



Neutral Citation Number: [2025] EWCA Civ 958

Case No: CA-2024-002732

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT
THE HONOURABLE MRS JUSTICE LANG DBE
[2024] EWHC 273 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23 July 2025

Before:

LADY JUSTICE ANDREWS
LORD JUSTICE LEWIS
and
LADY JUSTICE ELISABETH LAING

Between:

KEEP CHISWELL GREEN	<u>Appellant</u>
- and -	
(1) SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT	<u>Respondent</u>
(2) CALA HOMES (CHILTERN) LIMITED	
(3) HEADLANDS WAY LIMITED	
(4) ST ALBANS CITY AND DISTRICT COUNCIL	

Piers Riley-Smith (instructed by **Richard Buxton Solicitors**) for the **Appellant**.
Zack Simons KC (instructed by **Government Legal Department**) for the **First Respondent**.
Lord Banner KC and **Matthew Henderson** (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **Second Respondent**.
Paul Stinchcombe KC (instructed by **Harlod Benjamin Solicitors**) for the **Third Defendant**.

The **Fourth Defendant** did not appear and was not represented.

Hearing date: 11 July 2025

Approved Judgment

This judgment was handed down remotely at 10.30am on 23 July 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Richborough

Lord Justice Lewis:

INTRODUCTION

1. This appeal concerns a decision of the first respondent, the Secretary of State for Housing, Communities and Local Government, in which he accepted recommendations of an inspector and allowed appeals against decisions of the fourth respondent, St Albans City and District Council (“the Council”), refusing applications for planning permission for two residential developments on land within the metropolitan green belt in Chiswell Green near St Albans in Hertfordshire. The appellant, Keep Chiswell Green, is a local community group of residents which opposed the grant of planning permission for the two proposed developments.
2. One proposed development, promoted by the second respondent, Cala Homes (Chiltern) Ltd (“Cala”), was for up to 391 dwellings (and the provision of land for a new school) at a site to the south of Chiswell Green Lane. The appeal in relation to the refusal of this application for permission is referred to as Appeal A and the site as the Appeal A site.
3. The second proposed development, promoted by the third respondent, Headlands Way Limited (“Headlands”), was for up to 330 affordable homes for key workers on a site to the north of Chiswell Green Lane. The appeal in relation to the refusal of this application for permission is referred to as Appeal B and the site as the Appeal B site.
4. As part of the appeals process, an inquiry was held before an inspector between 17 April and 9 May 2023. Following the closure of the inquiry, but before the decision of the Secretary of State on the appeals, a new document, the Arup Green Belt Review (“the Arup Review”), was published. That document was commissioned by the Council as part of the process of developing a local plan and included recommendations about which areas of land should be released from the green belt. None of the parties to the inquiry, which included the appellant, sent a copy of the Arup Review to the inspector or the Secretary of State. The inspector recommended allowing the appeals and granting planning permission. The Secretary of State accepted those recommendations.
5. The appellant then applied for a statutory review of the Secretary of State’s decision, pursuant to section 288 of the Town and Country Planning Act 1990 (“the 1990 Act”). The principal ground of challenge was that the Secretary of State unlawfully failed to have regard to a material consideration which arose after the inquiry had closed but before the decision was made, namely the Arup Review which it was said had superseded an earlier green belt review (referred to as the SKM review).
6. Lang J. (“the judge”) dismissed the claim. First, the judge held that the appellant was not entitled to rely upon new evidence and grounds which it had not placed before the inspector or the Secretary of State. Secondly, she held that the Arup Review was not a mandatory material consideration and the Secretary of State did not act irrationally by not taking the Arup Review into account.
7. The appellant appeals on two grounds which can be summarised as follows:
 - Ground 1. The judge was wrong to find that there was a preliminary procedural bar preventing the appellant from

arguing that the Secretary of State had failed in her duty to have regard to a material consideration when determining the appeals against the refusal of planning permission.

