



Neutral Citation Number: [2009] EWHC 308 (Admin)

Case No: CO/5990/2008

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/02/2009

Before :

MR JUSTICE WALKER

Between :

(1) THE BARD CAMPAIGN	<u>Claimants</u>
(2) David BLISS	
- and -	
SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT	<u>Defendant</u>
-and-	
WESTON FRONT	<u>Interested Party</u>

Mr Ian Dove QC, Mr Richard Harwood and Mr Christopher Young (instructed by **S J Berwin**) for the **Claimants**
Mr Timothy Mould QC and Mr James Maurici (instructed by **Treasury Solicitors**) for the **Defendant** and
Mr Anthony Crean QC and Mr Tim Shepperd (instructed by **Morris Orman and Hearle**) for the **Interested Party**

Hearing dates: 22, 23, 26 & 27 January 2009

**Judgment Approved by the court
for handing down
(subject to editorial corrections)**

<p>If this Judgment has been emailed to you it is to be treated as 'read-only'. You should send any suggested amendments as a separate Word document.</p>
--

A. Introduction

1. This case concerns aspects of what the government has or has not done in relation to proposed “Eco-towns.” What are they? The government gave a definition in a glossary at Annex C of its Housing Green Paper entitled “Homes for the Future: More Affordable, More Sustainable” (“the HGP”) and published on 23 July 2007:

Eco-towns – exemplar “green developments”. They will meet the highest standards of sustainability, including low and zero carbon technologies and quality public transport systems. They will make use of brownfield land and surplus public sector land where practical and lead the way in design, facilities and services, and community involvement.

2. I stress that I am concerned only with the legal aspects of what the government has or has not done in relation to Eco-towns. This case is an application for judicial review. That means that the court must take great care to ensure that it does not usurp the functions of the Secretary of State. Government policy is for the government. The present case is essentially concerned with procedure. The common law makes requirements for procedures to be fair, and subject to statute it determines what those requirements are, and when they apply.
3. The claimants in this case are a company known as “The Bard Campaign” and Mr David Bliss. I shall refer to them together as “Bard”. They oppose the government’s proposal to include in an Eco-towns shortlist a depot at Long Marston in Warwickshire and Worcestershire. This depot is proposed to be a site for an Eco-town of at least 6,000 homes to be known as “Middle Quinton”. The site formerly belonged to the Ministry of Defence (“MOD”). The defendant (“the Secretary of State”) is responsible for the Department of Communities and Local Government (“DCLG”). The claim was lodged on 24 June 2008. Permission to apply for judicial review was granted on the papers by an order of Collins J dated 11 September 2008. By an order of Sullivan J dated 19 November 2008 Weston Front, an unincorporated association, was joined as an interested party. I shall refer to it as “Weston” or “WF”. It objects to a proposed “Weston Otmoor” Eco-town of 15,000 houses near the village of Weston-on-the-Green in Oxfordshire. The proposed Weston Otmoor Eco-Town is sometimes referred to as “WO”.
4. The complaints are not about planning permission. Eco-towns have not reached that stage. They have reached a stage where a process of shortlisting has begun. Since the issue of these proceedings that process has been taken further. There have been alterations to the proposed shortlist. A sustainability assessment has been published, as has a draft Planning Policy Statement. A further round of consultation has begun. These proceedings do not involve challenges to those further developments. The present challenge concerns a consultation document issued in April 2008. It was entitled “Eco-towns - Living a Greener Future.” I shall refer to it as “ELGF”.
5. In advance of the present hearing Bard issued an application notice asking the court to make an order requiring disclosure by the Secretary of State. The hearing time allocated for the substantive hearing was a period of two days. When the matter came on for hearing Bard made a proposal that the disclosure application be the subject of argument on the first day set aside for the substantive hearing, with judgment on the disclosure application to be given on the second day followed by an adjournment to a future date for the substantive hearing.

6. As a matter of case management I regarded Bard's proposal as unsatisfactory. It might well have involved considerable unnecessary time and expense. If Bard and Weston succeeded without the need for disclosure, then that would be an end of the matter. Conversely, if Bard and Weston did not succeed without disclosure, or succeeded only partially without disclosure, then the need for disclosure could be assessed with a better understanding of the issues. Accordingly I made a case management order that argument should proceed in the first instance without disclosure. I would then give a short oral judgment describing the conclusions that I reached on each ground and my reasons. At that stage it would then be open to Bard to proceed with the application for disclosure if Bard considered that the application was still warranted.
7. In the event argument on the substantive application occupied three and a half days rather than the two days estimated. On the afternoon of 27 January 2009 I gave a short judgment dismissing Bard's and Weston's claims. Bard then made their application for disclosure. I refused that application for reasons which I give in section N below. Accordingly until section N this judgment considers the position without reference to the disclosure application.
8. At the outset I shall summarise the key questions in the case and my answers.
 - i) Did the government properly consult on the principle of, and the key criteria for, Eco-towns? My answer is that it did. The approach taken by the government to consultation on principle and key criteria was sufficient to comply with relevant procedural requirements.
 - ii) Was there proper consultation in relation to ELGF? My answer is yes. ELGF was limited to certain preliminary aspects of shortlisting. The government was entitled to limit ELGF in this way, and it complied with relevant procedural requirements in relation to ELGF.
9. In section B below I summarise events prior to ELGF. Section C deals with ELGF and the announcement which accompanied it. Section D summarises events after ELGF. In section E I make some general observations about the grounds of challenge and relevant legal principles. Sections F-K deal in turn with the 6 grounds of challenge advanced by Bard. Where appropriate they also deal with assertions made by Weston in relation to particular grounds of challenge. Section L deals with three additional points made by Weston. Section M sets out the conclusions which I have reached, putting on one side Bard's disclosure application. Section N deals with Bard's disclosure application. At section O the overall result is described.

B. Events prior to ELGF

10. During the period prior to the HGP the government had been developing policies which in various ways sought to increase housing supply and to respond to climate change concerns.
11. Housing supply had been the subject of a "Sustainable Communities Plan" in February 2003. This identified four "Growth Areas": Ashford; London-Stansted-Cambridge-Peterborough; Milton Keynes and South Midlands; and the Thames

Gateway. In March 2004 the final report of a Review of Housing Supply by Ms Kate Barker was delivered to the government. Ms Barker noted that the UK had experienced a long-term upward trend in real house prices which had created problems of affordability. In addition, the volatility of the housing market had exacerbated problems of macroeconomic instability and had had an adverse effect on economic growth. For these reasons a lower trend in house prices was desirable, and this could be achieved by building an additional 70,000 to 120,000 houses each year in England.

12. In its response to the Barker Review in December 2005 the Government set an ambition of building at least 200,000 homes a year compared with existing rates of around 150,000. In this regard the Government announced a “New Growth Points Programme”, designed to provide support to local communities, outside the four Growth Areas, who wanted to pursue large scale and sustainable growth, including new housing, through a partnership with Government.
13. The response to the Barker review also identified the potential of large brownfield sites, including such sites in locations detached from neighbouring towns:

There is a good case for reusing large brownfield sites where they can be brought into use sustainably, alongside town centre schemes and urban extensions. Some of these may be sites previously used by the armed forces, by the health sector and by statutory undertakers and other utilities, such as former railway land. With the right design, good infrastructure and high quality links to neighbouring communities, these sites have considerable potential.

However, recent experience indicates significant delay and problems in delivering homes on many of these large sites, particularly in relation to infrastructure and local delivery capacity. Great care needs to be taken that sites are sustainable. Some may be too far from existing settlements to be viable, or have no prospect in the near future of securing the necessary public and private infrastructure. There may be other environmental factors which make such sites unviable. ...

14. In November 2006 Planning Policy Statement 3: Housing (“PPS3”) was published. PPS3 set out policies which were required to be taken into account by planning authorities. Among other things PPS3 stressed that in appropriate circumstances consideration should be given to options for accommodating new housing growth including expansion of existing settlements through urban extensions and creation of new freestanding settlements. Paragraph 36 stated:

In support of its objective of creating mixed and sustainable communities, the Government’s policy is to ensure that housing is developed in suitable locations which offer a range of community facilities and with good access to jobs, key services and infrastructure. This should be achieved by making effective use of land, existing infrastructure and available public and

private investment, and include consideration of the opportunity for housing provision on surplus public sector land (including land owned by Central Government and its bodies or Local Authorities) to create mixed use developments. The priority for development should be previously developed land, in particular vacant and derelict sites and buildings.

15. Turning to climate change concerns, these had featured to a limited extent in Planning Policy Statement 1: Delivering Sustainable Development (“PPS1”) published in January 2005. PPS1 was concerned with numerous aspects of sustainability. I set out here passages – concerning climate change and concerning other matters – of potential relevance to these proceedings:

2. Good planning is a positive and proactive process, operating in the public interest through a system of plan preparation and control over the development and use of land.

...

7. ... the country needs a transparent, flexible, predictable, efficient and effective planning system that will produce the quality development needed to deliver sustainable development and secure sustainable communities. National policies and regional and local development plans (regional spatial strategies and local development frameworks) provide the framework for planning for sustainable development and for that development to be managed effectively. Plans should be drawn up with community involvement and present a shared vision and strategy of how the area should develop to achieve more sustainable patterns of development.

8. This plan-led system, and the certainty and predictability it aims to provide, is central to planning and plays the key role in integrating sustainable development objectives. Where the development plan contains relevant policies, applications for planning permission should be determined in line with the plan, unless material considerations indicate otherwise.

9. Local communities, businesses, the voluntary sector and individuals have a right to a high quality service that is fast, fair, open, transparent and consistent and respects the cost, effort and commitment that has gone into engagement in plan making and in preparing and submitting applications. ...

...

13. The following key principles should be applied to ensure that development plans and decisions taken on planning applications contribute to the delivery of sustainable development:

...

(vi) Community involvement is an essential element in delivering sustainable development and creating sustainable and safe communities. In developing the vision for their areas, planning authorities should ensure that communities are able to contribute to ideas about how that vision can be achieved, have the opportunity to participate in the process of drawing up the vision, strategy and specific plan policies, and to be involved in development proposals. (See also paragraphs 40-44 below).

...

21. The prudent use of resources means ensuring that we use them wisely and efficiently, in a way that respects the needs of future generations. This means enabling more sustainable consumption and production and using non-renewable resources in ways that do not endanger the resource or cause serious damage or pollution. The broad aim should be to ensure that outputs are maximised whilst resources used are minimised (for example, by building housing at higher densities on previously developed land, rather than at lower densities on greenfield sites).

22. Development plan policies should seek to minimise the need to consume new resources over the lifetime of the development by making more efficient use or reuse of existing resources, rather than making new demands on the environment; and should seek to promote and encourage, rather than restrict, the use of renewable resources (for example, by the development of renewable energy). Regional planning authorities and local authorities should promote resource and energy efficient buildings; community heating schemes, the use of combined heat and power, small scale renewable and low carbon energy schemes in developments; the sustainable use of water resources; and the use of sustainable drainage systems in the management of run-off.

...

27. In preparing development plans, planning authorities should seek to:

...

(viii) Promote the more efficient use of land through higher density, mixed use development and the use of suitably located previously developed land and buildings. Planning should seek actively to bring vacant and underused previously developed land and buildings back into beneficial

use to achieve the targets the Government has set for development on previously developed land.

...

(x) Address, on the basis of sound science, the causes and impacts of climate change, the management of pollution and natural hazards, the safeguarding of natural resources, and the minimisation of impacts from the management and use of resources.

...

40. Planning shapes the places where people work and live. The planning system operates in the public interest to ensure the development and use of land results in better places for people to live, the delivery of development where communities need it, as well as the protection and enhancement of the natural and historic environment and the countryside. The outcomes from planning affect everyone, and everyone must therefore have the opportunity to play a role in delivering effective and inclusive planning. Community involvement is vitally important to planning and the achievement of sustainable development.

...

16. In December 2006 a consultation document entitled “Building a Greener Future: Towards Zero Carbon Development” sought views on government proposals to reduce the carbon footprint of new housing development. These included a timetable for revising the Building Regulations in order to reach zero carbon development in all new housing in England and Wales by 2016. Also in December 2006 the government published a “Code for Sustainable Homes.”
17. It was in the context of these developing policies that in March 2007 the government announced that it supported the building of an unspecified number of zero carbon or low carbon developments of 5,000 to 10,000 homes making use of brownfield and surplus public sector land. This, along with other housing proposals, was taken forward four months later when the government published the HGP on 23 July 2007. The HGP which contained in Annex C the definition of “Eco-towns” set out in paragraph 1 above began with a ministerial foreword by Yvette Cooper MP. The last four paragraphs of that foreword read:

We need a new national drive to support more affordable housing and we need to act now. That’s why the Prime Minister recently announced plans for three million new homes by 2020. Homes that reflect the diverse needs of all our communities.

This Housing Green Paper outlines our plans for delivering these homes. More homes – backed by more ambitious building targets, increased investment, and new ways of identifying and using land for development. More social housing – ensuring

that a decent home at an affordable price is for the many, not the few. Building homes more quickly – by unblocking the planning system and releasing land for development. More affordable homes – by increasing the options for low cost home ownership and more long term and affordable mortgage products. And greener homes – with high environmental standards and flagship developments leading the way.

But we cannot do it alone. It is only by working in partnership and harnessing the energy of local government, developers and house-builders, housing associations, as well as communities and tenant and resident groups – that we will truly make progress – building affordable, sustainable homes for the future, in communities where people are proud to live.

This is your opportunity to consider our proposals and help us shape the future of housing in England. I look forward to your contribution. [emphasis added]

18. There was then an executive summary. I set out what was said by way of introduction and when summarising sections I and II of the main document:

“Our vision

We want everyone to have access to a decent home at a price they can afford, in a place where they want to live and work. Good quality, affordable housing enables stable and secure family lives: we are all healthier, happier and wealthier when we have decent homes close to schools, healthcare and transport links.

But this is not just an issue for families. Good housing can improve our social, environmental and economic well-being. It helps create better communities that can attract investment and skilled workers. And getting the design right can also improve the environment and reduce our carbon footprint.

Therefore, the strategic housing decisions we take collectively over the next few years are critical to the life chances of the next generation.

Section I: What’s happened since 1997

Since 1997, housing has improved for many people. Homeowners have seen the value of their properties increase. Social tenants have seen massive improvements in the quality of their homes. And concerted action has slashed homelessness and directly helped 77,000 households to buy their first homes.

All of this has been achieved in a climate of economic growth and stability – far removed from the boom and bust of previous

decades. Low inflation and low interest rates have led to over 1 million more home owners over the last ten years.

We have achieved a great deal through our investment in housing over the past ten years. That investment means social housing now has over 1 million fewer non-decent homes and the number of private sector vulnerable households living in non-decent homes has been reduced by over 300,000. We have also cut the number of rough sleepers by over two thirds and ended the long-term use of bed and breakfast accommodation for families with children. Our investment has also helped improve demand for homes in some previously blighted urban areas.

The challenges we face

But we face new challenges today. Demand for homes to buy or rent is growing faster than supply. And as house prices have grown faster than wages, it is becoming increasingly difficult for young people to get a step on the housing ladder. And the challenges of climate change mean we need to provide greener, better-designed housing for the future.

This Green Paper sets out our proposals to improve the housing fabric of our society. We will work with our partners to provide:

More homes to meet growing demand;

Well-designed and greener homes, linked to good schools, transport and healthcare;

More affordable homes to buy or rent.

Section II: More homes to meet growing demand

Our first challenge is to provide more homes. Housing supply has increased substantially in the last few years and is now at its highest level since the 1980s, but supply is still not keeping up with rising demand from our ageing, growing population.

