advanced on four grounds. The first relates to the participation of one of the councillors on the Council’s planning committee, Councillor Magnus Macdonald, whose vote carried the decision in favour of granting the outline planning permission. It is alleged that he was disqualified from participating in the planning committee on this matter, because he is a director of Selwood which has had an interest in the affordable housing part of the development. Cllr. Macdonald receives, as director, some £3000 per annum. Next, it is said that the development will have a significant effect on the River Avon SAC, specifically because of the risk of contamination to the River Wylfe arising from the specialist foundations required for the development. Further, the claimant alleges that the Council’s Environmental Impact Assessment (“EIA”) screening opinion for the development was flawed. Finally, it is claimed that the Council’s conclusion that the development would not cause harm to heritage assets is flawed.
4. This was to be a one day hearing in Bristol on 17 July 2015. At the outset of the hearing there was an issue relating to witness statements from Lindsay Holdoway of HPH (served 4 July) and Paul Walsh of Selwood, relating to ground 1 and the relationship between HPH and Selwood. Additional evidence had been produced, including Mr Walsh’s statement, following the claimant’s request for disclosure of documents late on 13 July, three days before the hearing. That request was contained in the claimant’s skeleton, which had been due on 10 July. Disclosure was given on 15 July. At the hearing Mr Hunter, for the claimant, stated that he wanted to cross-examine these witnesses. There was no way that could be done and the case heard to completion on 17 July. The case could have been adjourned but I decided to hear the other three grounds, postponing consideration of ground 1. The parties were not able to reconvene until mid-September, even though I was prepared to hear the case before that. In the result, I heard ground 1 on 16 September, during the judicial vacation.

The application for outline planning permission

5. The site was inherited by Mr Holdoway from his father in 1991. Mr Holdoway and his wife now control its ownership and Mr Holdoway owns a controlling stake in HPH. No other party has had any financial interest in the site. In anticipation of an application for planning permission, HPH obtained reports in 2009 from Keystone Ecology (“Keystone”), environmental consultants. There was an ecological appraisal of potential constraints on development; a reptile survey; a preliminary tree survey for bat roosts; a bat activity survey; and an otter and water vole survey. In 2012 Keystone produced a second ecological appraisal of the site and an updated otter and water vole survey. In 2013 it completed a dormouse survey and a biodiversity value assessment.
6. HPH commissioned Ground Investigations (South West) Ltd (“Ground Investigations”) to conduct a Geo-Environmental Site Assessment dated 2 July 2013. It reported that while the site

was originally water meadow, in 1963 permission was granted for the tipping of excavated soil up to 1 metre above road level. Notwithstanding the terms of that permission, levels at the site in 1963-1964 were raised by up to 2 metres. Investigations had shown that ground conditions therefore comprised made ground up to 1.95 metres in depth, original topsoil, and alluvium upon a bedrock of Shaftesbury sandstone. Groundwater was struck in exploratory holes between 1.7 and 3 metres in depth. The report opined that subsequent variations in groundwater and hydrological conditions could occur in response to future seasonal or climatic changes. It added: “Groundwater levels on this site are likely to be influenced by the water levels in the adjacent River Wylfe and drainage ditches.”

7. Regarding possible sources of ground and groundwater contamination, the report noted that the majority of materials used to raise the site appeared to be reworked natural soils. There was a risk associated with materials of anthropogenic origin or of unknown composition, “that were not discovered within the selected positions of investigation”. The bus depot was a potential off-site source of mobile contamination.
8. As to controlled waters, the report stated that the site is located in an area of a principal aquifer and noted the proximity of the River Wylfe. Both controlled waters were deemed, the report said, highly sensitive. Thus a quantitative risk assessment was undertaken. Ten soil samples from the site were analysed and tested for over 50 different contaminants. The vast majority of the tests were negative or indicated negligible levels. However, one soil sample of the ten revealed an elevated level of arsenic and three samples revealed elevated concentrations of five PAH (polycyclic aromatic hydrocarbons) compounds: [5.3.3]. The report considered remedial measures to address the consequent risks to human health, including a thickness of ground cover in private gardens and communal areas: Vigilance was required during construction, it said, and should evidence of contamination or other materials be revealed further analysis and assessment may be required [5.3.4].
9. In terms of the pollution risks to controlled waters, the report considered them in the context of the proposed land use. It explained:

“[5.4.1] No attempt is made to evaluate water pollution risks such as might arise as a consequence of activities that take place to facilitate and realise the redevelopment of the site. These matters should, however, be considered by the Principle Contractor who, where necessary, should ensure that appropriate actions are taken to adequately mitigate such risk.”

The report said that there were marginally elevated concentrations of total petroleum hydrocarbons (“TPH”) in groundwater samples, but there was no link between those contaminants and the site. One possible source was the bus depot. TPH and arsenic were not detected in the river water samples. The report concluded on this aspect as follows:

“[5.4.6] Notwithstanding the above, given the fact that there are no potable groundwater abstractions in the vicinity of the site and that the samples recovered from the River Wylfe (i.e., a critical receptor) did not contain any detectable concentrations of TPH, taking into consideration the low risk ranking of the detected hydrocarbons, it is our opinion that a viable pollutant linkage is not present. As such, subject to consultation with the regulators, it is considered that the site and proposed development [do] not present a significant risk to sensitive environmental receptors.”

10. The report contained advice on ground engineering in the context of the design and construction of the proposed development. Excavations could be expected to encounter groundwater. Earthworks would need to comply with Environment Agency protocols to prevent soil particulate matter or surface water runoff from entering the River Wylfe: [6.2.1]. It would be necessary to afford particularly careful consideration to the design and construction of the

foundations and ground floor slabs of the proposed development in the light of the poor near surface ground conditions revealed: [6.3]. Possible foundation solutions included either piled foundations to the depth of the bedrock or “vibro ground treatment”. In the case of both, the report advised, the Environment Agency would have to be fully consulted since both could create potential preferential pathways for contaminant migration. Vibrating ground treatment was generally acknowledged as presenting a more significant risk of creating preferential pathways for contaminants: [6.3].