Ground 2. The judge was wrong to find that the Arup Review was not “so obviously material” so as to be a mandatory material consideration which had to be taken into account by the Secretary of State before he reached a decision on the appeals against the refusal of planning permission.

8. At the conclusion of the hearing, we announced that the appeal would be dismissed for reasons to be given in writing. These are my reasons for joining in that decision.

THE LEGAL FRAMEWORK

9. Planning permission is required for any development of land: see section 57 of the 1990 Act. Planning authorities dealing with applications for planning permission (and, by virtue of section 79(4), the Secretary of State when dealing with appeals against the refusal of planning permission) must, in accordance with section 70(2) of the 1990 Act have regard to: –

“(a) the provisions of the development plan, so far as material to the application,

.....

(c) any other material considerations.”

10. Section 38(6) Planning and Compulsory Purchase Act 2004 provides that:

“If regard is to be had to the development for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise.”

11. The Town and Country Planning (Inquiries Procedure) (England) Rules 2000 (“the Rules”) set out the procedure to be followed at an inquiry held in England in relation to an appeal against a refusal of planning permission. The Rules are concerned, amongst other matters, with the preparation for, and the conduct of, the inquiry. They deal with appearances at the inquiry, the preparation of statements of case, and the provision of evidence at the inquiry by the parties. Rule 17 deals with the procedure to be followed after an inquiry closes and provides, so far as material, that:

“17.— Procedure after inquiry

(1) After the close of an inquiry, the inspector shall make a report in writing to the Secretary of State which shall include his conclusions and his recommendations or his reasons for not making any recommendations.

.....

(4) When making his decision the Secretary of State may disregard any written representations, evidence or any other document received after the close of the inquiry.

(5) If, after the close of an inquiry, the Secretary of State—

(a) differs from the inspector on any matter of fact mentioned in, or appearing to him to be material to, a conclusion reached by the inspector; or

(b) takes into consideration any new evidence or new matter of fact (not being a matter of government policy),

and is for that reason disposed to disagree with a recommendation made by the inspector, he shall not come to a decision which is at variance with that recommendation without first notifying in writing the persons entitled to appear at the inquiry who appeared at it of his disagreement and the reasons for it; and affording them an opportunity of making written representations to him or (if the Secretary of State has taken into consideration any new evidence or new matter of fact, not being a matter of government policy) of asking for the reopening of the inquiry.

(6) Those persons making written representations or requesting the inquiry to be re-opened under paragraph (5), shall ensure that such representations or requests are received by the Secretary of State within 3 weeks of the date of the Secretary of State's notification under that paragraph.

(7) The Secretary of State may, as he thinks fit, cause an inquiry to be re-opened, and he shall do so if asked by the applicant or the local planning authority in the circumstances mentioned in paragraph (5) and within the period mentioned in paragraph (6); and where an inquiry is re-opened (whether by the same or a different inspector)—

(a) the Secretary of State shall send to the persons entitled to appear at the inquiry who appeared at it a written statement of the matters with respect to which further evidence is invited; and

(b) paragraphs (3) to (8) of rule 10 shall apply as if the references to an inquiry were references to a re-opened inquiry.”

THE FACTUAL BACKGROUND

The Applications for Planning Permission

12. The facts are fully set out in the judgment of the judge. The material facts for the purpose of this appeal can be summarised as follows. Cala applied for outline planning

permission for the “demolition of existing structures and construction of up to 391 dwellings (Use Class C3); the provision of land for a new school, open space provision and associated landscaping, internal roads, parking, footpaths, cycleways, drainage, utilities and service infrastructure and new access arrangements” (“the Appeal A scheme”). The Council refused that application on 6 December 2022. The principal reason for refusal was that the development comprised inappropriate development in the green belt for which permission could only be granted in very special circumstances. The Council did not consider that there were very special circumstances: the benefits did not outweigh the harm to green belt openness and the purposes of the green belt relating to encroachment to the countryside, urban sprawl and merging of towns.