Why we need more homes: While the housing stock is growing by 185,000 a year, the number of households is projected to grow at 223,000 a year, many of them people living alone.

New targets: That is why the Government is now setting a new housing target for 2016 of 240,000 additional homes a year to meet the growing demand and address affordability issues. The level of housing supply needs to increase over time towards this

target and we believe that a total of three million new homes are needed by 2020, two million of them by 2016.

Delivering 2 million homes by 2016 and 3 million homes by 2020: Our proposals assume that housing supply will rise over time towards the 240,000 per year target in 2016, delivering approximately two million new homes by 2016 and continuing at around 240,000 homes per annum over the next four years to deliver an extra million new homes by 2020.

The two million new homes that will be delivered by 2016 will include the following:

1.6 million homes are already in existing Regional Spatial Strategies (RSS) and plans now in place including around 650,000 homes in Growth Areas with support from the 2003 Sustainable Communities Plan (e.g. Thames Gateway and Milton Keynes/South Midlands);

150,000-200,000 additional homes in the new round of RSS and plans now under consideration, including many smaller sites and urban area schemes, together with **further, partial RSS reviews** where they are needed;

100,000 extra homes in 45 towns and cities that make up the **29 New Growth Points** which have already come forward in 2006 proposing high growth schemes. Those towns will be eligible for additional support and growth funding – comparable to support which Growth Areas receive, including access to a £300 million Community Infrastructure Fund for Growth Areas, New Growth Points and eco-towns;

An additional round of New Growth Points including for the first time the North. Our ambition would be to deliver around **50,000 new homes**. The final number will depend on the strength, costs and sustainability of bids coming forward;

We are launching today an invitation for local authorities and developers to propose **5 new eco-town schemes**, with the entire community designed to be able to reach zero carbon standards. Each scheme could provide between 5,000 and 20,000 new homes giving a total of some **25-100,000 homes**. Final decisions will depend on the strength, costs and sustainability of the bids received.

Delivering homes where they are needed: Young families face problems finding affordable homes in every region, in urban and in rural areas. New housing is therefore needed throughout the country delivered in a way that is sensitive to local needs. We are extending the New Growth Points programmes to northern cities and towns.

Rural homes: We recognise that rural communities face particular pressures. We will set out measures to ensure more social and shared ownership homes are delivered in villages, as the Affordable Rural Housing Commission proposed. The Housing Corporation is investing £230 million to deliver around 6,300 homes in small towns and villages through its 2006–08 affordable housing programme. We will set a target for delivery of affordable housing in rural areas over the period 2008-11. We are also supporting seven new potential pilot Community Land Trusts in rural areas, giving local communities access to land for affordable house building.

Planning reviews: We will set up partial reviews of regional plans to increase regional and local targets and ensure the new eco-towns and additional Growth Points are properly handled in the planning system. Reviews of Regional Spatial Strategies will be carried out by 2011 to reflect plans for 240,000 homes a year by 2016.

Local planning incentives and enforcement: A new Housing and Planning Delivery Grant will direct extra resources to those councils who are delivering high levels of housing and to those councils who have identified at least 5 years worth of sites ready for development. Local councils will have to identify enough land to deliver the homes needed in their area over the next 15 years by rapidly implementing new planning policy for housing (PPS3). We are publishing new guidance showing how councils can find the land they need. Where councils have not identified enough land and do not grant sufficient planning permissions, planning inspectors will be more likely to overturn their decisions and give housing applications the go ahead at the appeal stage. We will also consult on ways to strengthen the requirement on developers to commence development or lose planning permission, and what more can be done to develop a consistent approach to the disclosure of land holdings.

Public sector land: We have raised our target to 200,000 new homes to be delivered on surplus public sector land by 2016, a significant increase from the previous target of 130,000 announced in the Pre-Budget Report. English Partnerships will set out new standards for housing on surplus Government land, which will increase the number of affordable homes developed, bring forward sites more quickly and ensure that design and environmental performance standards are raised to meet housing policy objectives.

Recycling homes and land: We also need to make the most of existing homes and buildings and disused land. We believe brownfield land should be the priority for development. The Government will continue with the national target that over

60% of homes should be built on brownfield land and every region and local authority will be expected to set their own target for brownfield land use. The new homes agency will work with local authorities to support them in their place-shaping role, including on how local authority and other disused land can be used to lever in private investment and transform communities. Councils, as part of their strategic housing role, need to reduce the number of homes that are left empty for long periods of time. We will explore a range of measures including the new Housing and Planning Delivery Grant.”

19. Chapter 1 of the HGP included a passage in relation to Eco-towns:

Eco-towns

12. Eco-towns will build on the UK’s rich historic experience of creating planned new settlements. The garden cities are rightly highly regarded across the world. Ebenezer Howard’s vision of garden cities was of places to combine ‘the health of the country with the comforts of the town’. Green Belts have kept places separate and distinct and many of the new towns of the second half of the twentieth century have been highly successful. Modern schemes need to be more flexible in design and make more use of different models of financing but many of the lessons of the new towns still apply.

13. Eco-towns will be entirely new towns which are exemplar “green developments” of between 5,000 to 20,000 homes. They will be designed to meet the highest standards of sustainability, including low and zero carbon technologies and good public transport. They should incorporate renewable energy systems such that, overall, the whole development in Eco-towns is capable of achieving zero-carbon. The entire community will be designed to have zero or low carbon use, including new schools, community and health facilities. Environmental infrastructure will be a key component of ecotowns including effective flood management, sustainable urban drainage systems, waste water management together with greenspace and enhanced biodiversity.

14. Eco-towns will complement town and city centre renewal, urban extensions and the redevelopment of major sites in existing urban areas. Two prototype schemes, Northstowe in Cambridgeshire and Cranbrook outside Exeter in Devon, are already at an advanced stage of planning and will provide a test bed for informing plans for Eco-towns. Construction will start next year.

15. We are looking for at least five new schemes to start within two years, each with 5,000–20,000 homes. As new developments, they provide an excellent opportunity to show how homes can be built to higher environmental standards with potential for lower cost. This will include zero-carbon development and integrated services and transport. Final decisions will depend on the strength, costs and sustainability of the bids received.

16. In line with support provided to Growth Areas and New Growth Points, Government will invest in Eco-towns to provide support for delivery capacity, early site infrastructure projects, essential studies and master-planning. Eco-towns will be eligible for support from the Community Infrastructure Fund. £2m has already been made available for preparatory work. A large proportion of future investment in Eco-towns will be made by the private sector.

Selecting Eco-town developments

17. Alongside this Green Paper we are publishing a prospectus setting out the vision and outline criteria for Eco-towns. We are inviting proposals from local authorities and other interested groups as to how Eco-towns could contribute to additional growth. Eco-towns will be judged against the following criteria:

- zero carbon and environmental standards;
- sustainable travel;
- design quality, including through design competitions;
- community involvement; and
- use of land.

18. We are committed to preserving green spaces. So, where possible we will use brownfield and public sector land to deliver these new developments.

19. On identifying promising Eco-town proposals, we will:

- review them with other Departments and Agencies;
- commit resources where appropriate to enable Eco-towns proposals to be dealt with quickly through the planning system using mini RSS reviews and use of the new town powers where necessary to secure implementation;

- provide guidance for developers, prepared by David Lock and the Town and Country Planning Association (TCPA);
- establish a wider reference group to provide input and expert advice into their development; and
- sponsor an architectural competition to stimulate new thinking on design for new settlements...

20. At the end of Chapter 1 the government stated:

Next steps

[1] Continue to support delivery in the Growth Areas and New Growth Points

[2] Identify at least 5 new eco-town schemes by inviting responses to the eco-towns prospectus from local authorities and other interested groups

[3] Commit resources where appropriate to enable eco-towns proposals to be dealt with quickly through the planning system

[4] Launch a guide for developers

[5] Invite bids from individual local authorities and partnerships for New Growth Point status

[6] Develop a target over the Comprehensive Spending Review (CSR07) period for affordable housing in rural areas

[7] Continued investing in Housing Market Renewal over the Comprehensive Spending Review period with greater targeting of funding to areas facing deep seated structural challenges

21. The passage dealing with Eco-towns described one of a number of government proposals covered by the HGP, which comprised five main sections:

(1) Section 1 was a general introduction under the heading “Progress and Challenges.

(2) Section II was headed “More Homes to Meet Growing Demand”. Chapter 1 of this section was entitled “Delivering Homes Where They Are Needed.” This chapter dealt with growth areas and growth points. It then turned to deal with Eco-towns as set out above. After that it proceeded to describe the government’s approach to what was called “meeting the rural challenge” before ending with the passage on “Next Steps” quoted above. Thereafter in Section II chapters 2, 3 & 4 dealt

with “Delivery without needless delay – continuing planning reform,” “Public sector land use,” and “Recycling homes and land.”

(3) Section III was entitled “How We Create Places and Homes That People Want To Live In.” Here Chapters 5, 6 & 7 dealt with “Infrastructure,” “Well designed homes and places,” and “Greener homes.”

(4) Section IV was entitled: “Making Housing More Affordable.” Here Chapters 8, 9 & 10 dealt with “More social housing,” “Helping first time buyers,” and “Improving the way the mortgage market works.”

(5) Section V was entitled: “Delivery: How We Make It Happen.” In this section Chapters 11 & 12 were headed “Skills and construction,” and “Implementation: a shared endeavour.”

22. Annex A to the HGP was headed “Responses to consultation.” It began:

Purpose of consultation.

This consultation seeks view on a range of proposals relating to housing supply in England.

We welcome responses to the specific questions posed in this document as well as any general comments that you may have. A summary of these questions is set out below.

23. Annex A continued that responses and comments were to be received by 15 October 2007. It added that a summary of responses to the consultation would be published by 29 February 2008. The consultation criteria in the Cabinet Office Code of Practice were then set out: these will be found later in this judgement, in Section E below. The final page of the Annex identified specific questions which were numbered from 5-10. This numbering appears to have been an error – there were no questions numbered 1-4. What was set out on the final page was this:

Summary of Consultation Questions

We invite your views on the range of ideas and proposals contained in this Green Paper.

We particularly welcome your views on the following questions.

Chapter 6: Well designed homes and places

5. Do you consider that any additional tools and/or mechanisms are now needed to deliver the design policies in order to achieve our aspirations for an up-lift in quality and to improve inclusive design?

6. Do you agree that further work to explore and evaluate quality assurance approaches would be worthwhile?

Chapter 8: More social housing

7. What are your views on our proposals to allow councils to retain the full rental income from, and capital receipts on disposal of, additional new properties financed from local resources and consult on detailed options?

8. What are your views on our proposals to change the pooling regime for receipts from share equity schemes that local authorities develop and consult further on any details proposals?

9. What are your views on the strengths of the models for delivering new supply set out in chapter 12?

10. Are there other models you know of which could effectively secure the outcomes sought?

24. As promised in paragraph 17 of the HGP, on 23 July 2007 the government published in conjunction with the HGP a document entitled “Eco-towns Prospectus” (“the Prospectus” or “EP”) inviting bids from local authorities and others wishing to develop an Eco-town in their area. A ministerial foreword by Yvette Cooper MP gave a brief description of developments in housing since the second world war. It concluded:

We have seen strong support across the private sector, local government and local communities for building more affordable homes alongside higher environmental standards. Now we want local areas to come forward with ideas on how to put these principles and ambitions into practice – with a new generation of eco-towns.

25. The executive summary of the Prospectus stated as follows:

Eco-towns will be small new towns of at least 5-20,000 homes. They are intended to exploit the potential to create a complete new settlement to achieve zero carbon development and more sustainable living using the best new design and architecture. The key features we want to achieve are:

(i) places with a separate and distinct identity but good links to surrounding towns and cities in terms of jobs, transport and services;

(ii) the development as a whole to achieve zero carbon and to be an exemplar in at least one area of environment technology;

- (iii) a good range of facilities within the town including a secondary school, shopping, business space and leisure;
- (iv) between 30 and 50 per cent affordable housing with a good mix of tenures and size of homes in mixed communities; and
- (v) a delivery organisation to manage the town and its development and provide support for people, businesses and community services.

Government is looking to encourage and support local authorities and the private sector to bring forward around five new schemes. This prospectus sets out the context for the programme and explains how the Government can support these projects. It outlines the criteria by which they will be assessed, **subject to consultation** and testing in the planning process. [emphasis added]

26. In the main body of the Prospectus there was a heading, “Key Criteria for Eco-towns.” Under that heading paragraph 13 stated:

13. Eco-towns are a major opportunity for local authorities, house builders, developers and registered social landlords to come together to build small new towns. Eco-towns should be well designed, attractive places to live, with good services and facilities, and which connect well with the larger towns or cities close by. Uniquely, they offer an opportunity to design a whole town – business and services as well as homes – to achieve zero-carbon development, and to use this experience to help guide other developments across the country. The **essential requirements** we are looking for are:

- (i) eco-towns must be new settlements, separate and distinct from existing towns but well linked to them. They need to be additional to existing plans, with a minimum target of 5,000 – 10,000 homes;”
- (ii) the development as a whole should reach zero carbon standards, and each town should be an exemplar in at least one area of environmental sustainability;
- (iii) eco-town proposals should provide for a good range of facilities within the town – a secondary school, a medium scale retail centre, good quality business space and leisure facilities;
- (iv) affordable housing should make up between 30 and 50 per cent of the total through a wide range and distribution of tenures in mixed communities, with a particular emphasis on larger family homes;

(v) a management body which will help develop the town, provide support for people moving to the new community, for businesses and to co-ordinate delivery of services and manage facilities.

27. When describing outcomes that the government was looking for, section VII of the main document concerned land use. This section stated at the outset that wherever there were good opportunities to do so, schemes should make use of suitable surplus public sector land, or brownfield land. This was followed by paragraph 17, which stated:

17. Surplus Public Sector Land. Where practicable we want to encourage the development of eco-towns on surplus public sector land. In terms of registered surplus public sector land there are about 4,600 hectares, which provides a potential opportunity for development. A recent exercise to identify additional surplus public sector sites owned by central Government Departments revealed a further 550, with nearly 300 within the wider South-East. These are being examined by English Partnerships for housing development and some of these sites could offer potential opportunities for eco-towns.

28. Under the heading “Planning” the Prospectus stated:

27. Just as housing markets are wider than individual local authority boundaries, so identifying and considering potential eco-town schemes will require local authorities to look at the wider area of which they form part, the pattern of clusters and networks of towns, the links between them and the best strategic options for growth for the larger area. These are issues for the Regional Spatial Strategy (RSS) or for a partial RSS review. These reviews will provide the strategic planning context for consideration of individual proposals and sustainability/environmental appraisal as necessary.

28. In some cases the planning content provided by the development plan as a whole is already sufficiently clear to enable a proposal for an eco-town to be handled directly by a planning application. The Government wants to minimise delay and enable proposals for eco-towns to be dealt with quickly through all aspects of the planning system. We will be committing resources where appropriate to help achieve this.

29. The Prospectus concluded with a heading “Next Steps”. Under this heading paragraphs 30 – 34 stated:

30. **Local authority views of potential** We expect authorities and groups of authorities to give consideration to the case for higher growth in their areas over the next few months, and the extent to which new eco-towns proposals could contribute to increased housing supply, above that planned to 2016. This

process should build on the work that has been undertaken to inform RSSs to date, and the requirements of Housing Planning Policy Statement (PPS3) to maintain a rolling supply of housing, and to undertake housing market assessments of their areas and across sub-regions more generally. We are therefore asking for views on the scope for eco-town proposals from the relevant authorities, individually and collectively, taking particular account of housing market benefits. It will be important for proposals for an eco-town to relate to housing market pressures in the wider area.”