11. On 31 July 2013, Ground Investigations prepared a remediation strategy. It recalled that its Geo-Environmental Site Assessment identified a slight impact of hydrocarbons on underlying groundwater but that no specific remedial measures were necessary. Appropriate precautions should be adopted during building works, it said, to minimise pollution risks to the surrounding environment. This was particularly important in this context to address the potential for creation of migration pathways through the construction of specialist foundations.
12. The Landmark Practice reported on its landscape and visual impact assessment (LVIA) in December 2013. As regards the setting of listed buildings, the report noted the repositioning of the milestone, but that was offset by its restoration “and so the overall effect of the setting of the milestone is considered to be adverse but minor”. The proposed development “will have only a minor adverse effect on the setting of the bridge adjacent to the site”. Grade II Chatley House was 263 metres further west along Boreham Road, but there “will be no effect to the setting or visual amenity from this property”. As to the other Grade II listed properties, 146 and 147 Woodcock Road, their immediate setting comprises playing fields, Woodstock Road and late twentieth century housing opposite. One property had views towards the site, but the proposed development would be set back from Boreham Road with a 20 metre green buffer to the façade of the first house. Thus the proposed development would have only a minor adverse effect on the setting of the bridge adjacent to the site. The report concluded on this aspect as follows: “Therefore the significance of the effects on the setting is assessed as adverse but of minor significance.” As regards the effect of the development on the setting of the conservation area, the Landmark Practice report concluded that it was “considered to be negligible”.
13. HPH submitted the current application for outline planning permission, along with HAB Housing, in December 2013.
14. Keystone Ecology completed its Habitats Regulation screening in early December 2013. It consulted Natural England, the Environment Agency, the Council and others on the range of likely impacts of the development. Impacts raised by Natural England were water quality and the River Avon SAC. It stated first that the arrangements for foul water disposal were unclear, but had been addressed in discussions with Wessex Water. Secondly, there was an issue of surface water runoff, which would be addressed by the adoption of an appropriate sustainable drainage system and the monitoring of water quality in the existing ditch as part of the ecological management plan. Finally, there was the issue of pollution incidents during construction. Avoidance and mitigation were provided by the works complying with the Environment Agency’s document, Pollution Prevention Guidelines.
15. In early January 2014, English Heritage wrote to the Council that it did not object to the revised scheme with the Landmark Practice report. However, it said that it would like to have assurances that the buffer area proposed to the south east of the site would be sufficient to alleviate any harm which might be caused to the setting of the mill and the conservation area. (The assurance was subsequently provided.) English Heritage urged that the application be determined in accordance with national and local policy guidance and on the basis of the Council’s specialist conservation advice. It did not need to be consulted again.
16. Natural England wrote on 20 January 2014 that it had no objection to the proposed development. It noted the conclusion of the Keystone Ecology screening report of December

2013 that the proposal could be screened out from further stages of assessment because significant effects were unlikely to occur. The letter stated:

“This development proposal has a lot of potential for enhancing biodiversity and improving the condition of the River Avon SAC and SSSI at the stretch of the River Wylfe adjacent to the development site...”

17. On 4 February 2014, the Environment Agency reiterated early advice of 12 September 2013 that it had no objection to the development, subject to the imposition of planning conditions. As regards contaminated land, it said that would normally include the contaminated land conditions at this stage of the application, but overall it was satisfied from the information provided in the Geo-Environmental Site Assessment report of July 2013 that the contaminated land condition had been satisfied. However, it recommended the inclusion of three planning conditions regarding first, piling or other foundation designs using penetrative methods, secondly, infiltration of surface water and thirdly, contamination not previously identified found on the site.
18. On 3 February 2014, Louisa Kilgallen, the Council’s ecologist, completed a “Test of Likely Significance” report. That concluded that the development was not likely to have a significant effect on the River Avon SAC. Ms Kilgallen has held the post of senior landscape and design officer (‘ecologist’) with the Council for 9 years. In her witness statement, which I accept, she states that she has worked on large construction sites, including where piling and vibrated concrete columns have been used to reinforce ground conditions. She explains that she wrote the current procedure, which the Council uses to undertake assessments for the River Avon SAC, as well as previous versions, and that she has spent 9 years advising the Council on fulfilling its duty under the Habitats Regulations. She is supported by three other ecologists at the Council who routinely handle screening and assessments, including for the River Avon SAC.
19. In relation to the proposed development on the site, she has explained that she prepared the Test of Likely Significance in line with normal practices. She said that it was reasonable for her to rely on the Environment Agency’s response as regards contaminants: it had fully considered the Ground Investigation report; it was satisfied overall with the results and analysis in the report; its findings did not raise any concerns of note; and it found that the application was acceptable provided certain conditions were applied. Thus in her report of 3 February 2014, Ms Kilgallen concluded that as regards the significant risks of sediment rich water being discharged into the river during construction, and the preferential pathways for contaminants from the need for piles or vibrating columns as foundations, the Environment Agency’s advice would need to be followed and conditions would need to be resolved before reserved matters were granted. She proposed the following condition to planning permission:

“Before any works commence on site a Construction Management Plan will be submitted for Local Authority approval to demonstrate how the development will comply with Pollution and Prevention Guidelines 5: works and maintenance in or near water, (EA 2007), having particular regard to the risks associated with creating foundations for the development and the proximity of the site to the River Avon SAC. The works will be undertaken in accordance with the agreed Plan.”
20. The Council’s conservation officer wrote on 11 March 2014 that he had no objection to the proposed development: it would not necessarily have a significant impact on the Conservation Area or nearby heritage assets subject to robust landscape scheme and suitable materials, scale and design of future detailed applications.
21. On 16 April 2014, Peter Horton, a senior planning officer with the Council, issued a screening opinion under the Town and Country Planning (Environmental Impact Assessment)

Regulations 2011, SI 2011 No.1824 (“the 2011 Regulations”) (as amended), that the development did not require an environment impact assessment. The screening opinion, he said,

“requires a qualified assessment to be made based on whether the development as proposed, would likely have significant effects on the environment taking into account the characteristics of the site and proposed development...”

After referring to the Ground Investigation report of 2 July 2013 and its remediation strategy of 31 July 2013 to overcome exposure pathways, the screening opinion stated:

“Although the Council shall make no comment at this stage as to the acceptability of the proposal, the Council is satisfied that all relevant environment impacts appear to be reported within the aforesaid survey and no Environment Statement is necessary. All matters relative to land contamination can be fully considered through the normal planning process and be controlled via an appropriate planning condition should planning permission be granted.”

After referring to other reports relating to the proposed development, the screening opinion concluded.