13. Headlands applied for outline planning permission for “demolition of existing buildings and the construction of up to 330 discounted affordable homes for key workers, including military personnel, the creation of open space and the construction of new accesses and highway works including new foot and cycle path and works to junctions” (“the Appeal B scheme”). The Council refused that application on 25 October 2022. The principal reason for refusal was that the development comprised inappropriate development in the green belt which could only be granted in very special circumstances. The Council did not consider that the benefits outweighed the harm to the green belt and did not consider that they amounted to very special circumstances justifying the grant of planning permission.
14. Both Cala and Headlands appealed to the Secretary of State against the refusal of planning permission. The Secretary of State appointed an inspector, Michael Boniface MSC MRTPI, to hold one inquiry into both appeals. That inquiry began on 17 April 2023 and concluded on 9 May 2023. The Council appeared at the inquiry to oppose the appeals. The appellant was also permitted to participate and opposed the grant of planning permission for the two developments. On 1 June 2023, the Secretary of State made a direction under section 79 and paragraph 3 of Schedule 6 to the 1990 Act that he would make the determination on the appeals.

The Inquiry

15. In the course of the inquiry, participants made submissions about the SKM review of the green belt. The judge described the SKM review at paragraphs 12 to 16 of her judgment in the following terms so far as material:

“12. In the course of the appeals, the parties made submissions on the SKM Review which was published in two parts by Sinclair Knight Merz. The 1st Stage SKM Review was the ‘Green Belt Review Purposes Assessment’ Final Report 2013. The 2nd Stage SKM Review was the ‘Green Belt Review Sites & Boundaries Study’ Report 2014.

13. The 1st Stage SKM Review analysed the Green Belt of Dacorum Borough Council, St Albans City and District Council, and Welwyn Hatfield Borough Council. It did this by breaking down the Green Belt into ‘Strategic sub-areas’ for analysis. The Appeal Sites both fell within sub-area ‘SA-S8 - Enclosed land at Chiswell Green Lane at Chiswell Green (GB25)

14. The 1st Stage SKM Review recommended that eight strategic sub-areas be further reviewed and assessed in the 2nd Stage SKM Review. This included SA-S8.

15. The 2nd Stage SKM Review analysed S8 at Section 10. At Section 11.2 it ranked all 8 sub-areas depending on their suitability for Green Belt release and future development. S8 was ranked top ...with a finding that it was “the most suitable site” for development. Appeal A Site was found to be the least sensitive part of the sub-Area 8 (Inspector's Report paragraph 542 (“IR/542”)). Appeal B Site was found to be more sensitive and it was not recommended for release from the Green Belt for housing (see IR/312 and IR/550).

16. The 1st and 2nd Stage SKM Reviews were part of the evidence base for the Council's emerging Local Plan in 2019 which was withdrawn at the invitation of the Examining Inspectors. The Examining Inspectors raised concerns about some of the methodology used in the 2nd Stage SKM Review. Therefore the Council decided to commission a new 2nd Stage review from Arup. The Inspector found that these concerns had no bearing on the issues in these appeals (IR/531).”

The Publication of the Arup Report

16. The inquiry concluded on 9 May 2023. The Council had stated in its closing submissions to the inquiry that a new green belt review was to be published shortly. That review was the Arup Review which was published by the Council on its website on 16 June 2023 as part of its evidence in connection with the emerging local plan. The draft local plan would be the subject of consultation and would have to be the subject of an examination by an independent examiner. The recommendations in the Arup Review, if reflected in the draft local plan, would be tested in that process.
17. The introduction to the Arup Review explains that Arup had been appointed by the Council to provide a review of the Council's green belt and countryside “to help inform work carried out as part of the local plan” (para. 1.1). It explained that the purpose of a green belt review was to provide evidence of how different areas of the green belt performed against the five purposes of the green belt identified in the National Planning Policy Framework (“the NPPF”). It explained that a green belt review formed an important part of the evidence base and helped a council determine which changes to the green belt could be considered without damage to the purposes of including land in the green belt, and the degree to which harm to the green belt would result if development took place. It also explained that a green belt review was not a policy or decision-making document that proposed any release of green belt land, as that was for the Council to determine as part of the wider plan-making process (see section 1.2 of the Arup Review). It said that the 1st stage SKM review was considered a robust evidence base. However, to address previous criticisms of the 2nd stage SKM review, the Arup Review said it had conducted what it described as a “more granular and comprehensive approach to identifying sub-areas for assessment” (paragraph 3.1). Those issues were then addressed in the remainder of the Arup Review including, in