31. We will also welcome views from **other stakeholders** on these issues including **joint assessments** and proposals from private sector – much as the work to prepare for RSS revisions has involved local authorities, Regional Development Agencies, and housebuilders in giving thought to, and providing evidence in support of, higher housing numbers, and broad strategic locations of higher growth. We will welcome views from other stakeholders including environmental, housing and business representatives.

32. It will also be valuable for Government to be informed of emerging major proposals and potential schemes with significant infrastructure implications, so that discussion with infrastructure providers and on sustainability can take place at a sufficiently early stage to inform future development of the scheme.

33. As with the recent process to identify New Growth Points, Government will assess schemes with potential in order to carry out a high level **inter-Departmental strategic review** of proposals. This will include DEFRA, DfT, the Environment Agency, Natural England, Highways Agency and English Heritage to ensure that proposals coming forward are sustainable, affordable and realistic in terms of policy and infrastructure investment support. This in no way prejudices the role of the planning process – but it does allow better supported proposals to come forward.

34. **More detailed information for local authorities and potential proponents** is available separately. ...

30. On 2 August 2007, Mr. Henry Cleary (Deputy Director of the DCLG Housing & Growth Programmes Team) wrote to chief executives of local planning authorities in England. The letter said that it was written following the publication of the HGP to set out how the government would “invite proposals for additional new growth and Eco-towns, alongside many other measures and proposals set out in the [HGP]”. I shall refer to this letter as “the HGP letter”. It included the following:

“Eco-towns

The Green Paper indicates that we are looking for a least 5 new schemes of between 5 and 20,000 homes each, with final decisions depending on strength, cost and sustainability of proposals. The Eco-towns Prospectus sets out the criteria – large-scale free-standing new settlements that are exemplars of sustainable building and living, with the opportunity to design in low- and zero-carbon technology from the start. Eco-towns are intended to be well-designed, attractive places to live, with jobs and services, but also with good links to existing towns and cities close by. They will provide a major contribution to housing supply and increasing affordability – as a guide we expect around 30-50% of the homes in eco-towns to be affordable. The Prospectus sets out further guidance on planning, delivery and next steps (particularly paras 23-34). Higher environmental and earlier infrastructure costs will be taken into account in decisions on growth funding support.

The bidding and selection process for additional new growth points and eco-towns will be similar to that which applied to the first round of new growth points.

For both growth points and eco-towns we envisage a 3-stage process:

(a) By end October 2007 Expressions of interest in terms of strategic potential and based on the relevant criteria will be welcome from local authorities and on eco-towns from the private sector and other parties (with or singly or in partnership). At this stage we are looking for broad proposals and, in the case of eco-towns, views on potential – we are not looking for the level of detail appropriate to an individual planning application;

(b) November/December 2007 Proposals which are judged to have potential to meet the relevant criteria for new growth points or eco-towns will go forward for a strategic and high level cross-government review involving DEFRA, DfT, Highways Agency, Environment Agency and Natural England and the Government Office

(c) Early 2008 Government will announce schemes accepted for support, subject to consultation, testing and independent examination through the planning system, including use of the new town powers where appropriate (as set out in the Eco-towns prospectus). Conditions may include further detailed assessment of particular aspects such as environmental impact. Funding could be available from April 2008.

31. A total of 57 bids were eventually submitted pursuant to the Prospectus. As the number of likely bids rose the Prime Minister stated on 24 September 2007 that the government would now look to bring forward 10 Eco-towns. This was confirmed after the 31 October deadline had closed.
32. Once the bids had been received they were the subject of a process described as a “showstopper review.” This process was explained in a later document published on 4 November 2008. This document was entitled, “SA of the Eco-Towns programme – Introduction.” It included the following:

2.2.1 Communities and Local Government received 57 proposals, some led by local authorities but the majority by developers. Communities and Local Government then undertook an initial broad sift of the bids against the Eco-towns criteria set out in the Eco-towns Prospectus ... and categorised them as very strong; strong; medium; or poor ... The broad sift was undertaken on an internal basis partly because Communities and Local Government anticipated that some of the proposals would have little prospect of being taken forward and that to publicly identify such proposals would have led to a period of uncertainty for the communities concerned ...

2.2.2 Communities and Local Government then designated each bid ... A total of 33 schemes were confirmed as sufficiently strong to be considered through the regional review process.

...

2.3.1 Communities and Local Government then took forward assessment of the bids through a cross-government review of the proposed locations, mainly covering the transport and environment impacts in each case. Transport and the environment were focused on since Communities and Local Government considered these to be the two principal place-specific factors governing the success of a growth proposal. The cross-government review was also a ‘showstopper’ review that enabled Communities and Local Government to identify if there were any factors which would make it difficult or impossible to realistically provide infrastructure to serve a new settlement in that location or if the environmental impacts were unacceptable.

2.3.2 The cross-government review was carried out at a regional level with Department of Environment, Food and Rural Affairs, Department for Transport, English Heritage, Environment Agency, Government Offices, Highways Agency and Natural England. For the purposes of the Review, a short draft summary of the scheme and supporting documents were circulated to the key departments and agencies to inform a

round table discussion held on a regional basis with all parties represented, including the Government Offices. At the meetings the agencies were invited to give Sustainability Appraisal and Habitats Regulations Assessment of the Eco-towns Programme views on the sustainability impacts of the locations under review ... [using a banding system in which A signified that the proposal “meets criteria and no significant issues at this stage”; D signified the proposal met criteria but there was a potential show-stopper and F signified a proposal which failed to meet key criteria]

2.3.3 Discussions centred on those locations which had been listed for review. However, comments were also invited on locations which had been categorised as Reserve or List Only. List Only categorisations were overall confirmed as E or F and some other bids were also scored in these categories. Any bid scoring D or below was regarded as a ‘showstopper’ in terms of environmental and transport impacts on the information available at that stage.

2.3.4 In some cases, further information was sought from promoters of schemes, or agencies required more time to consider the impacts of a bid. These further deliberations led to changes in some of the assessments. The outcomes of these discussions, including any changes to the assessment bandings were recorded on a series of Assessment Summaries published on the Communities and Local Government website.

...

2.4.1 In parallel to the cross-government review, on 22 November 2007, Communities and Local Government wrote to all 57 of the scheme promoters, requesting further information on the key infrastructure requirements of the schemes; the extent to which they were able to contribute to the costs of delivery; and their plans for local consultation on proposals. This information was fed into an early assessment of deliverability.

...

2.5.1 All 57 locations were also assessed against housing market pressures ...

...

2.6.1 Of the 33 schemes considered at the regional review a total of 18 scored sufficiently well on the A to D grading and on delivery to be judged at that stage to be capable of going forward into a shortlist for wider consultation. This included two areas – Rushcliffe and Leeds City Region – where, in the

light of views from the relevant authorities who wished to consider areas of search in greater detail – Communities and Local Government agreed to a further review of potential sites rather than endorsing a specific scheme at that stage. In three cases where two schemes were competing in the same sub-region, a further review against Eco-town criteria and the issues raised in the cross-government review was carried out to identify the stronger candidate.

2.6.2 In determining the shortlist of locations with the potential to go forward as an Eco-town, Communities and Local Government took into account the following factors: a score of C or higher on the banding approach undertaken at the cross-government review; the housing market pressure in that area; and the assessment of deliverability. During the assessment process, Communities and Local Government also took informal soundings from local authorities and regional partners before short listing the 15 locations.

33. On 17 December 2007 the government published a Planning Policy Statement entitled “Planning and Climate Change.” The aim of this document was to supplement PPS 1 by setting out how planning should contribute to reducing emissions and stabilising climate change. It set out what were seen as key planning objectives and decision making principles in this regard. It then explained how those matters should be taken into account in regional spatial strategies and in local development documents, as well as when considering applications for planning permission.

34. A summary of responses to the HGP was published in February 2008. Paragraph 16 of this summary stated:

“Well over 100 submissions from across the range of respondent types commented on the Government’s proposals for new Eco-towns, of which over four fifths were supportive of the Government’s plans. A small number of responses (16) from local authorities, NGOs and RSLs/housing associations stressed that Eco-towns needed to be sustainable in terms of transport links to existing economies.

C. ELGF and the ministerial statement

35. On 3 April 2008 the government published a Written Ministerial Statement by the Minister for Housing and Planning (Caroline Flint MP). I shall refer to this as the “Potential Shortlist Announcement”. It named 15 locations which would “go through to the next stage of consultation”. It said that these potential locations had been published as part of a consultation document inviting views on both the broader objectives and benefits of Eco-towns and on the shortlisted locations. It added:

We will also be looking at the proposed schemes from promoters and we expect each proposal to be further refined

and improved over the coming months. We will be looking for clear evidence that each scheme:

achieves the highest possible environmental standards, not only mitigating the impact of development but positively enhancing the site as well as reducing the need for residents to rely on cars; is clearly deliverable, with funding identified and proper management arrangements set out; and is affordable, with a clearly agreed basis for contributions from private investors and public sector agencies.

A panel of experts will advise and challenge those leading the proposals to improve the environmental credentials of each project. Government will also be providing support to the relevant local authorities, comparable to the support on offer to local authorities designated as growth points or growth areas. We will continue to work in partnership with local government and the LGA as we move forward.

This consultation is the first of four key stages in the planning process for eco-towns.

Stage -1 three-month consultation on preliminary views on **eco-town** benefits and these shortlisted locations; stage 2- further consultation this summer on a sustainability appraisal, which provides a more detailed assessment of these locations, and a draft planning policy statement; stage 3 – a decision on the list of locations with the potential to be an **eco-town** as part of the final planning policy statement, later this year; and stage 4 – like any other proposed development, individual schemes will need to submit planning applications which will be decided on the merits of the proposal

Our objective is for five eco-towns to be completed by 2016, and up to 10 by 2020. we expect work to begin on some sites by 2010.

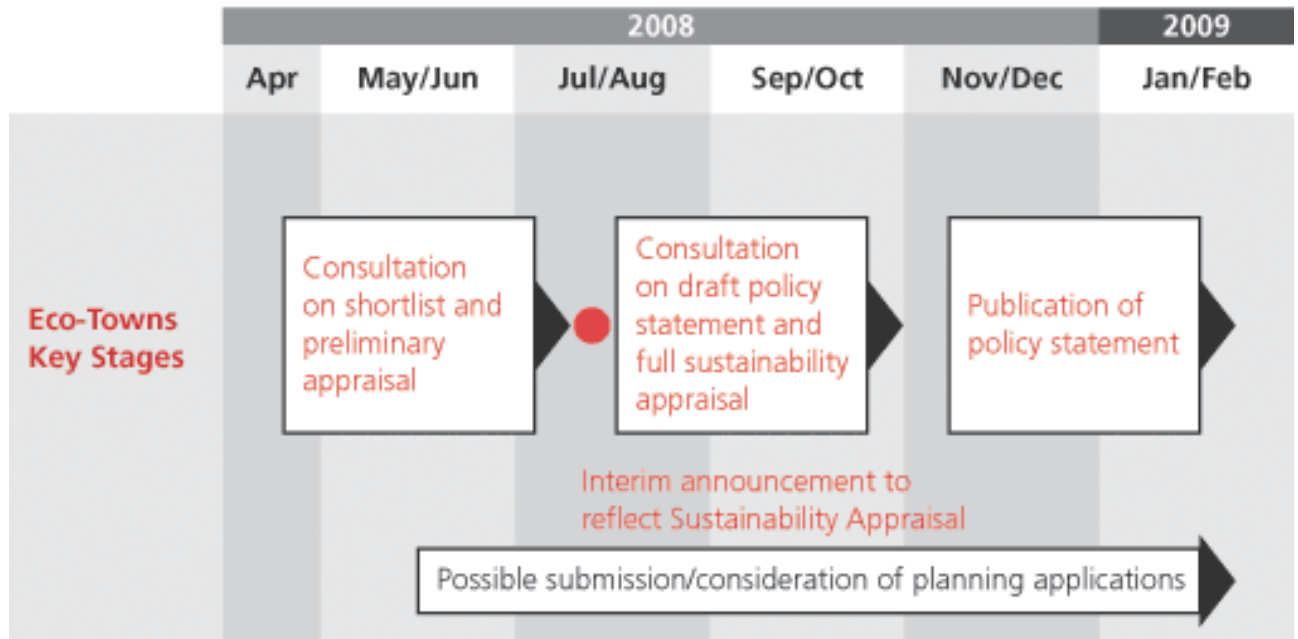
36. The consultation document referred to in the Potential Shortlist Announcement was ELGF. I set out some of the key passages.
37. In Section 1, entitled “Introduction and Summary,” the purpose of ELGF was explained. An explanation was also given that ELGF constituted only the first of four key stages:
 1. This consultation paper sets out how Government is taking forward the eco-towns programme including the shortlist of locations going forward for more detailed assessment.
 2. It seeks your views on:

- **the way in which the eco-towns concept is being developed and the different potential benefits that an eco-town could offer;**
 - **how particular features such as greenspace or innovative approaches to housing can best be developed in an eco-town;**
 - **preliminary views on the 15 locations going forward for further assessment;**
- 3.** We want anyone with an interest in climate change, more sustainable living and our housing shortage to give us their views, both on the programme as a whole and on the particular issues in individual locations, and on the approaches and technologies involved.
- 4.** We are looking for responses by **30 June 2008** and these will feed into a more detailed consultation on the individual locations as part of the Sustainability Appraisal and Policy Statement which we will issue in July as explained below. Details on how to respond to this consultation are at Annex E.
- 5.** Building on the principles set out in the eco-towns Prospectus, this paper also explains the planning process for eco-towns, indicates how the eco-town proposals from bidders will need to be further refined and developed, and points to the specific challenges which will need to be addressed in each location, if it is to be confirmed as a potential eco-town location. We received 57 bids covering a wide range of proposals and this paper summarises the 15 going forward for further assessment and how we will select up to 10 locations as suitable later this year. It also sets out how Government will support local authorities and other delivery bodies as the proposals are taken forward.
- 6.** The **4 key stages in the process** are as follows:
- this **consultation paper** which asks for preliminary views on eco-town benefits and the 15 short-listed locations;
 - there will then be a **more detailed assessment of the locations** (*the Sustainability Appraisal*) which will also be available for consultation, together with a draft planning policy statement on eco-towns. We expect to publish these in the summer;
 - publication of the final list of locations with potential to be an eco-town *final Policy Statement* which we expect later in 2008;

- consideration of **planning applications** for individual schemes.

38. A timeline was then set out:

Timeline – April 2008-February 2009



Key: ● Announcement/publication ◻▶ Ongoing activity

39. Section 3 began with a paragraph as follows:

The outcome of the bidding process We invited eco-town bids from both local authorities and the private sector. The full list of 57 responses is listed in Annex D. There was a wide range of ideas and proposals for new technologies and new approaches to more sustainable living. Some of these ideas could be applied generally; others are better suited to a particular location. Government is keen to encourage this type of new thinking and to see it develop further as the detailed proposals for individual projects are refined.

40. Paragraph 3 stated:

3. Each eco-town location will need its own approach but each will need to demonstrate key features to fit with the eco-towns criteria. While the detailed design will vary according to each location, this section gives an indication of the benefits which an eco-town development should provide. **We would welcome your comments on the potential benefits listed below. We are particularly interested in innovative approaches and**

techniques which require the whole town scale to be piloted successfully.

