Neutral Citation Number: [2021] EWHC 2026 (Admin)

CO/4184/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/07/2021

Before:

Mr Timothy Corner, QC
Sitting as a Deputy High Court Judge

- -

Between:

R (on the application of "G")	**Claimant**
- and -	
Thanet District Council	**Defendant**
-and-	
Kentish Projects Limited	**Interested Party**

- -

- -

Richard Honey, QC and Jonathan Welch (instructed by Kent Law Clinic) for **the Claimant**
Giles Atkinson (instructed by Director of Law and Democracy, Thanet District Council) for the Defendant

Hearing dates: 7th and 8th July 2021

- -

Approved Judgment

Timothy Corner, QC:

INTRODUCTION

1. This claim for judicial review is brought by the parent of a child at a Special Educational Needs school directly adjacent to land on the north side of Stirling Way, Ramsgate, Kent ("the site") which is owned by East Kent Opportunities LLP ("EKO") and for which the Defendant Council ("the Council") granted planning permission ("the planning permission") on 2nd October 2020 for a development of a three-storey block of 15 flats and 23 houses. The planning application was made pursuant to a contract between the landowners and the developer. The Claimant has brought this claim with pro bono representation to protect the interests of the school and its pupils, who are particularly sensitive and vulnerable children.

2. I thank all three counsel for their help. For the Claimant, although the pleaded case carries the signature of both counsel Mr Welch presented cogent oral submissions on ground 2, with Mr Honey dealing with the other grounds. For brevity, where I refer to submissions for the Claimant on ground 2, I refer to Mr Welch only, and for the other grounds, to Mr Honey only.

3. The Claimant contends that despite representations made, including by the school's headteacher, the Council's officer did not grapple with the impact of the development on the children of the school, especially in terms of construction noise, highway safety and air quality. The decision was procedurally flawed and infected by apparent bias. Overall, it is said to be apparent that the application was not properly scrutinised and was given an unduly easy ride. In summary, the Claimant advances the following grounds:

    (1) The application was "on behalf of" the Council and, under the scheme of delegation, had to be determined by the planning committee. The decision by an officer was unlawful.

    (2) The appropriate assessment undertaken by the Council failed to comply with the strict requirements of the Habitats Regulations, such that no lawful appropriate assessment of the impact of the development on the Special Protection Area was conducted.

    (3) The Council failed to assess construction noise impacts on the school and the efficacy of potential noise mitigation was simply assumed and not actually considered.

    (4) The Council failed to consider and grapple with highway safety risks in relation to children and parents at the school and failed to require a transport assessment, which would have included systematic consideration of highway safety, contrary to the policy requiring one.

    (5) The Council failed to consider the issue of air quality and failed to require an air quality assessment, again contrary to the policy requiring one.

    (6) The decision is tainted by apparent bias.

FACTUAL BACKGROUND

4. The Council granted planning permission on 2nd October 2020. Laleham Gap School is immediately north-west of the site. The development will be accessed along the same cul-de-sac as the school, with all traffic accessing the site passing the school entrance.

5. The school is a SEN school for pupils aged from 4 to 17 years of age, most of whom have a diagnosis of autism. The pupils are particularly sensitive to the surrounding environment, especially noise, air pollution and other disturbances. The sensitivities of the pupils are explained in the witness statements of the school's headteacher, Mr Les Milton, and the Claimant. These sensitivities are not disputed by the Council.

6. The site is a small part of the land allocated by policy SP09 of the Thanet Local Plan as a mixed-use area of development for residential and business purposes. It is a short distance from the Thanet Coast and Sandwich Bay Special Protection Area (SPA), Ramsar site and Site of Special Scientific Interest, and well within the zone of influence of that internationally important site.

7. EKO owns the site. EKO is a partnership of the Council and Kent County Council ("the County Council"). EKO has no employees and is steered by a management team of six persons, including one elected councillor and two senior officers of the Council. The obligations of EKO are performed by and through councillors and officers of the two councils, including the Council. EKO only acts with the authority of the Council.

8. The relationship between the Council-as one of two partner members of EKO- and developer Kentish Projects Limited (KPL) was raised in the Claimant's pre-action letter. The Council responded contending that "there is no contract between the Council and the developer in this case". The Claimant asked the Council to clarify the relationship between itself and KPL. In its Summary Grounds of Defence (SGD), the Council at paragraphs 13-15 acknowledged there was a contract but did not disclose it. A counterpart copy of the contract for the sale of land dated 11 February 2019 ("the Contract") was disclosed in redacted form by the Council after permission was granted for the claim. The Claimant asked for a copy of the Contract executed on behalf of EKO and a copy of that was provided. Despite the Council initially claiming that "the Council itself is not a signatory" to the Contract, the second copy of the Contract showed a representative of the Council did sign it. The Contract contains the following provisions:

   i) In clause 5.1, EKO obliges KPL to submit a planning application to the Council and to "use best endeavours to obtain the grant of a Satisfactory Planning Permission as soon as reasonably possible".

   ii) In clause 5.3, EKO agrees not to "do anything which may prejudice or obstruct the progress of any Planning Application or Planning Appeal made pursuant to this contract".

   iii) By clause 9, EKO is obliged "to co-operate with [KPL] and use all reasonable endeavours to assist [KPL] in obtaining a Satisfactory Planning Permission."

   iv) Where a Planning Agreement is required, KPL "shall (in consultation with [EKO] (who shall act reasonably and promptly)) use best endeavours to

negotiate and agree the terms of the Planning Agreement free from any Buyer's Unacceptable Conditions as quickly as reasonably possible" (clause 12.1).

9. The form of transfer in Schedule 1 to the Contract is required to be signed by an authorised representative of EKO. It is to be signed by a "Thanet District Council Representative". Clause 12 of Schedule 1, "Execution", states that the sale has been agreed by the EKO management committee and provides space for signature by authorised representatives.

10. The Council accepted in its Detailed Grounds of Defence (DGD) that the "transfer of land that results from the agreement can be said to be undertaken on behalf of the Defendant Council, as joint land owner" and that "if permission is not granted there is no sale". The s106 agreement is signed twice by the Council, including in its capacity as landowner.

11. Objections to the planning application were made in relation to issues including overlooking of the school, noise and disturbance for children during construction, increased traffic, lack of parking, air quality concerns for children at school with anxieties, and highway safety for children and parents during school drop off/collection.

12. The County Council biodiversity officer advised that, due to the proximity of the site to the SPA, the development must fully adhere to the Strategic Access Management and Monitoring Strategy (SAMMS) to mitigate for additional recreational impacts on the SPA. He advised that appropriate assessment ("AA") should be carried out. An AA was carried out, which the Claimant criticises.

13. The Council's own Environmental Health Officer (EHO) advised that "given the site adjoins a school for children with special educational needs who are extremely sensitive to noise, the construction impacts *must be effectively controlled*", and concluded: "It is therefore *imperative that construction impacts are assessed* and noise mitigation put in place" (emphasis added).