“It is the adopted position of the Council that the potential impact and material environmental issues for this particular proposal, as well as the impact on heritage assets, ecology and habitats, transport and air quality, and health and safety can all be adequately dealt with through the normal processing of planning application.”

Selwood’s role

22. In July 2011 the Council received government funding to explore whether a Neighbourhood Development Order might be appropriate, and the site was identified as a potential candidate for custom-built housing. As part of the process, the Council asked HPH to initiate discussions with those who might provide affordable housing, and in April 2013 Selwood and Green Square Housing of Swindon (“Green Square”) were identified as possible providers. The following month, Green Square said that it was not interested, but Selwood said that it was interested in custom-built housing. In June 2013, the National Development Order idea was abandoned after objection by Warminster Town Council.

23. There had been a meeting just prior to this between HPH and Mr Walsh, the development director of Selwood, where Mr Walsh had said Selwood was “keen” to become involved with HPH on the project. After the Town Council’s objection was successful, Mr Walsh wrote on 20 June 2013 stating it was a great scheme but “good luck with Plan B”. On 8 July 2013, HPH replied:

“We are now considering a new outline application for our site at Boreham to include a full market allocation of up to 40% affordable housing...”

We would be keen to work with Selwood on the affordable housing element of this development should consent be obtained and I wonder whether you have any comments on Selwood’s preferences as to the mix of unit size and ownership/rental arrangements. I have attached below recent information obtained from Wiltshire Council on their preferred mix and also G L Hearn – our planning consultants – view on housing mix requirements. I would appreciate your views on this and whether you might be interested should consent be obtained.”

24. On 22 July 2013, Mr Walsh commented on the housing mix. There was to be a regular meeting between Selwood and the Council and Mr Walsh invited HPH to suggest “any points you would like me to make”. Some time later, Mr Walsh sent further comments on the scheme. On

6 September 2013, an internal email between HPH and its planning consultant noting that Mr Walsh would try to attend a meeting between HPH and Warminster Town Council and would say:

“[T]hat we have been consulting together on NDO project, Selwood would be interested in the affordable element (might look at some novel self-build/finish on some of the affordable) and had no reason to think that we could not work together in the future on this project once consented.

[Mr Walsh] asked if there were any key messages that we would like him to mention and I said we would forward these to him early Monday.”

HPH’s consultant replied that it was really helpful and very accommodating on the part of Mr Walsh. If Mr Walsh could emphasise that Selwood were interested in innovating a self-build variant of affordable provision “this site may capture the imagination of local councillors.”

25. The Planning, Design and Access Statement of December 2013, prepared by HPH’s planning consultants, stated that:

“Discussions have also taken place with Selwood Housing who have been identified as the potential Registered Housing Provider for the planning application proposals.”

When HPH and HAB submitted their application for outline planning permission in December 2013, the Design Principles document by HAB and HPH stated in the introduction that they:

“are in discussion with Selwood Housing as a potential affordable housing partner on the scheme. Based in Trowbridge, Selwood owns over 5,700 homes across Wiltshire and Somerset, and has a strong focus on building successful communities and helping people to live more environmentally-friendly lives.”

26. In January 2014, HPH emailed Selwood, explaining that in conjunction with its new partner, HAB, it was planning to hold a 4 hour workshop in Warminster Civic Centre in February between 4pm and 8pm around the topic of custom-builds. The aim was to encourage interest in this form of housing delivery. Whilst relating this to the Boreham site, it would also be dealing with such things as the availability of mortgage finance, sustainability, the variety of custom-build models and affordable self-build housing. HPH wondered whether Selwood would be interested in joining that event, having a Selwood stand and exploring how Selwood might attract prospective interest in affordable custom-build, “We would very much like you to be involved if you can...”
27. In April 2014, there were discussions between HAB and the Council regarding the provision of the affordable housing. On 7 April the housing manager at the Council emailed HAB suggesting a meeting with them and Selwood. Mr Holdoway, from HPH, emailed HAB that it seemed the Council was “getting slightly ahead given this is an outline application and no terms have yet been agreed with Selwood”. HAB responded on 9 April stating: “Agreed regarding position with Selwood – perhaps we can have a discussion with [Selwood] and ask how they can assure us that we are getting good (even if not absolutely best value).”
28. The evidence of Mr Walsh was that Selwood was a member of the Council’s Development Partnership and that it was on this basis that Selwood gave advice to HPH and HAB about affordable housing. Mr Holdoway’s evidence was that Selwood offered the advice informally and unpaid; Green Square was not interested in providing advice. Mr Holdoway explained that since HPH was new to affordable housing it needed help. It was the intention to tender the affordable housing element of the development once outline planning permission was granted. The evidence of both Mr Walsh and Mr Holdoway, which I accept, is that it is standard practice

for developers to tender the affordable housing part of a development to ensure the best deal. Thus, at the application stage there will be no formal agreement between an affordable housing provider and a developer.

The planning committee meets

29. The officer's report to the Council's Western Area planning committee ("the planning committee") recommended that the application be approved, albeit acknowledging that it was a departure from the development plan. The officer's report noted that an ecological buffer zone of 0.53 hectares was proposed around the perimeter of the site along the River Wylfe in accordance with a management plan, which would create an undeveloped natural ring around the new development, maintaining the green boundary to the site. The officer's report recalled that Natural England, English Heritage and the Environment Agency had no objection to the development, and that the Council's conservation officer had concluded that the proposed development would not have a significant impact on the conservation area or the nearby heritage assets.
30. The section of the officer's report on the Bishopstrow Conservation Area noted that neither English Heritage nor the Council's conservation officer objected to the proposal. However, English Heritage has sought assurances that the buffer area proposed to the southeast of the site would be sufficient to alleviate any harm that might be caused to the setting of Boreham Mill and the Conservation Area. The officer's report then addressed how measures such as the proposed buffer zone and planting would address that issue. The officer's report stated that officers had concluded that developing the site would not harm the character and appearance of the wider countryside or harm the setting of Bishopstrow Conservation Area or nearby heritage assets.
31. There were many objections to permission being granted but there were four letters in support, including one from Selwood and two from promoters of self-build housing. In introducing Selwood's letter of support, the officer's report noted that Selwood was "the affordable housing provider that has been working with the applicant". Later, the officer's report stated:

"The applicant has already identified Selwood Housing to deliver the affordable housing and they are keen to innovate an affordable housing custom-build model."
32. The planning committee met on 11 June 2014. On 9 June 2014, Mr Chris Wordsworth from HPH had asked Mr Walsh if it would provide support at the meeting of the planning committee itself, to be held two days later. Mr Walsh attended the meeting but I accept his evidence that he had another application before the planning committee that day and if this had been dealt with before the HPH/HAB application he would have left, since he had other work to do. In any event he did not speak when the HPH/HAB application was considered.
33. When HPH/HAB's application came to be considered, another councillor objected to Cllr. Macdonald's participation. Mr Walsh sent Cllr. Macdonald a note. That note is no longer available; the Council officials at the meeting should have ensured that it was retained. Mr Choudhury very fairly accepted that this was a failing. The Council's Planning Code of Conduct for Members addresses outside interests and the issue of contact with applicants, developers and objectors and provides at paragraph 9.6:

"Public Speaking at Meetings – The council has an established procedure in respect of public participation at planning meetings. This should be complied with. In particular, it is not permissible during meetings for members of the public to communicate with councillors debating the proposal either orally or in writing, as this may give the appearance of bias."

The evidence establishes that the note stated said that Selwood had no formal agreement with the applicants and all that it had done was to talk to them.

34. The minutes of the planning committee meeting record that Cllr. Macdonald declared that he was a member of the Selwood board.

“However, Selwood Housing made a late submission in writing to clarify that it was a prospective partner, not the applicant, and that there was no formal agreement in place, after which Councillor Magnus Macdonald stated that he would vote on the application.”

Following the debate, which focused on affordable housing, he cast his vote in favour of approving the application. The final vote was 6 in favour, 5 against, with the chair voting against. Thus, if Cllr. Macdonald had withdrawn from the debate and not voted the application would have been refused. As regards the other applications before the committee that day, involving an application by Selwood itself, Cllr. Macdonald declared a pecuniary interest and withdrew from the meeting during its consideration.

35. Following the meeting, a complaint was made by another councillor to the Council’s deputy monitoring officer regarding Cllr. Macdonald’s participation at the meeting. It alleged a breach of the Council’s Code of Conduct. The deputy monitoring officer decided that there was no breach and that no further action should be taken.
36. HAB put the affordable housing part of the development (9 of 35 houses) to tender. Six parties were invited to tender, Selwood included. Only Selwood and Curo (based in Bath) bid. In an email of 30 June 2014 to HPH, HAB stated that “with their size, scope and experience it is very possible that Curo may be the stronger bid”. Later in the year, in November, Selwood became the preferred bidder for the project and Curo dropped out. Mr Walsh’s evidence was that there was no guarantee Selwood would eventually bid, but it seems to me that it was most probable it would given its close involvement with HPH and HAB throughout the application process.
37. Notification of outline planning permission was issued on 21 January 2015, with 25 conditions. Condition 12 is that prior to commencement of the development, the Council shall approve a scheme to maintain and enhance the River Avon SAC as agreed with the Environment Agency and Natural England, which will demonstrate the works in the buffer zones and details of a water quality monitoring programme. Condition 14 is as follows:

“[14] Piling or any other foundation designs using penetrative methods shall not be permitted other than with the express written consent of the local planning authority, which may be given for those parts of the site where it has been demonstrated that there is no resultant unacceptable risk to groundwater. The development shall be carried out in accordance with the approved details.”

38. Condition 17 provides:

“[17] No development approved by this permission shall be commenced until a Construction Environmental Management Plan, incorporating pollution prevention measures, has been submitted to and approved in writing by the local planning authority. The plan shall subsequently be implemented in accordance with the approved details and agreed timetable.”

39. Condition 20 states that the development should be carried out in accordance with approved plans, including the proposed ecology zone. Under condition 21, safeguards should be implemented during the construction phase to minimise the risks of pollution from the development, and the applicant was referred to the Environment Agency’s Pollution Prevention Guidelines. Condition 25 prevents development commencing until there is a report on

contamination on the site, submission of a remediation scheme and its implementation, the reporting of unexpected contamination, and the verification of remedial works.

Ground 1: Bias/Disqualification

40. Mr Hunter for the claimant advanced as his first challenge on this ground the rule of automatic disqualification for financial interest. His argument was that Cllr. Macdonald was automatically disqualified as a result of his directorship of Selwood. Selwood was involved in the application and had an interest in its fate given that the applicants for planning permission had identified it as, effectively, their affordable housing partner.
41. The rule about automatic disqualification for pecuniary or proprietary interest was stated in *Dimes v Proprietors of Grand Junction Canal* (1852) 3 HL Case 759, where the judge, Lord Cottenham, had a shareholding in the defendant canal. The extent of any disqualifying interest is irrelevant: *Serjeant v Dale* (1877) 2 QB 558, 566; *R v Camborne Justices, ex parte Pearce* [1955] 1 QB 41, 47. In *R v Bow Street Magistrates, ex parte Pinochet (No. 2)* [2000] 1 AC 119 the rule of automatic disqualification was held to extend beyond pecuniary or proprietary interests to the promotion of a cause, in that case the judge “taking an active role as trustee or director of a charity which is closely allied to and acting with a party to the litigation”: at 132-3, 136, per Lord Browne-Wilkinson. The rule was first applied to decisions made under planning legislation in *R v Hendon RDC, ex parte Chorley* [1933] 2 KB 696, a case where one of the councillors present at the meetings deciding by general assent to grant planning permission was the estate agent for the owner of the land. The bias was said to be “quite clear”.
42. In my view, Cllr. Macdonald had no direct pecuniary or proprietary interest in the planning application so as to be automatically disqualified from participating in the decision. The case is not comparable to the *Chorley* case [1933] 2 KB 696, where the councillor was acting as an agent for the existing owner of the land in negotiations for its sale to the prospective developer. The decision of the committee in the present case did not lead to Cllr. Macdonald obtaining any benefit. There are too many contingencies between the committee’s decision and any benefit to him as a director of Selwood for the rule to have any purchase. As to promotion of a cause, it seems to me that *Pinochet* was an exceptional case, not only because it involved, as it did, a judge. Here Selwood was not a party to the decision, as the charity was in that case. Cllr. Macdonald cannot be regarded as promoting the cause of affordable housing through his voting on planning permission on this application.
43. The second challenge on this ground was statutory disqualification as a result of a disclosable pecuniary interest. Section 31 of the Localism Act 2011 (“the 2011 Act”) provides:

“31. Pecuniary interests in matters considered at meetings or by a single member

- (1) Subsections (2) to (4) apply if a member or co-opted member of a relevant authority –
 - (a) is present at a meeting of the authority or of any committee, sub-committee, joint committee or joint sub-committee of the authority,
 - (b) has a disclosable pecuniary interest in any matter to be considered, or being considered, at the meeting, and
 - (c) is aware that the condition in paragraph (b) is met.