Are these potential benefits the most important which an eco-town could deliver. Do you have views on how they could be most effectively delivered?

In addition to these, are there other significant areas of potential benefit which you would wish to see added to this list?

Are there particular technologies or approaches which you would wish to see piloted to help achieve the eco-town outcomes?

41. Section III then went through potential benefits, discussing each in turn. They were zero-carbon, resilience to predicted future climate change for their area, managing water, air quality, leadership in minimising and recycling and extracting value from waste, maximising benefits for the natural environment in terms of “green infrastructure” and enhancing bio-diversity, more sustainable travel, improving the quality and delivery of housing and trialling new approaches, community building and empowerment, provision of high quality employment opportunities and lifelong learning, and piloting and testing new ways of delivering public services as well as making them more sustainable and responsive to climate change. The discussion of each of these potential benefits concluded with a set of questions. In relation to each potential benefit whether there were other significant areas of potential, and whether there were particular technologies or approaches which consultees would wish to see piloted to help achieve “the Eco-town outcomes.”
42. Section 4 was entitled “What happens next?” It stated:

How the planning process will work – decisions on individual applications and the planning policy framework

1. More work is needed on which locations could be suitable for an eco-town as well as on particular schemes being put forward before decisions on a final list of locations can be taken. This *consultation paper* sets out a shortlist of locations where Government believes there is potential for an eco-town based on consideration of its benefits, its infrastructure fit and deliverability based on the information we have had from bidders and other sources. In the next stage that preliminary assessment will be followed up with more detailed work.

Planning

2. Any eco-town scheme will be the subject of a planning application and we would expect most to be determined by the local planning authority. It is important that eco-town schemes are taken through the planning process to ensure that all issues have been considered, all views gathered and the best solution

achieved. It is important for local communities to have their say on individual schemes and community engagement is a vital part of the process for delivering eco-towns successfully. The Government also wants to set the right planning policy framework for eco-towns and to indicate those locations that have the potential to be an eco-town; we therefore propose to consult on and publish a *Planning Policy Statement on Eco-towns*, which will create a framework for consideration of eco-town planning applications. Further details of the planning issues are set out in Annex A.

Potential Locations – The Planning Framework

3. The shortlist of locations published today will be subject to a more detailed *Sustainability Appraisal* (SA) which will provide greater detail on environmental sustainability and other issues and test them against reasonable alternatives. We will publish the SA for consultation alongside a draft Planning Policy Statement on Eco-towns in July. This statement will set out the core principles and criteria for eco towns as well as a refined list of potential locations which could include sites or locations that are not currently shortlisted (as a result of consideration of alternatives in the SA). The final decision on the policy statement will take into account the SA and the views of consultees and be published as the Eco-towns Policy Statement in the Autumn. While an individual planning decision is decided on individual merits, this policy statement, and the evidence that underpins it, will act as a material consideration in those decisions.

Improving the Proposed Schemes

4. Alongside this consideration of principles and locations, developers, local authorities and others concerned with individual schemes will need to do more work to *refine and improve the detailed proposals they have made*, for example by agreeing and clarifying the infrastructure required, ensuring that it is robustly costed and evaluating novel environmental and other technologies needed to deliver the eco-towns vision for that location. There will need to be a costed plan for delivery of the project with input from public agencies on likely support and realistic assumptions about future public investment.

5. Refining and developing these specific eco town proposals will enable Government and local authorities to be assured that a project is viable for its location, can be effectively delivered, and matches the eco-towns ambition. There are three key areas of test in this further work:

- *Sustainability*: does the proposed approach achieve sufficiently high environmental standards, not only mitigating impacts but positively enhancing the site for example in terms of bio-diversity and accessible greenspace. In terms of transport does it generate a substantial shift away from car use and reduce the need to travel compared with a standard approach to development.
- *Deliverability*: is it clear how the project could be delivered over time in this location. Is there a clear statement on funding support for infrastructure by the promoters in the light of government and public sector assessments. Is there provision for delivery and long-term management arrangements, including secure funding for the latter.
- *Affordability*: is the total cost of delivering a scheme in this location affordable within the funding streams likely to be available from investors and from the public sector. Is there a basis for agreeing the respective contributions of each and is this based on reasonable expectations by relevant public infrastructure bodies and likely to be agreed between the parties.

6. To help bidders review and refine proposals Government will be establishing an assessment and review panel (**The Eco-towns Challenge Panel**) and it will also be offering Local Authorities additional support to help with developing costed plans for the delivery of schemes. Wherever possible government wishes to take a partnership approach with the LA on taking forward the eco-town and it will be offering **local authority Partnership Agreements** which can provide a basis for funding for necessary studies, additional capacity within the authority and expertise so that it is in a good position to contribute to this part of the process. Further details of the process for refining schemes and government support is set out in Annex B. When the Homes and Communities Agency is established we would expect it to play a major role in supporting local authorities and working with bidders to review and refine proposals as set out in Annex B.

7. As stated above, all schemes will be subject to the necessary planning applications and this process of refining and developing the proposal, engaging with the local community and discussing issues with the local authority should lead to an improved planning application being made and a better chance of receiving planning permission. In addition if a scheme meets the Government's eco-town criteria then we will offer continued support to the local authority and the developer to take it forward as set out in Annex B. This is all without prejudice to any final planning decisions which will be taken on the individual merits of each scheme.

43. Section 5 was entitled “The 15 bids going forward for further assessment.” It began:

1. These bids going forward performed the most strongly in an initial scrutiny across Government and its agencies in terms of transport and environment issues, affordability benefits and deliverability against eco-towns criteria. Each of these now needs to be assessed in more detail as set out in section 4.

2. What follows is an initial **summary of the issues** for each location with a broadly indicative map marking, which in some cases includes alternative options or sites. Also included is information on **housing affordability** and a housing affordability pressure indicator (ratio of lower quartile home prices to lower quartile earnings). This sets out some of the specific challenges and potential benefits in each location. **More detail is available from the individual scheme bidders** and a more detailed assessment of each location will become available in the Sustainability Appraisal alongside consideration of alternatives.

...

44. The summary of issues for Middle Quinton comprised a single page as follows:

West Midlands – MIDDLE QUINTON	
Stratford-upon-Avon, Warwickshire	
Description	The eco-town proposal comprises a 240ha brownfield site 6 miles to the SW of Stratford upon Avon between Long Marston and Lower Quinton. It is a former MoD Engineers depot with extensive warehousing, a rail system and a rail (freight use) connection to the main Worcester-Oxford-London line.
Proposed benefits	A scheme of at least 6,000 zero carbon homes on previously developed land, with substantial employment opportunities, affordable housing and community infrastructure, including up to four schools, health care and retail facilities and high quality public transport links to surrounding towns and villages, all supported by leading edge environmental technology. [<i>Housing Affordability Pressure – Very High</i>]. The scheme would deliver 2,000 affordable housing units in comparison with current delivery of 170 annually and 3,000 households on waiting list. Stratford experiences very high levels of demand for rented accommodation in relation to its role as an international destination – an issue recognised in the Stratford World Class vision initiative.
Initial summary of	<i>Environment</i> The scheme will need to be developed with design sensitivity to its setting close to Cotswolds AONB and

challenges and constraints	<p>suitable mitigation measures. Would look for an SFRA to make sure there is no flood risk on site. Capacity of existing sewage network unlikely to be able to cope. The scheme will need to include a contaminated land survey and to carry out remediation sustainably.</p> <p><i>Transport</i> No major issues regarding the strategic transport network but the scheme would need to develop and support a substantial improvement to public transport links to surrounding centres and particularly Stratford upon Avon.</p> <p><i>Employment</i> The site is already a significant employment centre with scope for expansion around proposed eco-town technologies including recycling and sustainable construction.</p> <p><i>Conservation and historic constraints</i> Historic settlements, listed buildings and landscape issues would need to be safeguarded and enhanced as the scheme is developed.</p>
See Annex D for further details of a proposal for this location.	
Do you have views on the inclusion of this location in the programme?	
A more detailed assessment will be included in the Sustainability Appraisal. Are there other potential benefits or challenges which you would wish to see addressed for this location?	
Are there particular issues which you would like to see the proposals for this location address?	

45. The summary of issues for Weston Otmoor comprised a single page as follows:

South East – WESTON OTMOOR	
Cherwell DC, Oxfordshire County Council (also relevant to Oxford City Council)	
Description	The site adjoins the M40 Motorway and the Oxford-Bicester railway around 3 miles SW of Bicester and 7 miles from Oxford. The total area is over 800 hectares of which around 130 has are currently in use as a grass airstrip. The southern edge of the site fringes the Oxford Green belt.
Proposed benefits	The eco-town proposal is for a major scheme of 10-15,000 homes which would achieve exceptional standards of sustainability, particularly in relation to transport, while

	<p>also relieving housing pressures in a sub-region with one of the most highly stressed housing markets in the south east and creating significant new business space. The proposal is based on a major package of investment in rail (including restoring services on the Oxford to Milton Keynes line) and other public transport, and would incorporate a major Park and ride facility adjoining the M40, combined with improvements to the A34/M40 junction and stringent controls on car access to/from the site.</p> <p><i>Housing Affordability Pressure - Extreme.</i> Scheme would deliver 3-5,000 affordable housing units in comparison with current new build of affordable housing of 100 and 230 annually in relevant LA areas. Current households on housing waiting lists are around 3,400 in Cherwell and 3,965 in Oxford.</p>
<p>Initial summary of challenges and constraints</p>	<p><i>Environment</i> The scheme will need to ensure adequate protection for the WendlebyMeads and Mansmoor grassland SSSI on the southern boundary of the site, which is a nationally important unaltered lowland hay meadow and will need to be safeguarded against potential impacts for example, from increased use of the site for recreational purposes. Development must go ahead in a way that does not exacerbate flood risk. The main water issue is lack of local sewerage infrastructure - the scheme will need to provide for a major increase in current capacity. There is also a need to ensure that water resources can be provided sustainably given that the development is an area of "serious water stress". Possible need for remediation of former landfill sites within the site boundary.</p> <p><i>Transport</i> The scheme will need to demonstrate a robust, deliverable and viable set of transport options for this site. The options of major investment in Oxford - Milton Keynes East-West Rail Link (and new station), park & ride, tram system and free transport for residents on site and to Oxford will require major investment commitments and ongoing subsidy as well as strong controls on car use in and around the site.</p> <p><i>Employment</i> The site will generate significant new employment but it will be critical to ensure that the project directly benefits Bicester and the need for a stronger jobs-services - homes balance in the existing community.</p> <p><i>Conservation and historic constraints</i> Is in an area with historic landscape (Otmoor) and historic settlements - potential impacts would need to be managed.</p>
<p>See Annex D for further details of a proposal for this location.</p>	
<p>Do you have views on the inclusion of this location in the programme?</p>	
<p>A more detailed assessment will be included in the Sustainability Appraisal.</p>	

Are there other potential benefits or challenges which you would wish to see addressed for this location?

Are there particular issues which you would like to see the proposals for this location address?

46. Reference was made in argument to the summary of issues for another proposed eco-town, Pennbury. This summary comprised a single page as follows:

East Midlands – PENNBURY (STOUGHTON)	
Harborough and Oadby & Wigston Borough Councils, Leicestershire County Council, Leicester City Council	
Description	The site would accommodate 12-15,000 homes based on a development of 750 ha within a 1,720ha of greenfield/brownfield/ part surplus public sector land site on the outskirts of Leicester (4 miles south east from the centre), surrounded by farmland.
Proposed benefits	<p>The eco-town proposal would create a largely freestanding community, but linked to Leicester, on the basis of very ambitious environmental and sustainability standards and environmental innovation. Built on 40% of the available land, 15,000 homes with jobs, schools and healthcare would be designed to complement the surrounding settlements. The scheme pioneers innovative transport and energy solutions and new methods of community participation.</p> <p><i>Housing Affordability Pressure – High.</i> The scheme would deliver 4,000 affordable housing units in comparison with current delivery of 210 annually in relevant LA areas. Current households on waiting list – 3,000 in Harborough, Oakham and Wigston and 1,045 in Leicester.</p>
Initial summary of challenges and constraints	<p><i>Environment</i> The scheme will need to address the impact on water issues in urban Leicester and since water resources in the area are in deficit, a sustainable approach to meeting demand would need to be identified. Adequate capacity of sewage treatment works in the area will have to be demonstrated. Surface water runoff must be carefully controlled. Land contamination from previous uses such as airfield and fuel depots must be remedied sustainably. Impacts on the local landscape and biodiversity especially fish populations would need to be considered.</p> <p><i>Transport</i> The scheme will need to accommodate the development with an enhanced local public transport infrastructure, within constraints of existing housing and street layout on edge of urban area and severe road</p>

	<p>congestion into this part of Leicester along the A6. Rail services are distant from the site.</p> <p><i>Employment</i> Further work will be needed on the economic and retail hierarchy aspects of a scheme in this location. It would need to complement work to regenerate Leicester, including initiatives on training and linking adult education to employment.</p> <p><i>Conservation and historic constraints</i> Small parts of the site have green wedge status and eastern part of site attractive countryside. One scheduled ancient monument, and some other monuments of significant archaeological importance. Some of the surrounding villages are designated conservation areas.</p>
<p>See Annex D for further details of a proposal for this location.</p>	
<p>Do you have views on the inclusion of this location in the programme?</p>	
<p>A more detailed assessment will be included in the Sustainability Appraisal. Are there other potential benefits or challenges which you would wish to see addressed for this location?</p>	
<p>Are there particular issues which you would like to see the proposals for this location address?</p>	

47. In each case the “further details” set out in annex D consisted merely of the name of the scheme promoter and an email contact.
48. Annex A to ELGF stated:

Planning Applications

1. Like any other proposed development eco-towns will be subject to a planning application which we would generally expect to be decided by the Local Planning Authority. Such an application could be submitted at any time and each application must be decided on its merits and the local planning authority will need to take into account all the impacts of the proposals. In order for this to happen developers will need to provide full details of their Environmental Statement, community consultation and consideration of alternatives. The planning application will also address issues such as design, the impact of the proposed development on the landscape and neighbourhood, the transport system, public services, infrastructure and benefits to the community.

2. Any planning application must be determined in the context of the planning policy framework, including the development plan and any other material considerations. Government statements on planning policy are material considerations and this will include the eco-towns Planning Policy Statement. ...

Planning Policy Framework

3. We want to create the right framework for consideration of eco-town planning applications through the publication of the **Planning Policy Statement on Eco-Towns**. The Policy Statement on Eco Towns will be an important material consideration in the determination of any planning application for an eco town, particularly where the Development Plan is silent or out of date (the Development Plan includes the regional spatial strategy (RSS) together with any adopted local development plan documents (DPDs) and any “saved policies” still in effect).

4. We are commissioning more detailed **Sustainability Appraisal** work that will include evaluation of the locations being considered. This will provide greater detail on environmental sustainability and other issues and test them against reasonable alternatives. Where necessary Appropriate Assessment will also be carried out under the Habitats Regulations. We expect to publish the Sustainability Appraisal and any Appropriate Assessment results for consultation alongside the **draft Planning Policy Statement on Eco Towns** in July 2008. The final decision on locations will take into account the Sustainability Appraisal and the views of consultees. The consultation on the draft statement will conclude with a final Eco-towns Planning Policy Statement, including the final list of potential locations in the Autumn.