14. The Council's scheme of delegation provides that the Planning Committee will determine a planning application where:

> "*2.2.1.*
> *(c) The application has been submitted by or on behalf of a Member or an Officer of the Council;*
> *(d) It is an application by or on behalf of Thanet District Council.*"

15. The school's headteacher, Mr Milton, was told that the planning application would be determined by the Council's planning committee. The application was originally scheduled to be heard at a committee meeting.

16. The Council's planning officer Ms Fibbens prepared a delegated report setting out her consideration of the application. That report was checked by a senior officer before being finalised. The delegated report recorded the fact that objections had been made about noise during construction, highway safety for children and parents, and air quality.

17. The delegated report describes a potential construction management plan involving consultation with the school. Condition 25 requires a scheme for mitigating construction noise impact to be submitted to and approved by the Council. The delegated report does not assess construction noise impacts on the school. The conditions do not require any such assessment either. The delegated report concluded that highway safety impacts were considered to be acceptable, although the Claimant says this was without considering the issue of highway safety in relation to the school.

18. The delegated report acknowledged the SPA is affected negatively by recreational disturbance potentially causing a decline in bird numbers and concluded that a financial contribution was required to enable the Council to be satisfied that a likely significant effect could be avoided.

LEGAL PRINCIPLES ON DETERMINATION OF PLANNING APPLICATIONS

19. Under section 70(2) the Town and Country Planning Act 1990 ("the 1990 Act") local planning authorities must have regard to the provisions of the development plan so far as material and to any other material considerations. By section 38(6) of the Planning and Compulsory Purchase Act 2004, if regard is to be had to the development plan, the determination is to be made in accordance with the provisions of the development plan, unless material considerations indicate otherwise.

20. Whether or not a particular consideration is material is ultimately a matter for the court (Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR 759 (per Lord Keith at p.764)). In Oxton Farm v Harrogate Borough Council [2020] EWCA Civ 805 the Court of Appeal confirmed that material considerations fall into two categories, those which the decision-maker may take into account but need not and those which the decision-maker must take into account. Where a consideration is a policy requirement it is mandatory and must be taken into account.

21. A public body has a basic duty to take reasonable steps to acquaint itself with relevant material and to grapple with it (Secretary of State for Education v Tameside Metropolitan Borough Council [1977] AC 1014 at 1065B and R (CPRE Kent) v Dover District Council [2018] 1 WLR 108 at [62]).

22. There is a duty to take consultation responses conscientiously into account (R (Smith) v East Kent Hospital NHS Trust [2002] EWHC 2640 (Admin) at [61]).

23. In South Bucks District Council v Porter (No. 2) [2004] 1 WLR 1953 at [36] it was stated that reasons where given must be intelligible and must be adequate, enabling:

> "*The reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved… The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter, or by failing to reach a rational decision on relevant grounds.*"

24. Where a local planning authority has an interest in a site for which it is considering a planning application, it is under a particular duty to weigh the issues, engage with objections thoroughly, conscientiously and fairly (Stirk v Bridgenorth District Council (1996) 73 P&CR 439 at p. 444) and to set out all relevant material in any report (R v South Glamorgan County Council ex p. Harding (1998) COD 243). In such circumstances procedural requirements require close observance (R v Lambeth Borough Council ex p Sharp [1987] JPL 440 at 443 and (1988) 55 P&CR 232 at 237-240).

25. The general approach to planning officers' reports to planning committees was set out in Mansell v Tonbridge and Malling BC [2017] EWCA Civ 1314.

> "*42. The principles on which the court will act when criticism is made of a planning officer's report to committee are well settled. To summarise the law as it stands:*
>
> *•The essential principles are as stated by the Court of Appeal in R. v Selby DC Ex p. Oxton Farms [1997] E.G.C.S. 60 (see, in particular, the judgment of Judge LJ, as he then was). They have since been confirmed several times by this court, notably by Sullivan LJ in R (on the application of Siraj) v Kirklees MBC [2010] EWCA Civ 1286 at [19], and applied in many cases at first instance (see, for example, the judgment of Hickinbottom J, as he then was, in R (on the application of Zurich Assurance Ltd t/a Threadneedle Property Investments) v North Lincolnshire Council [2012] EWHC 3708 (Admin) at [15]).*
>
> *•The principles are not complicated. Planning officers' reports to committee are not to be read with undue rigour, but with reasonable benevolence, and bearing in mind that they are written for councillors with local knowledge (see the judgment of Baroness Hale of Richmond in R (on the application of Morge) v Hampshire CC [2011] UKSC 2 at [36], and the judgment of Sullivan J, as he then was, in R v Mendip DC Ex p. Fabre [2017] PTSR 1112 (2000) 80 P&CR 500 at 509). Unless there is evidence to suggest otherwise, it may reasonably be assumed that, if the members followed the officer's recommendation, they did so on the basis of the advice that he or she gave (see the judgment of Lewison LJ in R (on the application of Palmer) v Herefordshire Council [2016] EWCA Civ 106 at [7]). The question for the court will always be whether, on a fair reading of the report as a whole, the officer has materially misled the members on a matter bearing upon their decision, and the error has gone uncorrected before the decision was made. Minor or inconsequential errors may be excused. It is only if the advice in the officer's report is such as to misdirect the members in a material way-so that, but for the flawed advice it was given, the committee's decision would or might have been different-that the court will be able to conclude that the decision itself was rendered unlawful by that advice.*
>
> *•Where the line is drawn between an officer's advice that is significantly or*

> *seriously misleading-misleading in a material way-and advice that is misleading but not significantly so will always depend on the context and circumstances in which the advice was given, and on the possible consequences of it. There will be cases in which a planning officer has inadvertently led a committee astray by making some significant error of fact (see, for example R (on the application of Loader) v Rother DC [2016] EWCA Civ 795 [2017] JPL 25), or has plainly misdirected the members as to the meaning of a relevant policy (see, for example, R (on the application of Watermead Parish Council v Aylesbury Vale DC [2017] EWCA Civ 152. There will be others where the officer has simply failed to deal with a matter on which the committee ought to receive explicit advice if the local planning authority is to be seen to have performed its decision-making duties in accordance with the law (see, for example, R (on the application of Williams) v Powys CC [2017] EWCA Civ 427: [2017] JPL 1236). But unless there is some distinct and material defect in the officer's advice, the court will not interfere.*"

26. As it was an officer decision the Council was under a statutory duty to provide reasons for granting the planning permission (Openness of Local Government Regulations 2014, reg 7(3)(b) and R (CPRE Kent) v Dover District Council [2018] 1 WLR 108 at para 30 per Lord Carnwath JSC). These are to be discerned from the delegated report.

27. It was agreed that the principles in Mansell are broadly applicable to when the decision is taken by the officer him or herself under delegated powers. However, Mr Honey rightly pointed out the situation is different. Apart from the existence of the specific duty to give reasons set out in the previous paragraph, where an application is determined under delegated powers there is no extra layer of member consideration in addition to the officer report. Members cannot themselves fill any gaps left in the officer report.