...

- (4) The member or co-opted member may not –

- (a) participate, or participate further, in any discussion of the matter at the meeting, or
- (b) participate in any vote, or further vote, taken on the matter at the meeting”.

A ‘disclosable pecuniary interest’ is defined by section 30(3) as follows:

“(3) For the purposes of this Chapter, a pecuniary interest is a disclosable pecuniary interest” in relation to a person (“M”) if it is of a description specified in regulations made by the Secretary of State and either –

- (a) it is an interest of M’s...”

The Relevant Authorities (Disclosable Pecuniary Interests) Regulations 2012, 2012 SI No. 1464, specify in the Schedule, “Any employment, office, trade, profession or vocation carried on for profit or gain.” Under section 33 there can be an application for dispensation from the requirements of section 31.

44. *R (on the application of Freud) v Oxford City Council* [2013] EWHC 4613 (Admin) was a renewed application for permission to apply for judicial review regarding a decision to grant planning permission for a new School of Government building for the University of Oxford. One of the members of the committee was employed by the university. In the course of his reasons, Ouseley J said that the councillor was employed by a different part of the university and

“41 ...for him to have been obliged not to participate in the debate, it would have to be shown that he had a disclosable pecuniary interest in the subject matter of the discussion. He had no pecuniary interest in this subject matter. He was not in any part of the university which was promoting it. He had no contract to deal with it. He had nothing in that respect which could amount to a disclosable pecuniary interest in that matter.”
45. Mr Hunter contends that, under section 31, Cllr. Macdonald had a disclosable pecuniary interest in the matter before the planning committee. He was aware that Selwood stood to benefit directly from the grant of permission and accordingly was statutorily disqualified from participation in the meeting and should have withdrawn. In my view, however, Cllr. Macdonald had no disclosable pecuniary interest in the matter to be considered. Selwood was not the applicant for planning permission and at the point of the decision had no contract with HPH/HAB. It may have built up goodwill with its advice to them over a period, but at the time of the grant of planning permission the affordable housing part of the development was yet to be tendered. In the result, Cllr. Macdonald was not disqualified under section 31 of the 2011 Act.
46. Apparent bias is the third challenge under ground 1. The legal test for the appearance of bias is set out in *Porter v Magill* [2002] 2 AC 357:

“The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased”: [103], per Lord Hope.

Whether there is apparent bias is to be judged from the point of view of a reasonable observer having regard to all material facts which that observer would have been able to ascertain as a member of the public. Each case turns on its own facts: *Resolution Chemicals Ltd v H Lundbeck A/S* [2013] EWCA Civ 1515; [2014] 1 W.L.R. 1943, [36]. The principle of apparent bias applies in the context of local government decision-making, although its importance is

generally more limited in this compared with a judicial context: *R (Lewis) v Redcar and Cleveland Borough Council* [2008] EWCA Civ 746; [2009] 1 W.L.R. 83, [71] [98], [113].

47. Two cases involving local government decision-making throw light on how the principle of apparent bias applies in practice. In *R v Chesterfield Borough Council ex parte Darker Enterprises*, [1992] C.O.D. 465, a councillor who was a director of the Coop had voted refusing to renew a licence for a sex establishment next to a Coop store. The councillor had appreciated that he might be seen to have an interest because if the sex establishment closed, the Coop could expand into its premises. He declared his interest and took no part in the decision. Nonetheless, Brooke J held that there was apparent bias and quashed the decision of the committee.
48. By contrast, in *R. v Holderness BC ex parte James Robert Developments Ltd* (1993) 66 P & CR 46 one of the members of the planning committee declining planning permission was a councillor who worked for a rival builder in the same area to the applicant. The matter came before the Court of Appeal on costs, but in the course of the judgement the issue of whether a breach of natural justice had occurred by reason of the appearance of bias was considered. By majority it was held that there was no breach. After referring to the advantages, which it was said that the councillor's position gave him, Simon Brown LJ said:

"However sceptically one may regard the integrity of local government decision-making as a whole, those contentions, I am bound to say, strike me as altogether too cynical. No doubt in an ideal world no one would ever adjudicate upon another's cause if it gave him the very least opportunity to advance some interest of his own, however indirectly. No doubt the very most fastidious of Councillor Hunter's friends, if asked whether he should sit on the planning committee dealing with these appellants' applications, might have suggested that perhaps it would be best if he did not. But I can hardly think that all his friends would clearly thus have advised him and in my judgement it is going too far to say, as we are invited to do upon this appeal, that the mere fact of being a rival builder (perhaps one of many) within a provincial planning district necessarily disqualifies one from sitting on the planning committee": at 49.

Butler-Sloss LJ agreed:

"All councillors elected to serve on local councils have to be scrupulous in their duties, search their consciences and consider carefully the propriety of attending meetings and taking part in decisions which may give rise to an appearance of bias even though their actions are above reproach. But if a builder is not to sit on a planning committee when planning applications are made for development by a rival builder, in effect he is to be debarred from sitting on the planning committee at all... Equally can a surveyor, or architect sit on the planning committee since one or both may be involved with other builders in projects in the area? Is it too far-fetched to ask builders' merchants and other suppliers to debar themselves, or plumbers or electricians? Within this simple formula as proposed is a wholesale requirement for all those who know something about planning and building or ancillary services within the area to absent themselves from a committee where their general expertise might be useful": at 57-58.