5. **Local and Regional Plans** The Statutory Development plan remains the starting point for considering all planning applications. In some places eco town proposals are in line with the existing local plan or plans that are at an advanced stage of preparation. In these cases we would expect the principle of development to have been established and an application to be in accordance with the plan through a Local Development Framework Core Strategy or Area Action Plan as appropriate. The Government is keen to ensure that such plans are in place and as part of the support for eco-towns, we will be offering assistance to local authorities to help bring Local Development Frameworks forward where appropriate. In some places the adoption of an up-to-date local planning documents is some way off. In these circumstances the evidence gathered and assessments undertaken in the preparation of the Planning Policy Statement on Eco-Towns will support the development

of policy in local planning documents but will also be an important factor in the decision on any planning application. Similarly, at regional level, in some places the relevant RSS encourages the preparation of options for growth in the places being considered for eco-towns. In other places the RSS is silent and again the eco-town policy statement will be a useful addition to the policy framework. We expect the RSS reviews announced in the Housing Green paper (which depending on the region will be prepared between now and 2011) to test the longer term issues that arise from the eco-town proposals – such as the ultimate size of new settlements.

6. Additionality of housing numbers The Housing Green Paper made it clear that the housing numbers in existing and in some cases emerging plans were not high enough to address the pressing problem of long term housing need and affordability. We are therefore aiming to complete a further set of Regional Spatial Strategy partial reviews by 2011 that will include revised housing numbers for local planning authorities that are consistent with our national aim to deliver 240,000 homes per year by 2016. We expect eco towns to contribute significantly to help to meet those revised targets for additional housing and we want to assure local authorities which include an eco-town in their future housing plans that it will, of course, count towards those future housing targets, which in most places are likely to be more stretching.

49. Annex E to ELGF dealt with the consultation process. It asked that responses to ELGF be sent no later than 30 June 2008.

D. Events after ELGF

50. On 4 June 2008 the government published Planning Policy Statement 12 entitled “Creating strong safe and prosperous communities through Local Spatial Planning”. This made reference to “eco-town status” in the following passage:

4.20 **The production of core strategies should follow the Government’s principles for community engagement in planning. Involvement should be:**

appropriate to the level of planning;

from the outset – leading to a sense of ownership of local policy decisions;

continuous – part of ongoing programme, not a one-off event, with clearly articulated opportunities for continuing involvement;

transparent and accessible – using methods appropriate to the communities concerned; and

planned – as an integral part of the process for making plans.

...

4.25 Consultation on the core strategy during the preparation phase of the plan should be proportionate to the scale of issues involved in the plan.

4.26 If it is proposed to produce a new or revised core strategy for an area, for example, to respond to a major change in circumstances, such as receiving eco town or growth point status [footnote], it will in the government's view be appropriate to involve the community in considering the options for the strategy before the final document is produced. A rather different level of consultation may be appropriate where some specific aspect of the core strategy is being revised such as the approach to the delivery of affordable housing.

[As regards eco-town status the footnote referred the reader to ELGF.]

51. During the course of the period allowed for consultation in response to ELGF there was considerable correspondence between those acting for Bard and for Weston on the one hand and government, local government bodies, planning authorities and promoters of the relevant bids on the other hand. For reasons given later in this judgment it is not necessary to set out this correspondence extensively. In relation to Middle Quinton, Bard's solicitors sent a pre-action protocol letter on 21 May. A reply was sent by the Treasury solicitor on 13 June 2008. In the meantime a letter dated 12 June 2008 was sent by Mr Daniel Smith of DCLG to Mr Simon Ricketts, the solicitor acting for Bard pursuant to a request for information. The letter included the following:

I am writing in response to your request for information relating to information held by or on behalf of the Government relating to the proposed development of Long Marston as a potential new settlement or eco-town. Your request has been handled under the provisions of the Environmental Information Regulations 2004.

I can confirm that Communities and Local Government does hold *some* of the information that you have requested and that I am able to provide you with some of the information which you requested. I wish to advise you however that some of the information cannot be disclosed for the reasons given in the annex attached to this letter.

Environmental Information

- a) Environmental information has been assessed, summarised and included in the initial assessment sheets for each individual scheme. This can be accessed via the CLG website.

As part of the second stage of consultation we will be publishing a draft Sustainability Appraisal and draft planning policy statement, which will set out more detail of each location.

Information relating to “rigorous cross-Government assessment”

- (b) Every bidder submitted an expression of interest. For those not short listed, we are withholding these as they fall under exception 12(5)c- disclosure of the information would adversely affect intellectual property rights of the bidder- and 12(5) e- the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic inters- of the Environmental Information Regulations. However, the consultation document, Eco-towns: Living a Greener Future in annex D, provides the contact details of all bidders who submitted an expression of interest for those seeking further information.

...

Views were sought across government on the proposed schemes, and these views are included in the initial assessment sheets as at item (a). I can confirm that bidders, as well as Other Government Departments have provided further information to CLG, however, we have taken the decision to withhold this as it falls under exceptions 12(4)e- the request involves the disclosure of internal communications-and 12(5)c and 12(5)e. ...

Correspondence relating to the Long Marston proposal

- (c) I have enclosed three letters from Henry Cleary here in Communities and Local Government to the developer of the Long Marston scheme dated 22 Nov 2007, 2 may 2008 and 6 June 2008. The responses to these letters are being withheld under exceptions 12(5)c and 12(5)e.

Meetings held

- (d) I can confirm that CLG has met with the developer of the Long Marston scheme and Local Authorities 4 times. ...

...

Reasons why public interest favours withholding information

Revealing all the details related to the Middle Quinton bid could lead to the information being used by other promoters of eco-towns or other new settlements to gain a competitive advantage.

Disclosure of all the details related to the Middle Quinton bid would make it less likely that promoters would provide the Department with commercially sensitive information in the future and consequently adversely impact on the ability of the Department to conduct an award of funding in a cost-effective manner and obtain best value.

If proposals do not make the final list of locations the promoter of the scheme could still choose to submit a planning application outside of the eco-town process. To release all the details related to the Middle Quinton bid or of other schemes could affect the promoter's ability to submit a future planning application.

52. On 12 June 2008 local newspapers circulating in the areas of the proposed shortlist locations contained an advertisement placed by DCLG. It referred to ELGF, urged that responses be lodged by 30 June, asserted that “Eco-towns should be good for both local community and the environment,” and accompanied this with a question, “Are eco-towns a good idea?”
53. The advertisement also stated “There will be further consultation (until the end of October) on a more detailed assessment of potential locations”.
54. Bard’s claim form in these proceedings was lodged on 24 June 2008. The consultation period for ELGF came to an end on 30 June 2008. In total 12,822 responses were received. Of these 4,000 or thereabouts were postcards objecting to the Western Otmoor site.
55. On 23 July 2008 a document entitled “Eco-towns-Living a greener future: progress report” was published by DCLG. It set out initial proposed planning criteria and planning process for Eco-towns, an updated list of locations and where to find out more about the current proposals, how the second stage of consultation would work and the work underway to assess the proposals across Government and with local authorities and others. On the same day DCLG published a SA scoping report. This had been the subject of consultation with the designated consultation bodies under the Environmental Assessment of Plans and Programmes Regulations 2004 (“the SEA Regulations”).
56. On 11 September 2008 Collins J granted permission to apply for judicial review.
57. In relation to Weston, reliance was placed on a letter sent by the current Minister, Mrs Margaret Beckett, on 30 October 2008 to Councillor Wood of Charwell District Council in relation to alternatives to Weston Otmoor, and in particular a proposal for an alternative option at North West Bicester. Her letter included the following:

I would very much welcome working with your authority on the further development of the Bicester proposal. While the Sustainability Appraisal we have commissioned will identify the strengths of the location at a strategic level, we will need to see a more detailed conceptual study which would evaluate how the site can work as an eco-town in the light of the criteria and standards we will shortly publish.
58. On 4 November 2008 DCLG published documents which commenced the stage envisaged in paragraph 4 of Section 1 of ELGF, involving more detailed consultation on individual locations. These documents comprised the draft EPPS, a SA of the draft EPPS; a SA/HRA of the Eco-towns programme location by location for the 15 sites shortlisted in ELGF including Middle Quinton and Weston Otmoor along with an introduction and a conclusion, an annex profiling the European sites

relevant for the purposes of the HRA, a non-technical summary of the draft Eco-Towns PPS and Eco-towns programme; an Impact Assessment of all of the above; and a document summarising the consultation responses to ELGF. The consultation period for this second stage of consultation commenced on 4 November 2008, and replies were requested by 19 February 2009.

59. On 18 November 2008 Sullivan J added Weston Front as an interested party.
60. Bard proposed to apply for interim relief to suspend the consultation process until these proceedings were resolved. The Secretary of State consequently gave an undertaking to extend the time for the Long Marston consultation to 6 March. A similar undertaking was sought and obtained by Weston Front. On 22 December the Secretary of State extended the entire consultation period to 6 March.

E. Grounds of challenge and legal principles

61. Bard's combined statement of facts and grounds was a diffuse document. In their skeleton argument for the substantive hearing however Bard nailed their colours to the mast. Six grounds of challenge were identified as follows:

In breach of the common law relating to consultation, the SEA Directive, the Aarhus Convention and the Code of Practice on Consultation, the Secretary of State has failed:

1. to consult on the principle of constructing eco-towns, alternatively any such consultation has to give sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response;
2. to consult on the key locational criteria for eco-towns;
3. to consult at all on the 42 locations proposed which were rejected by ministers in favour of the 15 proposed locations;
4. to provide adequate information to enable informed representations to be made. Instead, information has been produced late, has dribbled out in response to requests and some relevant (and non-confidential) material is still being withheld from the public;
5. to provide adequate time for consultation, given the late production of material.

Additionally,

6. a declaration is sought (because this still appears to be in issue) that the Eco-Towns policies are subject to the requirements of the Strategic Environmental Assessment Directive and Regulations.

62. In this section I shall examine the common law relating to consultation, the Aarhus Convention and the Code of Practice on Consultation. The SEA Directive calls for separate analysis, and I will therefore deal with it in section K below.
63. Similarly when examining grounds 1-5 in sections F-J below I take in turn on each ground the alleged breaches of common law requirements, the Aarhus convention and the Code of Practice on Consultation. I shall include in each of grounds 1-5 where appropriate, relevant assertions made by Weston. Alleged breaches of the SEA Directive in relation to grounds 1-5 will be dealt with in section K, in conjunction with my analysis of ground 6.

Common law requirements as to consultation

64. It was common ground that the SoS must meet the requirements for proper consultation described by Lord Woolf MR in *R v North and East Devon Health Authority ex parte Coughlan* [2001] QB 213:

To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken.

65. Bard supplemented this by referring to the decision of Sullivan J in *R (on the application of Greenpeace Limited) v Secretary of State for Trade and Industry* [2007] Env LR 29; [2007] EWHC 311 (“*Greenpeace Energy Challenge*”). The case concerned a change of government policy in favour of nuclear power following a 2006 consultation document ‘Our Energy Challenge’. There had been an express promise some years earlier that any change of policy would be the subject of “the fullest public consultation”. At paragraph 44 Sullivan J summarised the relevant complaints:

“Two broad criticisms are made of the 2006 Consultation Document:

(i) it either was or appeared to be in the nature of an issues paper, seeking consultees' views as to which issues should be examined by Government (and the manner in which they should be examined) when deciding whether or not the new nuclear build option, which had been left open, should now be taken up; rather than the consultation paper on the substantive issue itself: should the new nuclear build option be taken up? The decision in July 2006 "leapfrogged the stage of carrying out proper consultation on the substantive issue".

(ii) if it was not simply an issues paper, but was intended to be a consultation paper on the substantive issue, it was inadequate, and the overall consultation process was unfair because:

(a) consultees were not told in clear terms what the proposal was to which they were being invited to respond;

(b) consultees were not provided with enough information to enable them to make an intelligent response; and

(c) on many issues, including in particular the critical issues of the economics of new nuclear power and waste disposal, consultees were deprived of the opportunity to make any meaningful response because the relevant information on which the government relied in making the decision that "nuclear has a role" was published after the consultation period had concluded."

66. At paragraph 61 Sullivan J emphasised the need for the consultation to be fair. Turning to the first criticism, at paragraph 81 onwards he identified the test as being whether those consultees who took the document at face value could reasonably foresee that following consideration of their responses the issue of principle would be decided. He found that the consultation paper was simply an issues paper without an indication that the issue of principle would be decided. The fact that many consultees had responded on the issue of principle rather than just the questions asked did not salvage the process.
67. On the second criticism, at paragraph 90 onwards Sullivan J found that there had been insufficient information for consultees to respond, and that it had been unfair to take account of new information. He observed that the less information that was available at an early stage the likelier it would be that consideration of further new information at a later stage would be unfair.
68. Bard added that the requirement to undertake consultation at a formative stage means that consultation must cover the principle of the proposal rather than merely the manner of its implementation. For example, in *R (Sardar) v Watford BC* [2006] EWHC 1590 a local authority decided on 5 September 2005 (a) to limit hackney car licences; and (b) that officers should prepare a report as to the manner in which this decision would take effect. A consultation process took place between 5 September and 20 October 2005. On 20 October the authority decided that the limit should be imposed with immediate effect. Quashing the decision, Wilkie J commented at paragraphs 29 and 33:

29. The fact that a council may have come to a provisional view or have a preferred option does not prevent a consultation exercise being conducted in good faith at a stage when the policy is still formative in the sense that no final decision has yet been made. In my judgment, however, it is a difference in kind for it to have made a decision in principle to adopt a policy and, thereafter, to be concerned only with the timing of its implementation and other matters of detail. Whilst a consultation on the timing and manner of implementation may be a proper one on these issues it cannot, in my judgment, be said that such a consultation, insofar as it touches upon the

question of principle, is conducted at a point at which policy on that issue is at a formative stage.

33. In my judgment, of these four conditions [identified in *Coughlan*], the second and third have manifestly been satisfied. I am also satisfied that the product of the consultation was conscientiously taken into account when the decision was made on the 20 October. In so deciding I bear in mind the approach to bias, in a different context, referred to by the defendant and described in the decision in *Georgiou*. The problem, however, is with satisfying the first principle and whether the conscientious consideration of the consultation was applied, in effect, to the question whether to reverse a decision which had already been made rather than taking a decision untrammelled by any prior decision. In my judgment, the requirement that the decision taking process, where consultation is required, has to be both substantively fair and have the appearance of fairness, is of such importance that, even though what was done after 5 September was done professionally and in accordance with the requisite standards, there must remain a residual feeling that the decision to delimit has not been taken in a fair way. On the crucial issue of principle the sequence has been - decision first, consultation later. It is a different matter to decide to reverse a previous decision rather than to take one in the first place and, in my judgment, the consultation exercise and its fruits went, on the issue of principle, to inform a decision of the first type rather than one of the second.

69. Bard then referred to a decision of Munby J in a case involving a “multi-stage consultation” on whether a 3 tier school structure should be replaced with a 2 tier structure. This was *R (on the application of Parents for Legal Action Limited) v Northumberland County Council* [2006] ELR 397, [2006] EWHC 1081 Admin. There was a statutory duty to consult on the future of individual schools. After what were called “Stage 0” and “Stage 1” of a consultation program, the Council decided on 19 April 2005 “to proceed to Stage 2 consultation on basis of 2 tier preference.” The Council acknowledged that at the conclusion of each stage a decision was made which focused future consultation, making it progressively more detailed and localised. Munby J summarised the effect of the evidence at paragraph 18 of his judgment:

Stages 0 and 1 of the consultation process involved county-wide consultation on the general principle of whether or not to adopt a two-tier model. There was no consultation on the implications for specific school partnerships, let alone specific schools. Stage 2 of the consultation process does focus on specific school partnerships and specific schools but is confined to consideration of different two-tier models. In other words, at no stage during the consultation process has there been any consultation on whether or not specific school partnerships, let alone specific schools, should adopt a two-tier model.