SUBMISSIONS

Ground 1: Under the scheme of delegation, the scheme should have gone to committee

28. The Claimant submitted that as an application made "on behalf of" the Council, under the scheme of delegation, it could only lawfully have been determined by the planning committee. The Claimant said that "on behalf of" means "in the interest of or for the benefit of" relying on the Oxford English Dictionary and Gillespie v City of Glasgow Bank (1879) 4 App Cas 632 (per Lord Hatherley at 642). He also relied on Cherwell District Council v First Secretary of State [2004] EWCA Civ 1420 at [56], where Chadwick LJ (with whom the other judges agreed) said that the expression was not limited to the private law concepts of master and servant or principal and agent, but had a wider meaning including "for the purposes of, as an instrument of, or for the benefit and in the interest of".

29. Mr Honey said that the application was on behalf of the Council because:

    (1) The Council as one of the two partners in EKO has obliged KPL under the contract to submit a planning application and to seek to obtain planning permission as soon as reasonably possible. The Council is a party to promoting

the development through the Contract and has agreed to the Contract which requires the planning application to be made. It would not have agreed to the Contract if the obligation on KPL to make an application was not in its interest.

(2) As joint owner of the site via EKO, the Council will benefit financially from the sale of the land if the planning application succeeds.

30. Mr Honey said that it would be inappropriate to give "on behalf of" a narrow servant/agent meaning because the exceptions in the scheme of delegation are aimed at upholding propriety and the integrity of the planning process, including avoiding the appearance of conflict of interest through transparent decision-making.

31. In response, Mr Atkinson said that nowhere is the application said to have been made "on behalf of" the Council, or for that matter on behalf of the County Council. Nothing in the scheme of delegation indicates that an application made by companies such as KPL or in respect of land owned by a joint venture such as EKO is to be considered as made on behalf of the Council.

32. He said that EKO has a separate and very distinct role from that of the Council as local planning authority. EKO is concerned to encourage and facilitate economic growth in Thanet which it achieves by engaging with the private sector. Its development activity, after an initial loan, has been funded by local businesses. The Council and the County Council wrote off the value of the land they each transferred to EKO. EKO is a viable and stable company which is successfully repaying its debt to the Council and the County Council and has recently paid dividends/distributions to the Council partners.

33. He continued that there is no financial benefit to the Council in granting the permission because the Council gifted land to EKO. It may or may not be repaid by way of dividends but that is not the purpose of the arrangement; the purpose is to encourage economic development.

34. Mr Atkinson said that there is no evidence that the Council would benefit from proceeds of sale of the land and there could be no suggestion that either party would seek damages from the other in the event of a breach of the contract between them.

35. That the roles of EKO and the Council are distinct is illustrated, said Mr Atkinson, by the fact that in 2013 the Council refused an application for outline planning permission made for the Eurokent site in Thanet owned by EKO.

Ground 2: Habitats Regulations non-compliance

36. Mr Welch for the Claimant drew attention to Directive 92/43/EEC, which makes provision in Article 6 for the conservation of special areas of protection. The Directive is implemented in domestic law by the Conservation of Habitats and Species Regulations 2017 ("the Habitats Regulations"). Mr Welch relied on the process to be followed, according to regulations 61 to 69:

(1) Screening. There must be an initial assessment by the competent authority (ignoring mitigation) whether a project is likely to have a significant effect on a protected site in combination or alone, with the threshold at this stage a "very

low one" (Sweetman v An Bord Pleanala (Case C-258/11) [2014] PTSR 1092 at [49] of AG Sharpston's opinion).

(2) Appropriate Assessment ("AA") if the screening stage leads to the conclusion without assistance of mitigation measures that there is likely to be a significant effect. So far as the standard required of an AA is concerned, it was submitted that a strict precautionary approach must be adopted following Friends of the Earth's Application for Judicial Review [2017] NICA 41 at [14]-[15] and [34]. The assessment must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt about the effects of the project on the site (Sweetman v An Bord Pleanala [2014] PTSR 1092 at [40-44]). It must also identify and examine the implications of the project for species present on the site, and for which that site has not been listed, as well as the implications for habitat types and species outside the boundaries of the site, insofar as those implications are liable to affect the conservation objectives of the site (Holohan v An Bord Pleanala (C-461/17) [2019] PTSR 1054 at [37]-[38]). An AA cannot be done without up-to-date information (Case C-43/10 Nomarchiaki [2013] Env LR 21 at [115] and [117] and Holohan per AG Kokott opinion at [29]).

(3) Subsequent grant of consent. In the light of the conclusions of the appropriate assessment the competent authority is to agree to the project only having ascertained that it will not adversely affect the integrity of the protected site, with no reasonable scientific doubt remaining about the absence of such effects; regulation 64 (5) and Waddenzee (C-127/02) [2004] Env LR 14 at [59]. Any mitigation measures must have a high degree of certainty regarding their outcome, "guaranteeing beyond all reasonable doubt that the project will not adversely affect the integrity of the area" (Grace v An Bord Pleanala (Case C-164/17) [2018] Env LR 37 at [46]-[61]). The authority must be certain and convinced that the project will not adversely affect the integrity of the site concerned (Sweetman at [40] and where doubt remains permission must be refused; Waddenzee at [57]).

37. Mr Welch submitted that the purported appropriate assessment in this case fell very far short of the legal standard.

(1) There was no consultation with Natural England ("NE") until the assessment was completed, which gave no opportunity to have regard to its representations when undertaking the AA, contrary to regulation 63 (3). The AA failed to identify "all the habitats and species for which the site is protected" and was therefore not sufficient to dispel all reasonable scientific doubt as to the adverse effects on the integrity of the site. It fails to refer at all to the SPA's habitats listed in the Natura 2000 site information reference document and omitted reference to one of the three species for which the site is protected, namely Little Tern.

(2) No consideration was given to implications of the scheme for species present on the SPA for which it has not been listed which might have implications for the conservation objectives of the SPA.

(3) The text of the AA was "mere assertion" against which the courts have warned.

(4) The assessment was not up-to-date. It was 1.5 years old when permission was granted, and the most recent research referred to in it was from 2011, 2013 and 2014.

(5) Evidence about the mitigation relied on which flowed from the 2016 SAMMS document was also not up-to-date and no consideration had been given to whether this type of mitigation has been successful or why it would be effective here.

38. Mr Welch said that the failure to carry out a proper and appropriate AA also meant that the Council failed to have regard to policy SP 14 of the Local Plan which requires an AA of the effects of the development of functional land in relation to the SPA. There had also been a failure by the Council to fulfil the duty set out in Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1977] AC 1014 to properly inform itself of the nature of the application before it.

39. Mr Atkinson said that a compliant AA had been prepared. NE had been consulted on 23rd April 2019, the day that Ms Fibbens prepared the "Habitat Regulation Assessment (HRA) Screening Matrix and Appropriate Assessment (AA) Statement for recreational disturbance". A box headed "Summary of Natural England's comments" was left blank. NE responded on 10th May 2019, making clear this was its "formal representation on appropriate assessment" and stating that it did not object to the grant of permission subject to the advice set out with regard to the SAMM scheme. That advice stated that the SAMM must be secured by planning conditions or obligations.