49. Both Mr Choudhury for the Council and Ms Thornton for HBH contended that the mere fact that Cllr. Macdonald was a director of Selwood, a potential partner of HPH and HAB, would not have caused the fair-minded and informed observer to conclude that there was a real possibility of bias. Their arguments ran as follows. All Selwood had done, as part of the Council's Development Partnership, was to give advice to HPH and HAB. At the planning committee meeting there was a discussion about whether Cllr. Macdonald could properly participate in the decision-making. The note Mr Walsh passed to Cllr. Macdonald was that there was no legal agreement in place and all that had happened was that Selwood had spoken to HPH. What was stated in the note was before the committee. Those facts would reassure a fair-minded and informed observer that Cllr. Macdonald and the committee were alive to the

potential for bias and had considered the matter carefully. The evidence now available confirms that there were several other interested providers, and that the invitation to tender, following outline permission, was sent to six providers, including Selwood. Certainly, since the grant of planning permission, Selwood has moved into the position of becoming the potential development partner, with Curo dropping out, but it was obvious that the scheme would be tendered since that was standard practice. Thus Cllr. Macdonald was at most the director of a potential development partner.

50. In my view, Cllr. Macdonald's participation in the decision to grant planning permission gave rise to an appearance of potential bias as defined by Lord Hope in *Porter v Magill*. It was plainly in Selwood's interests and Cllr. Macdonald's, as director, for the application to be approved. The reasonable and fair-minded observer, having the background facts, would have been aware that Selwood had committed time, resources and expertise in the way described earlier in the judgement to working with HAB/HPH over the design of the affordable housing part of the scheme. It may have begun this since it was part of the Council's Development Partnership although no one else did, Green Square having dropped out at an earlier stage. Mr Walsh's evidence was that Selwood had not made a final decision to bid for the scheme. In my view, however, it was highly unlikely that Selwood would have gone to all the trouble it did unless it was seriously interested in delivering the affordable housing part of the scheme and had reason to believe that it stood a good chance of winning the tender once planning permission was granted. As Mr Choudhury realistically conceded, it had built up goodwill with HPH. The evident reality of the position then was that although it was not a done deal, Selwood was the front runner to deliver the affordable housing part of the scheme and would, barring something unforeseen, be appointed to do so in due course. The note from Selwood to Cllr. Macdonald at the meeting of the planning committee fell short of stating the position accurately when it said that all that Selwood had done was to talk to the applicants.
51. The fair-minded and informed observer would also have been aware of what HPH and HAB were saying. HPH expressly wrote to Selwood that it was keen to work with it; Mr Holdoway's evidence was that it was simply professional courtesy to put it this way. I am not sure that the fair-minded and informed observer would appreciate the nuances. The impression which the Council had gained, evident in the 7 April email and the officer's report, was that Selwood was deeply involved with the scheme. In any event Selwood's strong position when it came to tendering to deliver the affordable housing was stated publicly. As set out in the design documents, it was a prospective partner working with HAB. That these documents were drawn up by planning consultants would be by the by to the fair-minded and informed observer: the fact is that these statements were authorised by the applicants and to the outside world were their statements. Moreover, Selwood was the only local, affordable housing provider to express public support for the scheme before the planning committee. Mr Walsh's evidence was that Selwood's letter was simply supporting affordable housing. However, the appearance created was that Selwood, HPH and HAB were working closely together on the scheme and had the very same interests. Curo's tendering was only later and is irrelevant to appearances at the time of the decision.
52. The authorities in this area, as is the present case, are fact specific. However, there is a parallel with *R v Chesterfield Borough Council ex p. Darker Enterprises*: just as in that case the Coop did not have an option to acquire the premises of the sex establishment next door, Selwood here did not have a contract to provide the affordable housing. Indeed it seems to me that the circumstances in the present case are stronger than in that case, because there the councillor declared his interest and did not vote. Notwithstanding this the court held that there was apparent bias. *R (Lewis) v Redcar and Cleveland Borough Council* [2008] EWCA Civ 746; [2009] 1 W.L.R. 83, where the court rejected apparent bias, was a predetermination case, in that it was alleged that the planning committee members had made their decision in circumstances which gave rise to a real risk of closed minds. Certainly one element of the attack on Cllr. Macdonald's participation was that he participated in a decision which furthered the cause of

affordable housing, which as a member of Selwood he obviously supported, but that was only part of it. The important distinction is that as a director of Selwood he also had a private interest.

53. Ms Thornton contended that there would be unfortunate consequences for the future of affordable housing were those in Cllr. Macdonald's position to be disqualified from participation in planning committee meetings. In her submission the position was analogous to that in *R v Holderness BC Ex p. James Robert Developments Ltd* (1993) 66 P & CR 46 and to the concerns raised there. In my view, Cllr. Macdonald's directorship of Selwood will not be an issue in the great majority of housing applications likely to come before the committee, even those with an affordable housing element. The position in this case is quite different. Selwood, with Cllr. Macdonald as a director, was not simply an affordable housing provider. Here it was the only provider which had been willing to give assistance on the scheme, had expressed a clear interest in delivering it, had been named by the applicants as their potential partner, and had written in support and attended the planning committee meeting when it was considered. In other words, its position was superior to that of any other interested providers of affordable housing because of its previous involvement and its prospects of winning the contract when the affordable housing part was tendered. Because of that, Cllr. Macdonald's private interests were engaged, as a director of Selwood, not just his interests in the cause of affordable housing. In all these circumstances it was wrong for Cllr. Macdonald to have participated in the meeting.

Ground 2: Impact on River Avon SAC

54. This ground concerns what the claimant contended is the Council's failure to address the risk posed to the River Avon SAC as a result of the presence of contaminants on the development land coupled with the specialised methods proposed for the foundations, contrary to its obligations under the Habitats Directive 92/43/EEC and the Conservation Habitats and Species Regulations 2010, SI 2010 No. 490 ("the Habitats Regulations"). In outline Mr Hunter's argument for the claimant proceeded as follows. The Ground Investigations report had found contaminants in the soil samples taken, advised that further investigations might reveal other soil sample concerns, and recommended measures to address the public health risks to future residents. It recognised that in light of the near surface ground water conditions which it also identified, that there would have to be special foundations on the site. Only two such methods were mentioned – presumably the only two available – pile foundations to the bedrock and vibration ground treatment. The report acknowledged that both had the potential for creating pathways for contaminant migration, yet left the solution to the future. So, too, did the Environment Agency, which proposed conditions to the planning permission to address the issue. There was no mention of the matter by Natural England.
55. When the Council's own ecologist, Ms Kilgallen, considered the issue, Mr Hunter continued, she relied on how the Environment Agency approached it, albeit that she did not consider that there would be no significant effect. He cited *Smyth v Secretary of State for Communities and Local Government* [2015] EWCA Civ 174, where Sales LJ emphasised that a decision-maker like the Council in this case cannot rely on the mere assertion of an expert, unsupported by the consideration of the background facts and without reasoning to explain the assertion made: [83]. That was the situation here. In any event, Mr Hunter submitted, the conditions ultimately imposed on the grant of planning permission were not what Ms Kilgallen suggested but what the Environment Agency proposed. Whereas she required the issue to be resolved prior to pre-preserved matters approval, the Environment Agency left it to the reserved matters stage, assuming that specialised penetration matters would not necessarily be required for the foundations. In other words, the Environment Agency did not consider whether it would be possible to use such methods without giving rise to unacceptable risk by the mitigation of contaminants to the River Wylfe. Thus there was a breach of the Habitats Regulations by the Council not considering whether the development would have a significant effect on the River Avon SAC before it granted permission.