70. At paragraphs 32 to 36 Munby J said this:

32 The claimant's case is very simple. Ms White submits that, by structuring the consultation process as it has and, in particular, by proceeding as it has in the wake of what she calls a broad structural decision on 19 April 2005, the defendant has prevented itself from complying with its statutory obligation to consult on *individual* school closures and alterations.

33 In substance I agree with Ms White. I repeat my analysis of the consultation process. Stages 0 and 1 of the consultation process involved county-wide consultation on the general principle of whether or not to adopt a two-tier model. There was no consultation on the implications for specific school partnerships, let alone specific schools. Stage 2 of the consultation process does focus on specific school partnerships and specific schools but is confined to consideration of different two-tier models. In other words, and this as it seems to me is the crucial point, *at no stage during the consultation process has there been any consultation on whether or not specific school partnerships, let alone specific schools, should adopt a two-tier model.*

34 There was, let me emphasise, no objection to the defendant adopting a phased consultation process. And I am quite content to accept, as Mr Purchase urges, that the entire consultation process — Stages 0, 1 and 2 — is properly to be viewed as one long consultation process. Nor, I should add, was there any objection to the defendant taking a preliminary or provisional decision, or decision in general principle, at the end of Stage 1 that its preferred model, county-wide, was the two-tier model: see [Nichol and others v Gateshead Metropolitan Borough Council \(1988\) 87 LGR 435](#). There was, therefore, in my judgment, no legal defect in the way in which Stages 0 and 1 of the consultation process were structured and implemented. Nor, in my judgment, was there — so far as concerns this head of complaint — any legal defect in the defendant deciding, as it did, on 19 April 2005, that the “preferred framework” was to be the two-tier model. And I agree with Mr Purchase that there is not, as such, any objection to the defendant consulting on the basis of a preference for a two-tier model.

35 The defendant's error was in treating that decision as precluding any public discussion during Stage 2 of the consultation process of anything other than two-tier models. Given what had gone before and given, in particular, that down to 19 April 2005 there had been no consultation on the implications for specific school partnerships, let alone specific schools, of the defendant's proposals, the vice here lies in the fact that the decision of 19 April 2005 has been understood as

confining the subsequent Stage 2 consultations in relation to specific school partnerships and specific schools to consideration of different two-tier models, when what is now required as part of the Stage 2 consultations, given that this opportunity was not afforded earlier as part of the Stage 0 and 1 consultations, is meaningful consultation, for example, on whether Southlands Middle School and Brockwell Middle School should be part of a two-tier system or remain as part of a three-tier system.

36 In these circumstances, as Ms White correctly says, the Stage 2 consultations — the *only* consultations relating to specific school partnerships and specific schools — are taking place at a time when the proposals are in truth no longer at a formative stage. The proposals are now no longer at a formative stage because the defendant's decision on 19 April 2005 is being treated by it as precluding any public discussion during Stage 2 of anything other than two-tier models. The consequence, as Ms White points out, is that consultees have been denied *any* opportunity — let alone any meaningful opportunity — to express their views as to whether, for example, Southlands Middle School and Brockwell Middle School should be part of a two-tier system or remain as part of a three-tier system. As Ms White puts it, and I agree, the consultation process has been operated in such a way that objectors have never been given a real opportunity to present their case against closure of particular middle schools. For this reason, in my judgment, neither the consultation process taken as a whole, nor the Stage 2 consultation on its own, is adequate.

71. It was said by Bard that this case demonstrated the importance of carefully structuring consultation if it is to be undertaken in stages. Mr Ian Dove QC, who appeared with Mr Richard Harwood and Mr Christopher Young for Bard, derived from it a proposition that if those who are particularly affected by a proposal are consulted at a later stage, the structure must ensure that they were not excluded from consultation at an earlier stage.
72. On the question of financial interest, Bard acknowledged that the leading case was *R (Alconbury Developments Ltd) –v- Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295. A concern arose about the ability of the Secretary of State to take a decision on planning grounds where the developer had agreed with the MOD, the owner of a disused airfield, that if planning permission was given the developer would redevelop the site into a national distribution centre in return for financial payments to the MOD. The House of Lords had held that this did not of itself disqualify the Secretary of State from taking the relevant decision. The ability to seek judicial review would enable an appropriate remedy to be sought if there were any breach of public law principles by the Secretary of State. In the light of this decision, Bard reserved its position on whether the Secretary of State in this case had “already trespassed too far.” The only point taken in the present proceedings was that on the Middle Quinton site, and other sites, the government had a financial interest by

way of claw back. That was said to give rise to a need for a special care in the conduct of consultation exercises surrounding this project in order to ensure that they were comprehensive, well informed and transparent, as well as being undertaken at a time when the proposals were genuinely formative. In order to ensure that there was an appearance of fairness, particularly anxious scrutiny had to be given to the consultation exercise – and the court should be keen to scrutinise it closely.

73. It was submitted by Mr Timothy Mould QC, who appeared with Mr James Maurici on behalf of the Secretary of State, that the cases cited by Bard – with one exception - did not involve any new principle going beyond the exposition by the Court of Appeal in *Coughlan*. The particular cases cited were cases which turned on their own facts. The proper approach, he submitted, was explained by the Court of Appeal in *Nichol v Gateshead Metropolitan Borough Council* (1988) 87 LGR 435.
74. There was one respect where the Secretary of State accepted that the cases cited by Bard added to the *Coughlan* principles. This concerned the test identified by Sullivan J in *Greenpeace Energy Challenge*. If a question arose as to whether a document was a consultation paper or merely an issues paper, the court should resolve this by asking whether those consultees who took the document at face value could reasonable foresee that following consideration of their responses the issue of principle would be decided.
75. To the extent that any question of this kind arises in the present case, I am content to adopt that test. In no other respect, however, do I consider that the cases cited by Bard introduce any principle additional to those set out in *Coughlan*.
76. The decision of Wilkie J in *Sardar* was concerned with the fairness of what appeared to have been a retrospective consultation. That was inevitably highly fact sensitive. The decision of Munby J in *Parents for Legal Action* concerned a statutory requirement to consult schools. On the facts that consultation had not been carried out prior to a decision on principle being taken. In neither case was the court seeking to lay down some new principle. In both cases the court was applying the *Coughlan* principles to the particular circumstances before it – which is equally the approach that I take in the present case.
77. By the same token I cannot accept that the argument that a “financial interest” on the part of government entitles consultees to something more than is set out in *Coughlan*. There is no hint of this in *Alconbury*. The mere fact that the public purse – and hence the public generally – may benefit from a particular proposal does not in my view warrant any departure from the *Coughlan* principles so as to make them apply more stringently.
78. I was taken to cases where the court has examined whether a point had been reached where a proposal was no longer at a formative stage. Mr Dove accepted that identification of the preferred approach did not of itself mean that this point had been reached. In my view the point at which that stage is reached must be a question of fact in each case.

The Aarhus convention

79. The United Kingdom is a party to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (“the Aarhus Convention”). Article 6 of that convention is headed, “Public Participation in Decisions on Specific Activities”, while Article 7 is headed “Public Participation Concerning Plans, Programmes and Policies Relating to the Environment”. It was not suggested by Bard that Article 6 was relevant in itself. However Article 7 incorporates by reference certain of the provisions in Article 6. Article 7 is in these terms:

Each Party shall make appropriate practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment, within a transparent and fair framework, having provided the necessary information to the public. Within this framework, article 6, paragraphs 3, 4 and 8, shall be applied. The public which may participate shall be identified by the relevant public authority, taking into account the objectives of this Convention. To the extent appropriate, each Party shall endeavour to provide opportunities for public participation in the preparation of policies relating to the environment.

80. In order to identify the content of the requirement in the second sentence of Article 7 it is necessary to set out paragraphs 2, 3, 4 & 8 of Article 6:

2. The public concerned shall be informed, either by public notice or individually as appropriate, early in an environmental decision-making procedure, and in an adequate, timely and effective manner, inter alia, of:

- (i) the proposed activity and the application on which a decision will be taken;
- (ii) the nature of possible decisions or the draft decision;
- (iii) the public authority responsible for making the decision;
- (iv) the envisaged procedure, including, as and when this information can be provided:
 - (a) The commencement of the procedure;
 - (b) The opportunities for the public to participate;
 - (c) The time and venue of any envisaged public hearing;
 - (d) An indication of the public authority from which relevant information can be obtained and where the

relevant information has been deposited for examination by the public;

(e) An indication of the relevant public authority or any other official body to which comments or questions can be submitted and of the time schedule for transmittal of comments or questions; and

(f) An indication of what environmental information relevant to the proposed activity is available; and

(v) The fact that the activity is subject to a national or transboundary environmental impact assessment procedure.

3. The public participation procedures shall include reasonable time-frames for the different phases, allowing sufficient time for informing the public in accordance with paragraph 2 above and for the public to prepare and participate effectively during the environmental decision-making.

4. Each Party shall provide for early public participation, when all options are open and effective public participation can take place.

...

Each Party shall ensure that in the decision due account is taken of the outcome of the public participation.

81. The Secretary of State disputed the legal relevance of this convention, as it has not been incorporated into UK law. On the issues in the present case, however, I do not need to decide this question. It was conceded by Bard that the only “plan or programme” relevant in these proceedings was “the Eco-towns shortlist”. ELGF was intended to play a part in the drawing up of that shortlist, but as the argument under each of grounds 1-5 progressed it was not suggested by Bard that the Aarhus Convention added to the common law in any respect that was relevant for present purposes.

Code of practice on consultation

82. A Code of Practice on Consultation was issued by the Cabinet Office in January 2004. It began by identifying six “consultation criteria.” Thereafter it said more about each criterion in turn. The six criteria were::

1. Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy

2. Be clear about what your proposals are, who may be affected, what questions are being asked and the timescale for responses
 3. Ensure that your consultation is clear, concise and widely accessible
 4. Give feedback regarding the responses received and how the consultation process influenced the policy
 5. Monitor your department's effectiveness at consultation, including through the use of a designated consultation co-ordinator
 6. Ensure your consultation follows better regulation best practice, including carrying out an Impact Assessment if appropriate
83. Bard relied upon the first three of these criteria. On criterion 2, Bard noted that the Code of Practice made specific points as follows:
- 2.1 ask focussed questions, and be clear about the areas of policy in which you are seeking views. ...
 - 2.3 as far as possible, consultation should be completely open, with no options ruled out...
84. Bard submitted that consultation criterion 3 was telling those who drafted consultation documents not to speak in riddles.

F. Ground 1: No consultation on principle

85. Here the complaints are that: (1) the Secretary of State failed to consult on the principle of constructing Eco-towns; and (2) if there was such consultation it did not give sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response. In oral submissions these complaints merged to a significant degree. They were also buttressed by suggestions which had not distinctly featured in Bard's Combined Statement of Facts and Grounds, and thus had not been the subject of specific response in the evidence answering the complaints.
86. At the start of Bard's oral submissions on ground 1 I was concerned that they might not have been focussing on the case advanced by the SoS. Mr Mould at this point intervened, stating that the SoS relied on the HGP as the document which invited comments on the principle of constructing Eco-towns. The SoS did not rely on ELGF or anything subsequent to ELGF as constituting consultation on the principle.
87. The result was that many of the submissions on Ground 1 in the skeleton arguments for Bard and Weston became superfluous. It is necessary on Ground 1 only to

examine their arguments contesting the SoS's assertion that prior to ELGF there had, through the HGP, been consultation on the principle. On this Bard and Weston advanced a preliminary argument which I am willing to assume is correct. Some readers of the HGP sent responses which treated the HGP as a consultation on Eco-towns. Bard and Weston warned that this did not show that HGP met the legal test for consultation. In my view the preferable approach in the circumstances of the present case is, in that respect, to put those responses on one side.

88. The first main contention was that the HGP could not amount to proper consultation on the principle because it did not assess alternative options. Here Mr Dove began by identifying a misunderstanding in the skeleton argument for the SoS. Bard was not saying that for proper consultation the HGP had to seek to show that eco-towns were the only answer to concerns about inadequate housing supply and about climate change.
89. Bard's points in this respect were then explained by Mr Dove. The HGP did not examine whether the housing proposed in eco-towns was needed and whether it could be provided in other ways, or whether innovation to deal with climate change could be developed in existing communities or in urban extensions or major urban redevelopment. Most fundamentally the HGP did not contain an assessment of whether providing a new settlement, remote from existing urban areas, was a more sustainable approach to housing development than developing in or near existing areas.
90. In effect this argument straddled both complaint (1) and complaint (2). There was an implicit premise that a document which did invite representations on alternatives could not be a consultation on principle. If that were wrong, however, by failing to examine alternatives the document failed to give sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response. In my view as regards both complaints (1) and (2) this argument is misconceived. There may be cases where consultation on alternatives is required in order to ensure fairness, for example where there is a legitimate expectation that consultation will include alternatives. Thus the government sought to examine alternatives in the document under consideration in *Greenpeace Energy Challenge* – no doubt because in the circumstances nothing less would do. But that is not the general position, as was made clear by Sullivan J in that case. At paragraphs 56 and 57 he commented on *Coughlan*:

56. In that case the Health Authority had sought and considered a report by Dr Clark on the opinions of local clinicians which was received well after the consultation period had ended. Rejecting the claimant's complaint that the authority had acted unfairly in considering the report, Lord Woolf said this at [112]:

“It has to be remembered that consultation is not litigation: the consulting authority is not required to publicise every submission it receives or (absent some statutory obligation) to disclose all its advice. Its obligation is to let those who have a potential interest in the subject matter know in clear

terms what the proposal is and exactly why it is under positive consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response. The obligation, although it may be quite onerous, goes no further than this.”

57. A paper on ethical decision-making fell into the same category:

“It was not a part of the proposal and not necessary to explain the proposal. The risk an authority takes by not disclosing such documents is not that the consultation process will be insufficient but that it may turn out to have taken into account incorrect or irrelevant matters which, had there been an opportunity to comment, could have been corrected. That, however, is not this case.” [115]

91. The argument in the present case amounts to an assertion that consultation on principle requires that there be an “issues paper.” There was, however, nothing in the history which gave anyone any legitimate expectation that there would be an “issues paper.” I shall examine in due course whether the HGP informed the public in clear terms what the proposal was and exactly why it was under positive consideration, telling them enough to enable them to make an intelligent response. At this stage I simply observe that if the HGP met this test then I see no reason to hold that fairness nevertheless required that the HGP contain an examination of alternatives.
92. Next, Bard submitted that the Housing Green Paper consulted specifically on six questions, unconnected with eco-towns, and said in passing ‘we invite your views on the range of ideas and proposals contained in the Green Paper’. Consultees were not told in clear terms that views were wanted on the principle of eco-towns. It was a reasonable expectation that if questions were asked, they would be asked on all the matters on which views are sought. Such an approach was consistent with the government’s own express policy in the Cabinet Office paper on consultation exercises.
93. I do not think that this submission has any sufficient factual foundation. The ministerial foreword to the HGP is set out in section B above. It referred to the HGP as “[t]his consultation,” and said that it sought “views on a range of proposals relating to housing supply in England.” The construction of Eco-towns was one such proposal. The ministerial foreword continued, “We welcome responses to the specific questions posed in this document **as well as any general comments that you may have.**” [emphasis added] This was echoed in Annex A. The ministerial foreword along with Annex A and the HGP as a whole made it perfectly clear that views were invited on Eco-towns. A reasonable reader would have had no doubt that the HGP was a consultation document. It was not an “issues paper” of the kind referred to in *Greenpeace Energy Challenge*. It covered a number of different aspects of housing. True it is that on two of those aspects it identified two and four specific questions respectively (questions numbered 5 and 6 on chapter 6, and questions numbered 7 to 10 on chapter 8) for readers to answer. On all the other aspects there was a general invitation for readers to send in their views. There was no basis for any reader to think

that views were sought only on those aspects where questions were asked. So far as the principle of constructing Eco-towns was concerned, the law does not require the formulation of specific questions. As to the Code of Practice, it said at paragraph 2.1 that a consultation document should “ask focussed questions, and be clear about the areas of policy on which you are seeking views.” The ministerial foreword and Annex A did both these things.