40. Mr Atkinson said that this showed that the Council did consult NE and did have regard to their representations before granting planning permission. Further, a subsequent email from NE to Ms Fibbens dated 26th February 2020 addressing an amendment to the scheme confirmed that NE had been consulted previously.

41. The Council was entitled to place considerable weight on the opinion of NE (Smyth v Secretary of State for Communities and Local Government [2015] PTSR 1417).

42. Furthermore, said Mr Atkinson, the Claimant's detailed criticisms of the AA were unjustified in the light of the discretion granted to the Council by R (Champion) v North Norfolk District Council [2015] 1 WLR 3710.

43. The AA did seek to secure a contribution to the SAMMS by way of planning obligation, which was signed on 15 September 2020 securing the SAMMS contribution of £12,450 before the permission was granted. NE were clearly content with a generic approach to small housing schemes within the zone of influence of the SPA such as this one and it could be inferred from their letter of 11th March 2019 to the Defendant Council and Canterbury City Council that they were satisfied that the mitigation in the shape of SAMMS does work.

44. Mr Atkinson concluded by saying that in the light of the acceptability of the AA, the additional points made by the Claimant in relation to Local Plan policy SP14 and the breach of the Tameside duty fell away.

Ground 3: Construction Noise Impact

45. Mr Honey argued that construction noise impact on the school was obviously material, having regard to the proximity and sensitivity of the school to construction noise, the advice provided by the Council's Environmental Health Officer and because it was one of the main points of objection, with objections pointing to the sensitivity of the pupils of the school to noise.

46. However, although the delegated report considered noise, there was no assessment of the construction noise impacts on the school. Furthermore, development plan policy SE06 was left out of account in breach of the statutory duty in section 70(2) of the 1990 Act. That policy (which also covers construction noise) requires that:

> "*Development proposals that generate significant levels of noise must be accompanied by a scheme to mitigate the effects, bearing in mind the nature of surrounding uses. Proposals that would have an unacceptable impact on noise – sensitive areas, or uses will not be permitted.*"

47. Furthermore, the efficacy of construction noise mitigation was simply assumed. Although the delegated report referred to a future construction management plan (which was required under condition 25 of the permission as granted) the error was made simply to assume without evidence or investigation that mitigation through that plan would be effective.

48. Mr Atkinson characterised this ground as a straightforward merits challenge. The particular sensitivity of the school's pupils to noise was highlighted by the Environmental Health Officer ("EHO") in her email of 19 July 2019 to Ms Fibbens. That advice was reproduced in the delegated report. The EHO went on to specify what she expected by way of a construction noise condition, which was also reproduced in the delegated report. It could not be said without evidence that the proposed condition will not work. It had been imposed on the basis of the Council's own expert advice from its EHO and the express requirement that the school itself should help create the mitigation strategy is the safeguard against any assumption that the construction condition would not work.

49. Mr Atkinson also submitted that policy SE06 was not relevant to the application because it addressed development, which itself generates significant levels of noise pollution, which housing does not. In any event, the substance of the policy, if relevant, had been applied in the delegated report through reference to the British Standard document on noise and vibration control on construction and open sites, BS 5228.

Ground 4: Highway Safety

50. Mr Honey submitted that the highway safety implications of the development on the school were obviously material given the proximity of the school and that it shared access with the site, the sensitivity of the pupils and their vulnerability in highway safety terms, and because it was one of the main points of objection.

51. Mr Honey said that the highway safety risk for parents and children was not considered or grappled with in the delegated report at all. The conclusion expressed, that the impact on highway safety was acceptable, was reached without any mention of the school.

52. Furthermore, there was a specific but related failure to require a Transport Assessment pursuant to policy SP09 or explain why one was not required. The "Transport Note" provided by KPL was clearly not sufficient to fulfil the requirement for a Transport Assessment.

53. Mr Atkinson relied on the fact that the statutory highways consultee, the County Council, did not object to the application on highway safety or any other grounds. Furthermore, the parents' concerns about highway safety were clearly taken into account in the delegated report as there was reference to "Highway safety for children and parents during school drop-off/collection".

54. Mr Atkinson also rejected the criticism that policy SP09 had not been applied. It was made clear in the explanatory text for policy TP01 of the Local Plan that

> "*With larger developments, equivalent to 100 dwellings or more, a Transport Assessment would usually be necessary. Smaller developments may only need a Transport Statement.*"

55. The Transport Assessment referred to in policy SP09 was for the entire Westwood development, comprising up to 17,000 m² of retail floor space and more than 600 dwellings. The development subject to this challenge comprised only a tiny part of the greater whole. In those circumstances, it was appropriate that only a Transport Note as opposed to a full Transport Assessment was provided.

Ground 5: Air Quality

56. Mr Honey contended that air quality in relation to the school was an obviously material consideration. The site was in the Thanet Urban Air Quality Management Area (AQMA). The school faced directly onto the A 256, described by the Council in its 2020 Air Quality Annual Status Report as a main source of air pollution in the district. Also, this was one of the main points of objection and furthermore Local Plan policy SE05 required that it should be considered.

57. The delegated report recognised SE05 was relevant. However, air quality was not considered at all in the delegated report, let alone grappled with. Secondly, the Council failed to consider or apply policy SE05, which required the provision of an air quality assessment and refusal of applications which did not comply with the policy's requirements for the reduction of the extent of air quality deterioration through mitigation measures. The policy required an assessment where developments either individually or cumulatively were likely to have a detrimental impact on air quality. No such assessment was undertaken.

58. Mr Atkinson responded that SE05 was mentioned in the delegated report and also air quality was listed in the summary of objections. Absent any objection from the Environmental Health Officer and given the imposition of condition 17 for the protection of air quality in accordance with policy SP14 and advice contained in the National

Planning Policy Framework, it could reasonably be understood that the issue was considered by the officer granting permission.

59. Furthermore, the EHO commented, noting that the site was within the AQMA and would require Standard Air Quality Mitigation comprising minimum emissions standards for gas-fired boilers and one electric vehicle charging point to be provided per dwelling. The imposition of condition 17 largely effected the Standard Air Quality Mitigation required by the Environmental Health Officer.

Ground 6: The decision is tainted by apparent bias

60. Mr Honey argued that the decision was tainted by apparent bias. The test for apparent bias involved a two-stage process. The court must first ascertain all the circumstances which have a bearing on the suggestion of bias. It must then be asked whether those circumstances would lead the fair-minded and informed observer to conclude that there was a real possibility that the decision-maker was biased (Bubbles & Wine Ltd v Lushka [2018] EWCA Civ 468 at [17)].

61. A fair-minded and informed observer was presumed to have full knowledge of the material facts; such factors are found by the court on the evidence; facts known by the fair-minded and informed observer are not limited to those in the public domain (Virdi v Law Society [2010] 1WLR 2840 at [37-44]). His or her approach will be based on broad common sense without inappropriate reliance on special knowledge, the minutiae of procedure or other matters outside the ken of the ordinary, reasonably well-informed member of the public (Locabail (UK) Ltd v Bayfield Properties Ltd [2001] 1 QB 451 at 477B-C).