56. Mr Hunter finally submitted on this ground that it was necessary before permission was granted and condition 14 imposed for the Council to have ascertained that there would be at least one foundation design which would avoid the risk to the SAC. That followed because of the principle that a planning authority which has granted planning permission cannot subsequently refuse to approve a scheme required to be submitted under a reserved matter or condition on the grounds that it is unsatisfactory if it must have been aware that no scheme more acceptable could, in practice, be devised. To allow the scheme to be refused in those circumstances would effectively derogate from the grant of permission: see *Lewis Thirkell v Proberun Ltd v Secretary of State for the Environment* (1991) 61 P&CR 77, 85-86, per Glidewell LJ.
57. Regulation 61 of the Habitats Regulations required the Council to make an appropriate assessment of the implications for the River Avon SAC of a proposal likely to have a significant effect on it. That is a question of degree calling for the exercise of judgement: *R (Jones) v Mansfield District Council* [2013] EWCA Civ 1408; [2003] Env L.R. 21, [38], per Dyson LJ. Based on the reports referred to earlier, the Council concluded that the development was not likely to have any significant effect and both the Environment Agency and Natural England agreed. Paragraph 5.4.6 of the Ground Investigations Report, quoted above, concluded that the samples recovered from the River Wylfe did not contain any detectable concentrations of TPH; there was no viable pollutant linkage between the site and contaminants in the groundwater, and it was considered that the site and proposed development did not present a significant risk to sensitive parts of the environment, such as the River Wylfe. So that dealt with the general risk of contaminants reaching controlled waters: the development itself would not have any significant effect on the River Avon SAC.
58. As to the claimant's point about the specialist groundwork and the risk of it creating potential pathways for contaminants to reach the river, it was addressed in the Ground Investigations report. It stated in paragraphs 6.2.1 and 6.3 that earthworks would need to be carefully controlled and completed in accordance with Environment Agency protocols, and full consultation would be required concerning the most appropriate piling technique to ensure potential preferential pathways for contaminant migration were not created. The Environment Agency was aware of the issue, proposing conditions to address it. So, too, was the Council's ecologist, Ms Kilgallen. I do not accept that she failed to exercise her judgement independently of the Environment Agency on this issue. As I said earlier, she has had experience with piling and vibrated concrete columns and with assessments for the River Avon SAC. Moreover, her independent judgement is evident in the condition she proposed, which differed from what the Environment Agency preferred.
59. The evidence demonstrates to my satisfaction that the Council had sufficient objective information to reach its conclusion that under the Habitats Regulations no significant effect was likely. Insofar as a risk was identified in relation to the construction works, this was addressed with conditions which specifically address it. These conditions refer, inter alia, to the need to follow Environment Agency protocols and to consult with it over the technologies used. There can be no objection to this course especially for what, after all, is a small scale development and when the risk is small: see *R (on the application of Long) v Monmouthshire County Council* [2012] EWHC 3130, [76]-[78], [82].
60. There is clear authority that mitigation measures such as those contained in these conditions can be taken into account in assessing significant effect under the Habitats Regulations: *R (on the application of Hart District Council) v Secretary of State for Communities and Local Government* [2015] EWCA Civ 174, [72]-[74]. There is nothing in the evidence to suggest that measures pursuant to the conditions are not possible. Their wording contains the additional safeguard that if some unforeseen adverse impact is subsequently identified, which cannot be resolved by mitigation, the development will be cut back to the extent necessary to ensure there will be no effect on the integrity of the River Avon SAC: see *No Adastral Town Ltd v Suffolk Coastal District Council* [2015] EWCA Civ 88, [74], per Richards LJ.

61. As to the *Proberun* principle, that has no application to the circumstances of this case. There the condition required approval regarding the means of access to the buildings. The issue was whether it could be refused for access which was the best that could be achieved within the site or could it be refused unless the applicants were able to obtain control over some land outside the site. Glidewell LJ held that the planning authorities were confined by the condition to the former. In this case, condition 14 is a perfectly straightforward negative condition: there was to be no piling without approval. No one, including Natural England and the Environment Agency, has suggested that it is not a reasonable condition. This was nothing like a condition that was impossible to meet.