94. Bard then said that the language of the HGP and the Prospectus showed that the government had made up its mind to promote eco-towns and was essentially interested in candidate locations rather than any response in respect of the principle of this solution. I detect nothing in the HGP itself which warrants this inference. The government was entitled, if it thought it desirable, to take steps to ensure that if the Eco-towns proposal were taken forward to the next stage, then assembly of the material needed for that next stage would be well in hand. Bard claimed that a decision must have been taken, for otherwise the government would have been misleading those to whom the Prospectus was addressed. I do not accept this claim. The Prospectus proceeded on the footing that Eco-towns would have certain key features. It sought proposals for particular locations – but in that context it stressed that the criteria for assessment of Eco-towns would be subject to consultation. The Prospectus was addressed to local authorities and to other “stakeholders” – including environmental, housing and business representatives. These “stakeholders” could hardly have been unaware that the government was consulting generally on Eco-towns. It must have been plain to them that there was no guarantee that the proposals for Eco-towns would be taken forward after consideration of responses to the HGP. That is an end of this point.
95. It was, however, suggested that reliance could be placed on events after the HGP. Thus:
- i) Bard noted that the Summary of Responses to the Housing Green Paper made no reference to concerns expressed about the selection criteria being used to define this new form of development. This was said to show a lack of interest in considering detailed issues raised in relation to selection criteria (for example, whether eco-towns might form extensions of urban areas). The reason, said Bard, was because the SoS had already determined that eco-towns were to be pursued.
 - ii) Moreover, while the Summary of Responses said that over four fifths of the responses on eco-towns were supportive, Bard submitted that the responses overall did not provide a “ringing endorsement” for the principle of eco-towns.
 - iii) When providing Bard with copies of responses the DCLG had failed to include an important letter from Warwickshire County Council.
 - iv) Bard added that it was now known that before the deadline for consultation responses, at least in relation to Weston Otmoor, DCLG met with the promoters and others and discussed matters relating to the bid.
 - v) It was also now known that from November 2007 the DCLG was undertaking the evaluation of the bids for candidate sites for eco-towns. It would be thoroughly disingenuous, as well as a waste of public money and time, to do

this at a time when the principle of having them and the criteria to select them was not settled and the subject of public consultation. The reality was that this was not the case and that the principle of having eco-towns had already been settled and was not what the consultation was all about.

- vi) Consistently with this when ELGF was published in April 2008 it failed to say anything about consideration of responses on the principle of eco-towns.
 - vii) The local advertisements in June 2008 for the first time posed the question ‘are eco-towns a good idea?’ They were a belated and muddled recognition that the Government had failed to consult on the principle of eco-towns earlier.
96. Taking these points in turn, the Summary of Responses did not need to deal with detail. It said that over four fifths of the responses on eco-towns were supportive. I decline Bard’s invitation to express a view on whether the responses overall did or did not provide a “ringing endorsement” for the principle of eco-towns. Assessment of the responses was a matter for the SoS. There was an omission by DCLG to provide Bard with a copy of a letter forming part of Warwickshire County Council’s response to HGP. There is no doubt that DCLG received the letter, and no reason to think either that the letter was not considered or that the omission was anything other than an oversight. Before the deadline for consultation responses DCLG met with promoters and others and discussed matters relating to bids, and from November 2007 the DCLG was undertaking the evaluation of the bids. For the reasons given in relation to the Prospectus none of this gives rise to any sinister implication. There was no need for ELGF to say anything about consideration of responses on the principle of eco-towns: that was not its purpose. The local advertisements in June 2008 aimed to spur residents in relevant areas to send in their thoughts. In that regard it is plain that the government thought it would be useful, as part of that spur, to ask residents some specific questions. For this purpose the government chose to begin with the question, ‘Are eco-towns a good idea?’ I detect no reason to infer that those responsible for this question thought that the government had failed to consult on the principle of Eco-towns earlier.
97. A further point on complaint (1) was advanced by Mr Dove in his oral submissions in reply. I shall turn to that point shortly. Before doing so it is convenient to complete my consideration of complaint (2), and to mention certain specific points made on behalf of Weston.
98. On complaint (2) I return to the question of principle arising from *Coughlan*. Did the HGP inform the public in clear terms what the proposal was and exactly why it was under positive consideration, telling them enough to enable them to make an intelligent response? If one takes the document at face value it seems to me clear that it did so. The HGP contained an extended discussion of the proposal for Eco-towns. It set out reasons why the government was in favour of the proposal. I have already addressed certain of the criticisms advanced in this regard. Three further criticisms arose under this head.
99. First, the HGP discussed land which might be considered for Eco-towns, and in that context identified surplus public sector land. This may have given the government a financial interest. I have explained in section E why I do not think that this puts the

government in any different position in relation to the *Coughlan* principles. Even if, however, there were a need for special care in that regard, I do not detect any lack of special care. The government had made it clear that it had a preference for the use of surplus public sector land in PPS3 at paragraph 36, and the HGP did not hide this in any way.

100. Second, Bard submitted that in truth the Eco-towns process was an attempt to outflank the planning system, and that information needed to be given as to why this was being proposed. In my view what is envisaged is a proposed Eco-towns Planning Policy Statement (“the EPPS”), which will include a list of locations that the government considers meet its criteria. This seeks to deploy planning law so as to require decision-makers to have regard to the EPPS. In so doing the government is using, rather than outflanking, the planning system. This process would not necessarily compel the grant of planning permission for a location on the list.
101. Third, Mr Dove complained that no documents underlying the proposal were disclosed. Disclosure of documents is not inherently necessary in order to comply with the *Coughlan* principles. I detect nothing in the history of the present matter to suggest that disclosure of documents was required.
102. On behalf of Weston Mr Crean submitted that local individuals were not well resourced. If there has been a consultation it must be accessible to an ordinary member of the public. It was a question of fact whether the HGP amounted to such consultation. If events after HGP were relied on they were too convoluted to be accessible to local individuals. As to the latter, however, events after the HGP were not relied on by the SoS for the purposes of making good any deficiency in HGP, and so Weston’s criticism of subsequent events does not call for consideration on Ground 1. As to the former, I consider that HGP was accessible to ordinary members of the public – it was available to all and its language was for the most part simple and clear in an area bedevilled by jargon.
103. Mr Crean then turned to the question whether there had been consultation at a time when proposals were at a formative stage. He noted that Mr Cleary’s first witness statement said that the Government was committed to the delivery of eco-towns. This, submitted Mr Crean, was inconsistent with consultation having taken place at a stage when principles were still being formed. In my view this takes Mr Cleary out of context. Mr Cleary made the observation in question when discussing a document published on 4 June 2008, long after the consideration of responses to the HGP.
104. Finally Mr Crean referred to the history of scoring of the Weston Otmoor bid. That history, he submitted, gave rise to concern about the objectivity of the Secretary of State. I deal with the history of scoring of the Weston Otmoor bid when I come to Ground 4 in section I below. For the reasons there given I am not able to say that it warrants an inference of lack of objectivity.
105. I turn to the further point on complaint (1) mentioned above. Oral submissions for the SoS recognised that local people may well not bother to read or respond to a green paper. The call to arms for them will not come until a site near them is proposed. Bard say that this shows the HGP was not directed to local people. I do not accept this, it was directed to all. As Bard accepted, this was a staged process. It made sense for

consultation to take place on the principle at the outset. If at stages after the HGP consultation anyone made representations asserting good reason to depart from the principle, the SoS was bound to have regard to this. That being so, I do not consider that fairness required the SoS, in the circumstances of the present case, to go through a process of re-opening the earlier consultation at the ELGF stage. I accept that later in the process there will be an increasing head of steam. The present proceedings, however, concern a relatively early stage in the process.

106. Moreover the government will be bound at all times to have in mind the need to take stock as matters develop. The duty of the government in this regard is conveniently set out in *Greenpeace Energy Challenge* by Sullivan J at paragraph 59:

59. The overriding need for fairness in any consultation process was confirmed by the Court of Appeal in *R. (on the application of Edwards) v Environment Agency* [2006] EWCA Civ 877: see [90]–[94] and [102]–[106]. At [103] Auld L.J., with whom Rix and Maurice Kay L.JJ. agreed, said this:

“103. In general, in a statutory decision-making process, once public consultation has taken place, the rules of natural justice do not, for the reasons given by Lord Diplock in *Bushell*, require a decision-maker to disclose its own thought processes for criticism before reaching its decision. However, if, as in *United States Tobacco* (see per Taylor LJ, as he then was, at 370–371, and at 376, per Morland J), and in *Interbrew* (see per Moses J at pp 33–35 of the transcript), a decision-maker, in the course of decision-making, becomes aware of some internal material or a factor of potential significance to the decision to be made, fairness may demand that the party or parties concerned should be given an opportunity to deal with it. See also the remarks of Schiemann J in *R v Shropshire Health Authority, ex p Duffus* [1990] 1 Med LR 119, at 223 as to the changing scene that a consultation process may engender and the consideration by Silber J in *R (Smith) v East Kent Hospital NHS Trust* [2002] EWHC 2640, at 39–44, of the possible need, depending on the circumstances, for further consultation on matters and issues that the initial consultation may have thrown up.”

107. For these reasons I conclude that the points argued on ground 1 lack legal merit.

G. Ground 2: Number, size and key criteria

108. Here the complaint is that there has been no public consultation on the key criteria and essential requirements for selecting Eco-towns, and their number and size. In large part the argument in relation to this ground overlapped with that on ground 1, and in that regard the points made in section F above apply, subject only to a qualification mentioned below.

109. Thus I do not consider that any adverse inference should be drawn merely because consultees were asked no specific questions about number, size and key criteria in either the HGP or the Prospectus. The government's proposals as to number, size and "outline" criteria were set out in the HGP, which in relation to criteria also included a cross-reference to the Prospectus. Accordingly the ministerial foreword and Annex A in my view clearly invited comment on all these matters.
110. Equally for the reasons given in section F I decline to draw any adverse inference from the brevity of the summary of the HGP consultation responses.
111. Bard's complaint on ground 1 that the principle had been set in stone prior to the HGP was echoed in a submission on ground 2 that the key criteria had equally been set in stone. Weston, by contrast, complained that in her letter dated 30 October 2008 the minister said that further criteria were shortly to be published. Neither of these complaints has any substance. For the reasons given in section F the criteria were not set in stone. Weston had no reason to think that they would be. On the contrary, it is elementary that the government would need to be willing to consider changing the criteria if good reason arose to do so.
112. As to number, it was explained on behalf of the SoS in the course of these proceedings that
- ... the number of Eco-towns to be promoted (i.e. at present 10) is not directly linked to issues of housing need. If housing need were the key determinant of the number of Eco-towns to be promoted then a number far greater than 10 would be being proposed The prime determinant of the number of Eco-towns to be promoted is thus not need but supply. That is to say the likely number of suitable locations for the development of Eco-towns.
113. Mr Dove rightly observes that this explanation did not feature in the HGP or the Prospectus. In the context of the proposal as a whole, it seems to me clear that the HGP was not suggesting that the number had been chosen because a particular number was needed to meet housing need. The natural inference was that when proposing numbers – and indeed size - the government was making a stab at what it thought could realistically be achieved. Bard may well be right in saying that there is an element of arbitrariness. Even so, it does not seem to me that consultees needed an account of government thinking in this regard in order to be able to respond intelligently.
114. There was a further assertion by Mr Dove that the desirability of Eco-towns depended on the local position as to number of people who could not meet their housing need without assistance. Mr Dove acknowledges that this was not the government's thought process. In those circumstances there can hardly be a complaint that the government ought to have set it out in the HGP.
115. On behalf of Weston Mr Crean made a complaint that the criteria had not been applied in a rational, fair and even-handed manner. I deal with the detail in section I below. This complaint does not in my view warrant any conclusion that the

consultation on criteria, so far as relevant to the present proceedings, has not been conducted properly.

116. I turn to the qualification mentioned earlier. In relation to the principle of the proposal for Eco-towns the SoS placed no reliance on events from ELGF onwards. However on key criteria, number and size the position was different. Key criteria and essential requirements for selecting Eco-towns are to be set out in the proposed EPPS – which is the subject of continuing consultation. The final number of locations to be selected, and the size of the proposed Eco-towns, are both dependent upon the outcome of next stage of assessment and consultation on the short-listed bids. In these circumstances it seems to me that in relation to Eco-towns their key criteria, their number and their size all remain the subject of continuing consultation, and for that reason also this ground fails.

H. Ground 3: The rejected bids

117. At the ELGF stage 15 bids were proposed for eventual shortlisting. There were 42 other locations the subject of expressions of interest but which were regarded as not being appropriate to go forward for further review. The Claimants complaint under Ground 3 is that ELGF sought only views on the 15 and not on the 42.
118. Bard acknowledged that ELGF provided a list of the sites rejected. However ELGF did not permit consultees to suggest that those rejected were preferable to those that had been shortlisted. Nor did it provide information to enable consultees to do so. Nothing in ELGF explained why those sites had been rejected. In practice that meant that the totality of the exercise between October 2007 and March 2008 to reject 42 sites was not and could not be the subject of consultation. There was no explanation of the matrix used in the process of rejecting, nor of the scoring mechanism.
119. Bard accepted that prior to the issue of these proceedings on 24 June 2008 they had received the letter of 12 June 2008 addressed to Mr Ricketts promising that at the second stage of consultation the government would set out more detail of each location. They had also been able to obtain copies of some documents relating to rejected bids, including certain summary assessment sheets prepared in the course of the showstopper review. They further accepted that in November 2008, after the issue of these proceedings, the government had published – and invited comments on – the SA on the Eco-towns Programme, a document which had examined certain alternative sites. As to defects in this and other steps taken by the government since the issue of these proceedings, Bard's approach was to reserve its position. For the purpose of the present proceedings. Bard did not accept that these developments vitiated their complaint about this aspect of ELGF. On the contrary, it was Bard's submission, supported by Weston, that these developments bolstered their complaint. In that regard Bard cited the rejected bid for Throckmorton. Both Throckmorton and Middle Quinton are in the West Midlands. An obvious question of interest to Bard was whether Throckmorton might be an alternative to Middle Quinton. However the SA on the Eco-towns Programme had not fulfilled the promise in the letter of 12 June 2008. It had excluded Throckmorton as not being even a potential reasonable alternative, and as with other locations placed in that category it had given no information about it. Throckmorton had been placed in that category because in the showstopper review it had been given a D/E grading. However that grading had never

been the subject of explanation, independent scrutiny or consultation. The only information Bard had about it came from the summary assessment sheet, which Mr Dove described as “shambolic.” Because consideration of alternatives had not been the subject of government consultation, there had been no opportunity for Bard to seek to persuade the SoS that Throckmorton was a reasonable alternative to Middle Quinton.