62. When considering apparent bias, it was necessary to look beyond pecuniary or personal interests, to consider whether the fair-minded and informed observer would conclude there was a real possibility of bias in the sense that the decision was approached without impartial consideration of all relevant issues (Georgiou v LB Enfield LBC [2004] EWHC 779 (Admin) at [31]). Public perception of bias was the key (Lawal v Northern Spirit [2004] 1 All ER 187 at 193 F-H, 196 C-D). The facts and context are critical, with each case turning on an "intense focus on the essential facts of the case" (Bubbles and Wine at [14]).

63. Mr Honey listed the circumstances giving rise to the appearance of bias:

    (1) Clause 5.3 of the Contract requires EKO not to do anything which may prejudice or obstruct the progress of the planning application and clause 9 requires it to use all reasonable endeavours to assist KPL to obtain a satisfactory planning permission.
    (2) Clause 12.1 obliges EKO to act reasonably promptly in relation to a planning agreement.
    (3) Through its partnership in EKO the Council obliged KPL to submit a planning application and use its best endeavours to obtain the grant of planning permission as soon as reasonably possible (Clause 5.1).
    (4) Through the means of the Contract and not just as joint landowner the Council will benefit financially from the grant of planning permission because under the Contract that grant will lead to the sale of the land.

(5) The Council is a signatory to the contract and listed as an authorised representative of the EKO. It is evident that obligations under the Contract fall in practice to be undertaken by members and officers of the Council.
(6) The Council delayed the disclosure of a copy of the Contract and its lack of candour reinforces the appearance of bias.
(7) An email from KPL's agent negotiating about the planning agreement refers to the fact that certain contributions were "not factored into the client's land offer to the landowners EKO" and that the request for them would render the scheme undeliverable. The land offer is that which underpins the Contract, which shows the Contract being used in the negotiation by KPL and appearing to feature in the Council's consideration of the application and planning issues.
(8) Whilst the application was initially proposed to be heard at committee the failure to present it to the committee was influenced by the request of KPL. This gives the impression that the Council wished to avoid scrutiny of the decision because it was seeking to help the applicant to secure planning permission - i.e. acting in line with the obligations of the contract.
(9) Measures recommended by consultees were not pressed for, in particular the construction noise impact assessment requested by the EHO and normal requirements for assessments as set out in local plan policy in relation to transport and air quality were not applied. The generic and inadequate Habitats Report further suggests the Council gave this application an unduly easy ride.
(10) The Council's failure to give adequate scrutiny to issues raised by objectors and its failure carefully to consider the impact on the school gives the impression of a desire to grant permission, regardless of potential effects; a desire to help KPL secure planning permission in line with the obligations in the Contract.
(11) The stance taken by the Council in its amended detailed grounds of defence that it is unconstrained by the normal principles of apparent bias in this case would itself reinforce the appearance of bias.

64. In written submissions Mr Atkinson responded that in accordance with R v Sevenoaks DC ex p Terry [1985] 3 All ER 226 and subsequent authorities this is not a case where the fair-minded and informed observer test falls to be applied. The Council has to determine an application on land in which EKO has an interest but that is within the permissible structural bias (R (Cummins) v Camden LBC [2001] EWHC 1116). However, in his oral submissions Mr Atkinson accepted that the fair-minded observer test did apply in this situation.

65. Mr Atkinson argued that if the fair-minded observer test is applied:

(1) The observer will know from the Contract that EKO is a distinct and separate body from the Council, which is the determining authority as defined in the Contract; there is no contract between the Council and the developer.
(2) The observer will know that the Contract between EKO and KPL does not include a clause specifying any damages payable in the event of a breach.
(3) It will not be known by the Observer that the remedy of damages is available "in the usual way".

(4) Nor will the observer know how or indeed if the sale of the land will benefit the Defendant financially.
(5) The observer will know that planning decisions are to be taken in accordance with section 38(6) of the Planning and Compulsory Purchase Act 2004 and section 70 (2) of the 1990 Act.
(6) The observer will also know that land ownership is not a material consideration in determining planning applications.
(7) The observer will know that the Council, like many local planning authorities, sometimes has to determine applications for land in which it has an interest.
(8) The observer will know that the Council has previously refused planning permission for development land owned by EKO.
(9) The observer will know that if Council members took the decision in place of the officer that position too could be criticised for giving rise to apparent bias because it is the Council as a whole that has an interest in the land through EKO.

66. In the light of these matters there was nothing in the Contract, said Mr Atkinson, that gave rise to the appearance of bias or that would act as a fetter or restraint on the exercise of the Council's functions.

67. Clause 5.3 was concerned with the progress of the planning application through the bureaucracy which does not and cannot include specific references to the determination of the application by the Council as Determining Authority; that is a matter for the Council alone.

68. Clause 9 was concerned with EKO cooperating with and assisting KPL to obtain a satisfactory planning permission, but similarly that could not include actual determination. Clauses 5.1 and 12.1 urging EKO to act promptly are similarly concerned with the progress of the application but cannot sensibly be read as indicating an influence on the outcome of the Council's determination. In both those clauses as well as clause 9, all that is required of the parties is that they use best endeavours to obtain planning permission or negotiate and agree the terms of the planning agreement. That clearly excludes the determination of the planning application, because neither signatory to the Contract has the power to determine it.

69. There was no lack of candour on the part of the Council. There simply was not a contract in existence between the council and the developer, but only one between EKO and KPL.

70. The email of which the Claimant complained was about viability, and not ownership of the land. The reference to the offer to the owners was simply to make the point that the three contributions being sought in relation to off-site highway works, open space and a medical facility were not justifiable and would make the scheme undeliverable in the context of the land. No one could conclude that email was requesting the Council not to present the application to committee. The request was to hold the application in abeyance.

ASSESSMENT

Ground 1

71. I begin by identifying the nature of the issue I am asked to determine. It was agreed that the issue was whether the application for planning permission, made by KPL subject to contractual obligations owed to the Council, was "on behalf of" the Council, and therefore should have been determined by the planning committee and not an officer, in accordance with paragraph 2.2.1 (d) of the Council's scheme of delegation.

72. There was no evidence that the Council or any of its officers had before determination considered whether the application had been made "on behalf of the Council" and so whether it should be determined by the planning committee. Had this matter been considered and the judgement made that the application was not made "on behalf of the Council", the issue before me might have been whether such judgement could reasonably have been made. But because the issue was not considered, it was agreed that the matter was for me to determine.

73. I do so against the agreed legal background that "on behalf of" means "in the interest of or for the benefit of" and that the expression is not limited to private law concepts of servant or agent or principal and agent but has a wider meaning including "for the purposes of, as an instrument of, or for the benefit and in the interest of". Paragraph 2.2.1 (c) requires the planning committee to determine applications which have "been submitted by or on behalf of a Member or an Officer of the Council" but for paragraph 2.2.1 (d) it does not matter who actually made the application. The question is, whoever made the application, was the application for the benefit of the Council?