Ground 3: EIA screening

62. The objective of the Environmental Impact Assessment Directive 2011/92/EU is to ensure that, before permission is granted, projects likely to have significant effects on the environment should be made subject to a mandatory assessment with regard to their effects. The directive is given effect in the United Kingdom by the 2011 Regulations, the Town and Country Planning (Environmental Impact Assessment). A person proposing a development may request the planning authority to adapt a screening opinion as to whether an Environmental Impact Assessment (“EIA”) is required: r.5(1). Once a development falls within Schedule 2 of the 2011 Regulations, an EIA is required if the development is likely to have significant effects on the environment by virtue of factors such as its nature, size or location: r.2(1). Likely means a “serious possibility” or “real risk”: see *R (on the application of Bateman) v South Cambridgeshire District Council* [2011] EWCA Civ 157, [17], per Moore-Bick LJ; *Evans v Secretary of State* [2014] EWCA Civ 114, [21], per Beatson LJ. In deciding whether the development is likely to have significant effects, regard must be had to the criteria in Schedule 3.
63. In Mr Hunter’s submission there were two fundamental legal flaws in the Council’s screening opinion which concluded that the development would not have significant effects on the environment. First, it applied the wrong test; and secondly, it failed to consider whether there was a risk of significant effects on the River Avon SAC as a result of the presence of contamination on the land and the need for specialised groundworks for the proposed development. At the second hearing, Mr Hunter invoked in support *R (Champion) v North Norfolk District Council* [2015] UKSC 52; [2015] 1 W.L.R. 3710, [46], [53], per Lord Carnwath.
64. As to the first point, Mr Hunter contended that the Council’s screening opinion, having made clear that it was not determining the acceptability of the proposal, placed an impermissible gloss on the test of likely significant effects by adding a further requirement. That requirement was in effect that the impact would have been such that it could not be adequately dealt with through the normal processing of the planning application. In his opinion, such an approach is wrong as a matter of law: see *R (Gerber) v Wiltshire County Council* [2015] EWHC 524 (Admin). Regarding the second point, Mr Hunter’s argument was that while the screening opinion did take into account the risk posed from contamination to humans, it did not take into account the risk posed by contaminants moving through groundworks for the development to the River Avon SAC.
65. In my view this is nothing like *R (Gerber)*, another case involving this Council, where it was not clear that the author had the correct test in mind in preparing the screening opinion and reliance was placed on future reports in the course of the planning process. Here there were a number of quite detailed reports with sufficient information that the Council used to reach a determination in effect as to the likelihood of significant effect. Here the screening opinion stated the right test as evident in the first extract from it quoted earlier in the judgement.

66. The issue is whether the test was subsequently distorted when the screening opinion accepted that environmental impact would be addressed in the course of the planning process and the imposition of conditions. In my judgement, the fact that conditions and remedial measures might be further refined in the course of the planning application did not undermine the clear determination reached by the officer in the screening opinion. Indeed, it seems to me that it can be regarded as confirming his conclusion that there were no likely significant effects. That makes the circumstances quite different from those in the *Champion* case, where the risks were acknowledged on all sides.
67. As to the second point, that the screening opinion did not address the risk posed by contamination to the River Avon SAC, that fails in the light of the passages from it quoted earlier in the judgement: the screening opinion referred expressly to the Ground Investigations report and stated that the Council was satisfied that all relevant environmental impacts appeared to be reported in it. It then specifically mentioned all aspects of the land contamination. In my judgement, the Council had sufficient information for it to reach the determination it did on the likelihood of significant environmental effects. The screening opinion cannot be regarded as flawed.

Ground 4: impact on heritage assets

68. In *Barnwell Manor Wind Energy Ltd v Northamptonshire District Council* [2014] EWCA Civ 137; [2015] 1 W.L.R. 45, Sullivan LJ said:

“[29] For these reasons, I agree with Lang J’s conclusion that Parliament’s intention in enacting section 66(1) was that decision-makers should give “considerable importance and weight” to the desirability of preserving the setting of listed buildings when carrying out the balancing exercise. I also agree with her conclusion that the Inspector did not give considerable importance and weight to this factor when carrying out the balancing exercise in this decision. He appears to have treated the less than substantial harm to the setting of the listed buildings, including Lyveden New Bield, as a less than substantial objection to the grant of planning permission.”

After quoting this passage, Charles George QC, sitting as a deputy High Court judge in *Ecotricity (Next Generation) Ltd v Secretary of State for Communities and Local Government* [2015] EWHC 801 (Admin), said this:

“95. Thus the rather surprising consequence is that section 66(1) of the Listed Buildings Act has been held to require that decision makers give “considerable importance and weight” to the desirability of preserving the setting of listed buildings regardless of whether the harm to such a heritage setting is less than substantial or presumably even if it is less than significant. That this should be so is not immediately apparent from the wording of the statute, but the statute now has glosses of such high judicial authority that at the level of this court the interpretation is binding, however anomalous the consequences. As Lindblom J said in *R (Forge Field Society) v Sevenoaks District Council* [2014] EWHC 1895 (Admin) paragraph 55 where the decision challenged was one of a local planning authority rather than on appeal:

“Once [the officer] had found that there would be some harm to the setting of the listing building and some harm to the conservation area, the officer was obliged to give that harm considerable importance and weight in the planning balance.””

69. In the light of these decisions, Mr Hunter submits that section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 requires not only that considerable importance and weight be given to any harm to a listed building or its setting, but that there is a strong presumption against the grant of planning permission where any such harm would be caused,

even if it is less than significant. In his argument, the same approach applies under section 72 of the 1990 Act with respect to a conservation area.

70. In the circumstances of this case, he continued, the planning committee was never advised of their duties under sections 66 and 72 of the 1990 Act and the strong presumption against the grant of permission in the case of any harm to heritage assets and the conservation area. English Heritage had given no further advice after January 2014 and had thrown the burden onto the Council's own conservation officer. His advice was not that there would be no harm to the conservation area, but merely that there would be no significant harm. Earlier, Landmark Practice, HPH's consultants, had concluded that there would be some harm, albeit that they considered it to be minor, and had asked for assurances regarding the effectiveness of the buffer zone around the development. Thus the presumption was triggered. The planning committee was not properly advised: the conservation officer's advice was misstated in the officer's report as no harm would be caused by the development. It ought to have been directed to consider the harm and whether it was outweighed by other factors, including the public benefits of the development. Accordingly, the Council's assessment of the impact on heritage assets and the conservation area was flawed.
71. The starting point in considering these submissions is the basal principle, restated by Sullivan LJ in the *Barnwell Manor* case, that the assessment of the degree of harm to the setting of a listed building is a matter for the decision-maker's planning judgement: [22]. In this case the officer's report before the planning committee concluded that developing the site would not harm the setting of the Bishopstrow Conservation Area or nearby heritage assets. In my judgement there was ample evidence on which to base that conclusion and it was reasonable to reach it. The LVIA by Landmark Practice had found minor adverse effects in the repositioning of the milestone (about which no issue is raised) and the setting of the adjacent bridge, but nothing in relation to other heritage assets and the conservation area (negligible effects). English Heritage was content; it was given assurances about the buffer zone around the site. The conservation officer's phraseology in one part of his letter was unfortunate but his overall conclusion clear. Since the planning officer's judgement was that overall there was no harm to the heritage assets and the conservation area, there was no reason for the report to draw attention to the duty in section 66 of the Planning (Listed Buildings and Conservation Areas) Act 1990.

Conclusion

72. For the reasons I have given regarding apparent bias under ground 1, I grant judicial review and will quash the decision of 21 January 2015 to grant planning permission.