particular section 3. It stated that the 2nd stage of the SKM review “is entirely replaced by this newly commissioned” green belt review (paragraph 3.5).

18. The sub-area of the green belt which included Appeal Site A was assessed “to perform moderately against NPPF purposes but makes an important contribution to the wider Green Belt”. It set out a detailed analysis and its conclusion in summary was that “Overall, the sub-area plays an important role with respect to the strategic land parcel, and its release in isolation or in combination would harm the performance of the wider Green Belt”.
19. The assessment of the sub-area of the green belt which included Appeal Site B was that it “performs strongly against NPPF purposes and makes an important contribution to the wider Green Belt”. It set out a detailed analysis and its conclusion in its summary was that “Overall, the sub-area plays an important role with respect to the strategic land parcel, and its release in isolation or in combination would harm the performance of the wider Green Belt”.
20. The Council, which resisted the appeal and opposed the grant of planning permission, did not send the Arup Review to the inspector nor the Secretary of State. The appellant who knew of the Arup Review at least by September 2023 (as it made representations about it to the Council) did not send it to the inspector nor the Secretary of State. Nor did Cala or Headlands send it.

The Inspector’s Report

21. On 24 October 2023, the inspector provided a thorough, comprehensive and detailed report dealing with both appeals. It should be read in its entirety. For the purposes of this appeal, it is only necessary to consider those parts which deal with the green belt. As the inspector correctly noted at paragraph 525, one of the main issues common to the appeals was the green belt. As the inspector correctly understood, “Inappropriate development is, by definition, harmful to the Green Belt and should not be approved except in very special circumstances” (see paragraph 152 of the NPPF).
22. The inspector recorded the cases of the parties, and the evidence of Cala and Headlands on the effect of the proposed developments on the green belt. He set out the benefits of the proposed developments identified by Cala and Headlands which, principally, included a contribution to meeting the housing needs in St Albans in circumstances where the Council had a shortage of housing land and would only be able to provide about 40% of the housing needed over the next five years and where the supply of affordable homes was said to be even more precarious. He set out their cases as to why the contribution to housing needs amounted to very special circumstances justifying inappropriate development in the green belt. He recorded the submissions, and reviewed evidence submitted on behalf of the appellant, and others, on the green belt. He also recorded the case for the Council which opposed the appeals and opposed the grant of planning permission for these two proposed development. In that section of the report, the inspector recorded that “a new Green Belt review is due to be published shortly” (paragraph 300 of the inspector’s report).
23. The inspector’s conclusions begin at paragraph 525 of his report. His conclusions on the green belt generally are set out at paragraphs 527 to 533 in the following terms (paragraph numbers are references to paragraphs in the report):

“Green Belt

527. Both appeal sites are located wholly within the Metropolitan Green Belt. The Government attaches great importance to Green Belts. The fundamental aim of Green Belt policy is to prevent urban sprawl by keeping lands permanently open; the essential characteristics of Green Belts are their openness and their permanence.

528. There is no dispute between the parties that the appeal proposals constitute inappropriate development in the Green Belt and that such development would be, by definition, harmful to it. Such proposals should not be approved except in very special circumstances. These will not exist unless the potential harm to the Green Belt by reason of inappropriateness, and any other harm resulting from the proposal, is clearly outweighed by other considerations.