74. In my view, it was. The Council as one of the two partners in EKO obliged KPL under the Contract to apply for planning permission and to seek to obtain such a permission as soon as possible. As Mr Honey submitted, it is not possible to envisage the Council doing this unless seeking planning permission for the site was in its interest.

75. Mr Atkinson agreed that the obtaining of planning permission did not have to be in the Council's *financial* interest for it to be said that the application was for its benefit and in its interest. Regeneration benefit to a public authority could be enough, he (rightly) agreed. Quite apart from any financial considerations, the Council plainly saw this application as being for its benefit and in its interest because it would help regenerate the area, through development. Such development was the very purpose for the creation of EKO. I think this is clear from the Kent County Council report on the Manston Business Park dated 3rd July 2020, which says at paragraph 1.1 that:

> "*The JV was to focus and maximise the overall regeneration benefits to Thanet, with significant mutual benefits for both partner authorities.*"

76. Mr Atkinson did not suggest that this statement about the purpose of EKO's creation represented only the views of the County Council and not those of his Council also. Nor did he suggest that the objective behind securing planning permission to develop the site was anything other than the regeneration benefit which is the founding purpose of EKO.

77. Therefore, even in the absence of any possibility of financial benefit for the Council, I would consider the fact that it would gain from the regeneration that development of the site would foster meant that this application was indeed made on behalf of the Council. The development was in its interest and for its benefit as a public authority seeking to regenerate the area through development. Given the Council's acceptance that

regeneration benefit could be enough to mean an application was made on behalf of a public authority, it follows that the Council has in essence accepted that ground 1 is made out.

78. In any case, there was also at least the potential for financial benefit. As joint owner of the site via EKO, the Council stands to benefit financially from the sale of the land if the planning application succeeds. Mr Atkinson said that there is no financial benefit to the Council from the grant of permission because the Council gifted the land to EKO and had written off the value of the land it transferred to EKO. But the fact is that as its own accounts and the County Council report of 3rd July 2020 (paragraph 6.1) show, in recent years EKO has been able to make dividend distributions back to both Council partners. It was not disputed that EKO's ability to make those dividend payments came from the sale of the land in its possession with the benefit of planning permission.

79. Thus, the Council had a clear financial interest in planning permission being obtained for development of the site, as part of the portfolio of land interests conveyed to EKO by the Council and the County Council.

80. I was not persuaded by Mr Atkinson's argument that the application was not described in the documents (for example the planning application) as having been made "on behalf of the Council". I must decide what was the substance of this matter, and what the relevant documents did or did not say is not decisive. Nor was I persuaded by Mr Atkinson's point that nothing in the scheme of delegation indicates that an application made in respect of land owned by a joint venture such as EKO is to be considered as made on behalf of the Council. Again, I have to look at the substance.

81. Overall, therefore, accepting the responsibility of deciding as a matter of fact and degree whether this application was made "on behalf of" the Council, I am clear that it was. The application was in the Council's interest and to its benefit because it was plainly in its interest as a public authority promoting regeneration through development, and it was also strongly in its financial interest, having regard to the potential for being paid dividends by EKO, as in the past.

82. It follows that in my judgement this application fell squarely within paragraph 2.2.1 (d) of the scheme of delegation and should have been determined by the planning committee. That it was not so determined, but determined instead by an officer, means of itself that this judicial review application succeeds, and the planning permission must be quashed, whatever view I take on the other grounds.

Ground 2

83. In my judgement the Appropriate Assessment ("AA") did not comply with the legislative requirements and relevant caselaw.

84. As the Claimant submitted, the AA failed to identify "all the habitats and species for which the site is protected" and was therefore not sufficient to dispel all reasonable scientific doubt as to the adverse effects on the integrity of the site. It omitted reference to one of the three species for which the SPA is protected, namely Little Tern. Further, there was no assessment of species other than those three species which might have implications for the conservation objectives of the SPA, and no assessment of the

implications of the proposed development for habitat types and species outside the SPA boundaries, insofar as those implications would be liable to affect the conservation objectives of the SPA.

85. Also, the information on which the AA was based was not up-to-date in relation either to the effect of the development or the efficacy of mitigation. It relies on surveys from 2013/2014, whereas the Local Plan states (paragraph 4.46) that there has been further decline in Turnstone numbers since 2013, and I was told that there has been continuing monitoring concerning the effectiveness of SAMMS since 2019. The AA written in 2019 was not updated to take account of that monitoring and the monitoring was not taken into account in determining the application.

86. Mr Atkinson placed much reliance on the views of Natural England ("NE"). Had the AA been otherwise adequate I would not have thought the permission should be quashed on the ground that that the AA was prepared before NE was asked for comment. However, as I have said, a compliant AA was not prepared.

87. I do not think that the correspondence from NE saves the Council in relation to ground 2. On 10th May 2019 in its response to consultation NE said that subject to the advice "given below" it did not object to the grant of permission. It repeated the view previously expressed in a letter of 11th March 2019 that SAMMS was effective to deal with increased recreational pressure but then went on to say:

> "*Providing that the appropriate assessment concludes that these measures must be secured as planning conditions or obligations by your authority to ensure their strict implementation for the full duration of the development, and providing that there are no other adverse impacts identified by your authority's appropriate assessment, Natural England is satisfied that this appropriate assessment can ascertain that there will be no adverse effect on the integrity of the European Site in view of its conservation objectives.*"

88. Of course, the Council is entitled to place considerable weight on the opinion of NE, as established in Smyth. However, to begin with, NE was not saying that it was satisfied with the AA. It was placing the burden on the Council to satisfy itself that there were no adverse impacts other than from recreational disturbance. I do not see how the Council could satisfy itself of that point without undertaking a proper AA. Secondly, although the Council was entitled to place considerable weight on NE's satisfaction with the SAMMS, it was for the Council to satisfy itself of its efficacy on the basis of up-to-date information. I do not see how it could have done that, given that I was told that there was monitoring after the date of NE's letter which shed further light on the efficacy of SAMMS. I should add that on 26th February 2020 NE responded to a further consultation from the Council in relation to amendments to the application. But that response simply said that the amendments made no material difference; it did not indicate any up-date to its views as expressed in the letter of 10th May 2019.

89. Given that the AA was not compliant, it follows that the Council failed to apply Local Plan policy SP14.

90. I have considered whether it would be appropriate to refuse relief as a matter of discretion. It would not. Under section 31 (2A) of the Senior Courts Act I cannot say

that had a compliant AA been produced, the decision whether to grant permission would be highly likely to have been the same. In any event, as stated by Holgate J in Pearce v Secretary of State for Business Energy and Industrial Strategy and Norfolk Vanguard Limited [2021] EWHC 326 at [147], where a decision is flawed on a point of EU law the bar for withholding relief is higher than under section 31 (2A).

91. Ground 2 therefore succeeds.

Ground 3

92. In relation to construction noise, the EHO said that a Construction Noise Management Plan should be required by condition to mitigate the impact of construction noise on the school. Such a condition was imposed, by condition 25.

93. However, it is said for the Claimant that the imposition of a Construction Noise Management Plan was not sufficient, and that the impact of construction noise should have been assessed before permission was granted and that a scheme of mitigation should have been submitted with the application.