120. In relation to Weston Otmoor the SA on the Eco-towns Programme had identified and examined two reasonable alternatives, Shipton and North West Bicester. The complaint remained that neither had been among the 15 potential bids for shortlisting at the ELGF stage and both had been excluded from consultation in ELGF.
121. Mr Dove submitted that proper consultation had to be about the process of whittling down as a whole. That has never occurred. The result was a breach of the requirement that consultation be at a formative stage, when options are open.
122. Bard added that the late stage of the consultation on locations was a breach of Article 6(4) of the Aarhus Convention requiring public participation ‘when all options are open’. Since the geographical scope of the Eco-towns Shortlist and the Eco-towns Programme is the whole of England, the 42 rejected locations ought to be regarded as reasonable alternatives to those proposed.
123. Weston made an additional point in this regard. The proposal for Weston Otmoor would involve encroaching on Green Belt land. Weston says this is a reason why Weston Otmoor should not be on the shortlist. In order to deploy this fully it is said that Weston should be able to see information about all the bids, enabling it to see whether there was a proper comparison with consideration of whether any of the others involved Green Belt land and to what extent.
124. Points on this ground concerning the SEA Directive are dealt with in section K below.
125. I consider that this complaint misunderstands ELGF. It did not comprise the consultation prior to final determination of which locations should be on the shortlist. It merely sought views on 3 matters. They were:
 - [1] the way in which the eco-towns concept is being developed and the different potential benefits that an eco-town could offer;
 - [2] how particular features such as greenspace or innovative approaches to housing can best be developed in an eco-town;
 - [3] preliminary views on the 15 locations going forward for further assessment;
126. As was clear from paragraph 4 of ELGF, this was no more than a preliminary to the consultation prior to final determination of which locations should be on the shortlist. It was undertaken in the hope that views on these 3 matters might assist the SoS for

the purposes of formulating material for that consultation when it eventually took place.

127. The 3 matters did not include the rejection of alternatives. I can see no good reason why the SoS should be required as a matter of law to introduce the question of alternatives at the ELGF stage. It was for the SoS, not the court, to identify areas on which preliminary views would be helpful. Accordingly the SoS was entitled to leave any consultation about alternatives to the next stage. It follows that both at common law and under the Aarhus convention the complaints under ground 3 are not valid complaints about ELGF. Whatever the position may have been at the time of ELGF, the crucial stage for consultation about alternatives was going to come later. An assessment at the time of ELGF would be premature, for the outcome would depend upon an examination not of what had happened by the time of ELGF but rather of the position at the crucial later stage. Whether, in relation to matters subsequent to ELGF, what has so far happened - and may in future happen - complies with the law on consultation is not for me to decide. In those circumstances I consider it highly undesirable that I make any comment on the legal merits of complaints as to consultation about rejected bids.
128. Accordingly I conclude that as regards alternative sites it is sufficient that ELGF envisaged later stages when the merits and demerits of alternative sites could be properly consulted upon. There may be grounds to criticise what happened at the later stages: I do not know. If there are, then those criticisms go to the validity of what was done later, not to the validity of ELGF. It follows that this head of claim fails.

I. Ground 4: Lack of information

129. Bard's skeleton argument asserts that there was a failure to provide adequate information to enable informed representations to be made. Instead, information has been produced late, has dribbled out in response to requests and some relevant (and non-confidential) material is still being withheld from the public.
130. In part this complaint concerned failure to provide information about alternative locations. That aspect of the matter falls away as a result of my conclusion that there was no obligation at the ELGF stage to consult about alternative locations.
131. As regards the remainder of this ground the complaint by both Bard and Weston was that for Middle Quinton and Weston Otmoor respectively, as for other sites proposed to be shortlisted, only a single page of information had been provided in ELGF. It was insufficient for the government to say that it had given in annex D the name and email contact for the proposer of the relevant development. Moreover additional information which Bard and Weston had been able to obtain did not remedy deficiencies in ELGF, on the contrary they strengthened the case for saying that those deficiencies had vitiated ELGF as a consultation document. On the latter aspects, Mr Mould made clear at the outset of argument on this point that if there had not been enough information in ELGF the Secretary of state would not seek to say that the requisite information was available elsewhere. Thus the question simply becomes whether ELGF provided sufficient information or not.

132. In support of the contention that ELGF did not provide sufficient information Bard and Weston referred to a range of matters. They complained of factual inaccuracies in the relevant single sheet. Bard disputed what ELGF said about Middle Quinton. They highlighted alleged errors in relation to transport, employment, and whether the site comprised previously developed land. Another general complaint concerned topics on which the single sheets failed to provide information. There was none about the planning status of the site. Nor was there any information about how the site scored against the government's key criteria. A third general complaint involved concerns which arose from ELGF's single sheets in respect of other sites proposed to be shortlisted. In particular, what was proposed as regards Pennbury suggested that there was a change in the key criteria, because that site would be an urban extension, or something similar to an urban extension, whereas it had been indicated previously that an Eco-town would need to be on a free-standing site.
133. As a further general point it was asserted that information was needed so that consultees could make representations which built upon substantive and procedural matters emerging during the shortlisting process. The material provided after ELGF was published about what happened prior to ELGF was difficult to understand, incomplete, and had errors in it. There was a lack of information about interaction between DCLG, local authorities and promoters. In particular in relation to Middle Quinton there had been meetings attended by a representative of the Government office, but Bard had not been able to obtain a note of such meetings. The single sheet in ELGF said nothing about them, nor about an acknowledged conflict with plans at the regional and local level. There had been at least one meeting between DCLG and representatives of English Heritage but such notes as were available gave no way of knowing whether the single sheet in ELGF accurately represented English Heritage's views.
134. As regards Weston Otmoor an internal DCLG email of 15.2.08 was said to be a smoking gun: It said that there were significant concerns, particularly given the lack of realism in the transport strategy that the proposer of Weston Otmoor had provided. Weston Otmoor had already been moved from a C grade to a grade of "C/D" for environmental reasons. Since then it had been graded D in transport terms, and the author of the email suggested it should be moved to a D grade overall. A meeting the following week would confirm whether this downgrading was appropriate. A week later on 22 February 2008 an email from DEFRA to DCLG stated, "[t]here should be no surprises here for you: there are 3 outright show stoppers-Boston, Scunthorpe and Weston Otmoor." Why it should not be surprising that there was a show stopper at Weston Otmoor was wholly unexplained, and this was said to be "redolent of other documentation existing which has been withheld." It was "both startling and surprising .. that notwithstanding that Weston Otmoor has a show stopper it found its way onto the short list."
135. At paragraphs 78 to 82 of its skeleton argument Weston advanced additional points of a similar kind but by reference to a different legal analysis:
78. It would have been a very easy matter indeed for the Defendant to publish in a single and accessible form the criteria which it intended to apply to the selection of eco-town locations. Instead it has produced this jumbled mess of

different criteria in different documents at different times. It does not constitute a proper consultation for ordinary members of the public and it is, in truth, a paper chase traceable only by a person of energy and persistence.

79. Further, the Pennbury site in Leicestershire is not “freestanding” and therefore fails to meet the criteria but was nevertheless selected for further consideration. This implies either that this jumble was not the real criteria or that there was some further criteria of which no one else was aware.

80. Further or alternatively, if this jumble is said to be the criteria then it is irrational, preposterous and unfair that Weston Otmoor is still seriously being considered since it is so obviously in conflict with them.

81. Another way to put this is that contrary to WF’s legitimate expectation these criteria have not been applied in a rational, fair and even-handed manner:

(i) Public Authority Support: Both of the Statutory Planning Authorities vehemently oppose the selection of the Weston Otmoor site.

(ii) Brownfield: The site is entirely Greenfield. On 4th November 2008 Margaret Beckett apologised for her predecessor’s error in thinking that Weston Otmoor was a brownfield site. It follows that at all material times whilst conducting the showstopper review the Defendant was acting under the mistaken belief that the Weston Otmoor site was brownfield.

(iii) Conformity with Green Belt Policy: 174 hectares of the Weston Otmoor site lies within the Statutory Green Belt. The developer currently proposes inappropriate development in the Green Belt as part of this proposal and the extent of the Green Belt incursion is not fixed and is not known.

(iv) The SSSi Criterion: “Part of the land identified within the Eco-town boundary is SSSi and under a Higher Level Stewardship Scheme. The SSSi is noted for its extremely rare grassland (MG4) and is also an historically important ridge and furrow landscape feature which is likely to be affected by increased visitor use”. [This quotation was taken from a “reporting assessment” by Natural England.] As to the likelihood of significant adverse effects the same document states:

“Water Quality Issues: Potential for eutrophication on SSSI which if it happened would lead to habitat degradation and loss of a rare and valuable grassland site”.

(v) Early Delivery: The Defendant’s document “Eco Town Proposals: Review Assessment Summary (March 2008)” reads:

“Site falls in SWOX water resources zone where significant new resource likely to be required to meet cumulative growth, unlikely to be deliverable until 2020s”.

(vi) Good Transport Links: [the email of 15 February 2008 was quoted.]

82. The confusion as to what criteria were employed and how they were applied to selecting some sites and rejecting others is deep and real. WF should not be in this position. They are entitled to expect to be provided with a clear indication of what the criteria are and how they have been applied. Instead, WF has been left with the very real impression that the process has been far from thorough and is, in fact, capricious and subjective.

136. On point (iii) of paragraph 81 Mr Crean added that the site could not be described as “fringing the Green Belt” – on the contrary it incorporated part of the Green Belt. On point (iv) Weston Otmoor conspicuously failed the criterion. On point (vi) the emails eventually provided by DCLG said transport would be a catastrophe.
137. Mr Crean continued that the first downgrade to C/D itself gave rise to concern about the objectivity of the SoS. There had been no clear explanation of why C/D in the light of these criteria. Added to that was the confusion about what happened following that first downgrade. Despite overwhelming factors to the contrary, somehow Weston Otmoor had escaped “showstopper” status, and there was a lack of information as to how this had come about.
138. On all these complaints it is not necessary to examine the detail. The short answer seems to me to be the same as on ground 3. ELGF gave local people a preliminary opportunity to give the SoS the benefit of their local knowledge. They did not need more than was in ELGF for that purpose, and if ELGF contained errors they could tell the SoS this. Complaints about lack of information were matters that might well inform the SoS’s decision about what information to provide at the next stage, but they did not give rise to good grounds in law to complain about ELGF. Again, whether what has so far happened, and may in future happen, on the next stage complies with the law on consultation is not for me to decide.

139. Accordingly I conclude that as regards lack of information it is sufficient that ELGF envisaged later stages when the merits and demerits of particular bids could be properly consulted upon. There may be grounds to criticise what happened at the later stages: I do not know. If there are, then those criticisms go to the validity of what was done later, not to the validity of ELGF. It follows that this head of claim fails.

J. Ground 5: Inadequate time

140. This complaint is that insufficient time was given to consider documents provided towards the end of the consultation period. The ELGF consultation period was for 12 weeks, in accordance with the Code of Practice on Consultation. It was inconsistent with this and with the common law as to consultation to provide important information at such a late stage.
141. The reality is, however, that the information in question was not supplied for the purposes of the ELGF stage of consultation. It was supplied under laws concerning access to information, in particular the Freedom of Information Act and the Environmental Impact Regulations. The complaint fails because, for the reasons given on grounds 3 and 4, this information was not needed for the limited purposes of the ELGF consultation.

K. Ground 6: SEA

142. The Claimants seek a declaration that the SEA Directive is applicable to “the eco-towns policies”. Directive 2001/42/EC “Environmental Assessment of Plans and Programmes Directive” introduces a process known informally as Strategic Environmental Assessment (“SEA”). The SEA Directive is implemented into English law by the Environmental Assessment of Plans and Programmes Regulations 2004 (“the SEA Regulations”). An environmental assessment (that is, SEA) is required for plans and programmes which are prepared for, inter alia, ‘town and country planning or land use’ and which set ‘the framework for future development consent of projects listed in Annex I or II to Council Directive 85/337/EEC’ [the Environmental Impact Assessment Directive] (regulation 5(2)) and which are likely to have significant environmental effects.
143. Bard say that an eco-town is an urban development project as listed in Annex II, paragraph 10 of the EIA Directive. The identification of eco-towns is a programme. It is adopted by an authority at national level. The Secretary of State intends that the identification of the eco-town locations will influence regional and local planning policy and development control decisions. A national policy therefore has to be issued by the Secretary of State to influence the preparation of those policies (see Planning and Compulsory Purchase Act 2004, ss. 5, 18). The adoption of the programme is therefore required by legislative provisions. It is in any event required by administrative provisions as the Secretary of State is unable to influence the formation of planning policy and development control decisions in the intended manner unless she adopts a plan or programme.
144. However the Secretary of State has indicated she will undertake a SA in full compliance with the SEA Directive. Accordingly, for the most part, the issue of

whether the draft PPS is subject to the SEA Directive is academic. The only live issue is whether the SEA directive required a SA no later than the time when ELGF was issued. One pre-requisite in the SEA Directive and the Regulations concerns the existence of a legal or administrative requirement. Assuming that there is such a requirement, obligations as to a SA will only arise when what is under consideration is a plan or programme. In my view that will not arise any earlier than the shortlisting stage. As ELGF was not concerned to be a full consultation on shortlisting, I consider that the SEA Directive and the Regulations did not impose requirements at the ELGF stage.

L. Weston's complaints

145. Generally, Weston relies on the documentation as establishing that there was no point in making representations on principle and criteria. These assertions fail for the reasons given on grounds 1 and 2. Weston also seeks to rely on principles of legitimate expectation. In the present context these do not add to the well known principles concerning consultation. I do not accept that there was anything to prevent the SoS discussing a bid with its promoter.

146. Weston seeks to rely on three additional grounds of challenge in respect of the proposals as to short-listing of Weston Otmoor in ELGF.

(i) Weston Ground 1 – Green Belt

147. Part of the Weston Otmoor site lies in Green Belt. Weston says that ELGF fails to demonstrate that the Secretary of State “adequately or at all ... applied [her] mind to the need to demonstrate “very special circumstances” which would justify any grant of planning permission. It is also alleged that selection of the site was irrational and contrary to PPG2 (the national planning policy on green belts).

148. For present purposes it suffices to say that for the reasons given under Ground 4 this complaint fails.

(ii) Weston Ground 2 – SSSI

149. The Weston Otmoor site has the potential to impact on a number of SSSIs. Weston alleges that the Secretary of State has not applied her mind to these issues.

150. The position on this is the same as on Weston's first point.

(iii) Weston Ground 3 - alternatives

151. Weston alleges that alternative sites to Weston Otmoor should have been considered before it was proposed to be short-listed in ELGF.

152. For present purposes it suffices to say that this complaint fails for the reasons given under ground 3.

M. Conclusions, putting on one side disclosure

153. For the reasons given above I have concluded that, subject only to Bard's disclosure application, all claims fail.

N. Bard's disclosure application

154. An application notice by Bard dated 6 January 2009 sought disclosure of a wide range of material. The grounds for this application were set out in the fourth witness statement of Mr Ricketts. It is clear from this statement that the material in question was sought in order to assist Bard's case on grounds 3 and 4 above. I have concluded that those grounds are misconceived in principle. Accordingly I refuse Bard's disclosure application.

O. The overall result

155. It follows from the above that Bard and Weston have not identified any infringement of public law in relation to what happened up to and including the consultation period envisaged in ELGF. The parties had submitted arguments on the exercise of discretion when granting relief. However in the result no question of discretion arises. For all these reasons my order at the conclusion of the hearing was that the application for judicial review was dismissed and the application for disclosure was refused.