94. As a starting point I must consider policy SE06 of the Local Plan. That policy requires that "[d]evelopment schemes that generate significant levels of noise must be accompanied by a scheme to mitigate such effects, bearing in mind the nature of surrounding uses."

95. At first Mr Atkinson said that SE06 was not relevant because it did not relate to construction noise. However, as Mr Honey pointed out, the supporting text (at paragraph 16.35) lists "BS5228 Code of practice for noise and vibration control on construction and open sites" as one of the sources of guidance in relation to the policy. This suggests that the policy applies to construction as well as operational noise, and in oral submissions Mr Atkinson rightly accepted this.

96. Therefore, it seems to me that the policy means that development proposals that generate significant levels of noise, including construction noise, must be accompanied by a scheme to mitigate such effects, bearing in mind the nature of surrounding uses.

97. This requirement was not addressed in the delegated report. Having regard to the evidence, it should have been addressed. The EHO's consultation responses made clear, in my view, that in the specific context of proximity to the school this was a case where construction noise would generate significant levels of noise. Her consultation response of 19th July 2019 drew attention to the guidance stating that pupils with special educational needs are generally more sensitive to the acoustic environment than others and that pupils with autism are often very sensitive to specific types of noise. She said that it therefore was imperative that construction impacts were assessed, and noise mitigation put in place.

98. This consultation response was reproduced in the delegated report, but the consequences were not worked through. Given the EHO's comments, accepted (by their incorporation in the delegated report) by the determining officer, this application had to be considered, in the context of the school, as one generating significant levels of noise.

99. In those circumstances policy SE06 applied and required the application to be accompanied by a mitigation scheme. However, the delegated report ignored SE06 and no mitigation scheme was required.

100. As Mr Honey said, the problem with this approach was that it meant that the efficacy of construction noise mitigation was simply assumed. Once planning permission is granted, there is no going back, and it is simply a question of identifying the best mitigation that can reasonably be put in place. It would no doubt be highly unusual for a planning application scheme to be refused on the ground of construction noise; but given the sensitivities of the school's pupils that cannot be ruled out.

101. It would have been open to the determining officer to take account of the requirements of SE06 for a mitigation scheme to be submitted with the application, and to have decided that this was not necessary, on the ground that it was clear that a satisfactory scheme could be devised so all that was required was a condition requiring a scheme to be submitted. The conclusion would then have been that the requirement in SE06 should not be applied. Provided reasons were given, this approach would be acceptable. But this was not what the officer did. Instead, she took no account of SE06 and the requirement for a mitigation scheme to be submitted with the application and went straight to imposition of a condition. In my view that was an unlawful approach.

102. If this ground stood alone, would it have been appropriate to refuse relief under section 31(2A) of the Senior Courts Act? In usual circumstances I would have done so, as it is highly unusual for planning permission to be refused because of the impossibility of providing sufficient mitigation for construction noise, particularly on an allocated site. In this case, however, my approach would have been different, because of the extra sensitivity of the school. I do not think it would be for me to say that the outcome would be highly likely to have been the same had the error I have identified not been made.

103. Ground 3 therefore succeeds.

Ground 4

104. The specific highway safety implications of the development of the school were, as the Claimant said, obviously material given the proximity of the school and that it shared access with the site, the sensitivity of the pupils and their vulnerability in highway safety terms. Also, a point of relevance and concern specifically to the school was raised in the objection letters, including that of the head teacher Mr Milton. The school tries to encourage older pupils to become independent travellers to the school. This involves them walking along Ozengell Place to access the school, whether they walk all the way from home or after alighting from a bus. Mr Milton's concern (explained in his witness statement at paragraph 22) was that increasing the traffic flow directly outside the school would increase the risk of this activity and deter young people and their parents from allowing the young people to travel independently to the school.

105. This alleged risk was a highly material issue in my judgement and one which needed to be properly considered. In the "Notification" section of the delegated report, where concerns of neighbouring occupiers are listed, there is reference to "Highway safety for

children and parents during school drop off/collection." However, in the Comments section of the report there is no reference to this point, and "school drop off/collection" does not refer to the particular point of independent journeys to and from the school by older pupils.

106. Mr Atkinson relied on the fact that the County Council Highways and Transportation department did not object to the scheme. They were zealous, he said, so they must have considered this point. I do not accept that. There is reference in the County Council's representation to speed restraint, but they cannot be assumed to have considered the concern about independent journeys.

107. There is a section of the delegated report headed "Highway Safety." However, though that section deals in detail with a number of issues, including a footpath/cycleway, the need for speed restraint, parking and highway improvement, it does not mention the independent journeys issue. In my judgement the only reasonable interpretation is that this issue was ignored. It was an important issue and a judgement should have been reached on it. Did it make the development unacceptable, or if not, was there mitigation that could be put in place that would make the development acceptable in this regard? We do not know.

108. Ground 4 must therefore succeed based on the above points. I should add that I am not convinced of the Claimant's submissions about the need for a Transport Assessment. Policy SP09 is the policy allocated Westwood as a whole for development and in that context states that "Proposals will be accompanied by a Transport Assessment." I do not think this necessarily means that proposals for any part of the Westwood site, however, small, have to be accompanied by a Transport Assessment. The Local Plan has to be read as a whole, and as Mr Atkinson said the explanatory text for policy TP01 envisaged that a Transport Assessment would not necessarily be needed for developments which (like this one) proposed fewer than 100 dwellings.

109. As with grounds 2 and 3, I have considered whether had this ground stood alone I would have refused relief under section 31(2A) of the Senior Courts Act. As with those other grounds, I would not have done so. It would be unusual for a development of this nature on an allocated site to be refused permission on highway safety grounds, but I cannot say that in the specific circumstances of this case the outcome would be highly likely to have been the same had the highway safety issue raised been taken properly into account. Permission could have been refused, or perhaps more likely, allowed but with further mitigation to deal with the issue raised by the school.

Ground 5

110. Policy SE05 provides that all developments which either individually or cumulatively are likely to have an impact on air quality will be required to submit an Air Quality or Emissions Mitigation Assessment.

111. Further guidance is given in the supporting text to the policy. Paragraph 16.24 states that:

> "*Developments that require the submission of an Air Quality Assessment include the following:*

> *(1) If the development is located in an area of poor air quality (i.e. it will expose future occupiers to unacceptable pollutant concentrations) whether the site lies within a designated AQMA, or, if so, advised by the Local Authority, or a 'candidate' AQMA…*"

112. During argument Mr Atkinson accepted that this meant that where development is proposed within in an AQMA, the planning application requires the submission of an Air Quality Assessment. Paragraph 16.25 goes on to say that the Council's air quality officer will confirm whether an air quality assessment is required, or if an emissions mitigation statement is required instead.

113. However, in the present case neither an air quality assessment nor an emissions mitigation statement was required of the developer, and there is nothing in the delegated report to indicate that consideration was given to requiring either. It is true that SE05 is mentioned in the list of development plan policies, but beyond that, there is no reference to air quality in the delegated report other than the bald reference in the list of local neighbour concerns to "air quality."

114. Mr Atkinson submitted that air quality had been sufficiently addressed in the report, also drawing attention to the EHO's consultation response. He said that we can assume that the EHO had considered whether an air quality assessment was required and decided one was not required. All the EHO did require was "Standard Air Quality Mitigation" in the form of minimum requirements for gas-fired boilers and also electric vehicle charging points (which are required by condition 17 in the permission).

115. I do not think it is possible to assume that the EHO considered whether an air quality assessment was required. The reality is that the Council failed to consider whether one was required, and therefore failed to apply its own Local Plan policy. Furthermore, I could not properly refuse relief under section 31 (2A) of the Senior Courts Act, as I cannot say the outcome would be highly likely to have been the same had the policy been applied. We cannot know whether had the Council had regard to the requirement for an air quality assessment it would have required such an assessment, or, had an assessment been required, what such an assessment would have said.

Ground 6

116. There was agreement on the approach to be taken to the apparent bias ground, as per the submissions of Mr Honey summarised above. As submitted by Mr Honey, the test for apparent bias involves the two-stage process of first ascertaining all the circumstances which have a bearing on the suggestion of bias, and then asking whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the decision-maker was biased.

117. However, I am to apply this test in the specific context that this is a case where the Council is the joint owner of the land subject of the application. It is inevitable that local authorities will have to determine planning applications relating to land in which they have an interest. Any judgement about apparent bias has to recognise this. In the words of Richards J in Georgiou at [31], it is important whenever an authority's decisions are being challenged not to apply the test in a way that renders decision-making impossible

or unduly difficult. I also remind myself of Ouseley J's reference in Cummings at [261] to there being a degree of permissible structural bias built into the statutory framework for decision-making where the local planning authority is dealing with an application relating to its own land.

118. Applying the agreed principles, I must reach a judgement as a matter of fact and degree.

119. I am not convinced that the Contract on its own would be sufficient to persuade a fair-minded observer that the decision was tainted by apparent bias. I think such an observer would recognise the reality that local planning authorities do own land. The observer would also recognise that since they are the local planning authority for land in their area, if land they own or in which they have an interest is to be developed, that will involve making a planning application to the authority, either directly or through a developer agent. Where an authority engages with a developer, there is likely to be a contract obliging the developer diligently to pursue the submission of a planning application and obliging the authority (as landowner) to assist or not obstruct.

120. Where an authority contracts directly with a developer there may be a specific clause providing that nothing in the contract shall be taken to prejudge the decision to be made on any planning application by the authority in its capacity as local planning authority. No such clause was included in the Contract in the present case, but that is perhaps unsurprising given that the person contracting with the developer KPL was not the Council itself (and/or the County Council) but EKO. As Mr Atkinson said, the Contract referred to the body that would determine the planning as the "Determining Authority". This recognised the distinct status of that body, whether local planning authority or Secretary of State on appeal.

121. I am therefore not convinced the Contract on its own was enough to convince the fair-minded observer that there was a real possibility that the decision-maker was biased. In saying this I have had regard to Steeples v Derbyshire County Council [1985] 1 WLR 256, in which planning permission for the County Council's own land was quashed in the light of a prior contract between the County Council and the proposed developer. The judge in that case referred to there being a liquidated damages clause if the County Council failed to use best endeavours to obtain a planning permission. I agree with Mr Honey that if EKO breached its contractual obligations in the present case KPL could seek damages, but it may be that the presence of a liquidated damages clause would have a greater impact on a fair-minded observer.

122. In any event, however, I do not have to decide whether the Contract on its own was enough in order to come to a conclusion on ground 6, as there are other matters to be taken into account also. Taking the Contract together with the following other matters, my view is that the fair-minded observer would indeed think there was a real possibility that the decision-maker was biased:

    (1) As I have found in relation to ground 1, the application should have been determined by the planning committee, under the scheme of delegation. That is a separate reason why this challenge must succeed, but Mr Atkinson accepted it was also relevant to ground 6. The fact that the application was not determined in this way, contrary to the scheme of delegation, would have substantial influence on the fair-minded observer.

(2) The application was initially proposed to be heard by the planning committee, but then the approach was changed. This has never been satisfactorily explained. In her statement, Ms Fibbens said that the reason it had not been determined by the committee was that no councillor had asked for it to be so determined. However, that does not explain why it was initially proposed for committee determination and then the approach was changed to one of officer determination.

(3) Matters which are the subject of grounds 2-5 were not dealt with properly. I will not repeat my conclusions on those grounds, but the fact that the report did not deal adequately with those matters would in my view have reinforced the observer's impression that the decision was tainted by apparent bias.

123. I therefore conclude that a fair-minded observer would have thought there was a real possibility that the decision-maker was biased. I should add that I do not give weight to the circumstances in which the Contract came to be disclosed or the arguments the Council made in this challenge. As to the latter, I think the fair-minded observer would expect a local authority faced with a challenge of this nature to seek to defend its actions and as to the former the Council was not formally a party to the contract, which may explain any delay in providing a copy. Also, I do not think the content of the email from KPL to Ms Fibbens of 11th May 2020 adds substantially to the points referred to in the two previous paragraphs of this judgement.

CONCLUSION

124. In my judgement therefore all the grounds succeed. This application should have been determined by the planning committee. Further, because it had an interest in the site this was a case in which the Council had a particular duty to weigh the issues, engage with objections, set and closely observe procedural requirements (see Stirk v Bridgenorth Borough Council and R v Lambeth Borough Council v Sharp). I think that duty was not complied with. Finally, I think a fair-minded observer would conclude there was real possibility of bias.

125. Mr Atkinson rightly accepted that if either ground 1 or ground 6 succeeded he could not argue that I should refuse relief as a matter of discretion. Ground 6 goes to the very heart of the decision-making process, and as to ground 1, it cannot be said that the outcome was highly likely to be the same had the right body (the planning committee) determined the application. I have in any event explained in relation to the other grounds why I would not have exercised the discretion to refuse relief.

126. It follows that this application succeeds and the planning permission must be quashed.

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

Claim No: CO/4184/2020

B E T W E E N:

R (on the application of) "G"

Claimant

- and -

THANET DISTRICT COUNCIL

Defendant

- and -

KENTISH PROJECTS LIMITED

Interested Party

AGREED ORDER

Upon hearing Mr Richard Honey QC and Mr Jonathan Welch on behalf of the Claimant and Mr Giles Atkinson on behalf of the Defendant

It is ordered that:

1. The claim for judicial review is allowed.

2. Planning permission reference F/TH/19/0323 dated 2 October 2020, for the erection of 23 two storey dwellings and a three storey building accommodating 15 self-contained flats together with associated parking and landscaping on land on the north side of Stirling Way Ramsgate, is quashed.

3. The Defendant must pay costs for the Claimant's pro bono representation within 14 days to the charity prescribed pursuant to s194 of the Legal Services Act 2007, namely the Access to Justice Foundation (PO Box 64162, London WC1A 9AN), in the agreed sum of £35,000.

Signed: ***Timothy Corner***
Dated: 15 July 2021