529. Consistent with the National Planning Policy Framework (the Framework), Policy 1 of the District Local Plan Review (1994) (LP) restricts development in the Green Belt other than in very special circumstances.

530. In preparing for a new Local Plan, the Council commissioned a Green Belt Review (GB Review) comprising the Green Belt Review Purposes Assessment (November 2013) (GBR Purposes Assessment) and the Green Belt Review Sites & Boundaries Study (February 2014). The first is said to be an independent and comprehensive Green Belt review that seeks to advise on the role different areas play in fulfilling the fundamental aim of the Green Belt and its five purposes as defined within the Framework, ranking and scoring their performance. The second, reviews the eight strategic sub-areas found to contribute the least towards the five Green Belt purposes against which all Green Belt land in St Albans was assessed in the GBR Purposes Assessment. [46-57, 248, 307-314]

531. The GB Review looks at the district on a large and strategic scale, rather than on a site-by-site basis and is now some years old, such that some circumstances may have changed. It also makes assessments in the context of a potential release of land from the Green Belt through the plan making process, which is not the purpose of these appeals. For these reasons, its conclusions cannot be directly applied to the appeal proposals. However, the GB Review is clearly a material consideration relevant in considering Green Belt matters in the district, notwithstanding that the Local Plan they were intended to support has been withdrawn by the Council and attracts no weight in and of itself. I have had regard to the GB Review in reaching my own conclusions. This is notwithstanding the

reservations expressed about the GB Review by the Inspectors examining the formerly emerging LP, which have no bearing on the issues in these appeals or on the purposes for which I have had regard to the GB Review. [55-57, 310-314]

532. Both appeals fall within strategic sub-area 'S8: Land at Chiswell Green'. It is a 'Tier 1' site, which includes sites that do not significantly contribute towards any of the five Green Belt purposes and are classified as exhibiting 'higher' suitability for at least two of the three categories relating to constraints, integration and landscape sensitivity. Out of the strategic sub-areas considered, it is ranked in first position, the most suitable area in the district. [59, 76]

533. The Council accepts that there will need to be a significant amount of development in the Green Belt if its housing requirement is to be met. That being the case, the relative suitability of sub-area S8 is an important consideration. [248, 307, 532]".

24. The inspector then considered Appeal A and said this:

"Appeal A

534. The site is largely undeveloped and open at present, with few structures, notably the existing stable block to the northwest and an unoccupied dwelling to the northeast. As such, there would undoubtedly be a significant and permanent impact on openness in a spatial sense. The introduction of 391 dwellings, a school and associated works would introduce a great deal of built volume to the Green Belt.

535. There would also be significant harm to openness in a visual sense in that the development would be seen from surrounding properties, highways and public rights of way, albeit that areas of open space would also be delivered. Activity within the site would also increase greatly with the comings and goings of residents, visitors, school pupils and staff. [62, 325, 351, 380]

536. That said, the development would not become a prominent part of the wider Green Belt and would only be visually harmful in relatively close proximity to the site. It is visually contained by existing built form on the eastern side, and this partially wraps around the site to the north and south. To the east, is Miriam Lane, which follows the western boundary of the site with thick landscaping along much of its length. This leads to the former Butterfly World site where significant development exists, such as building slabs, earth bunds, fencing and other built form associated with the former use. Even bearing in mind that some structures and uses within the site are apparently unauthorised and may be removed, development is visible and provides a good

degree of screening, along with a definitive boundary to the west of the site. [50-54, 59, 65, 73-75, 309, 316, 332, 334, 343, 354-360]

537. Nevertheless, it is clear that the development would result in significant harm to Green Belt openness and I attach this harm substantial weight.

538. So far as the Green Belt purposes are concerned, the first seeks to check the unrestricted sprawl of large built-up area. The proposed development would extend the urban edge of Chiswell Green, expanding the settlement into countryside. However, as I have described above, the site is relatively well contained by Miriam Lane, its landscaping (including some earth bunds) and the remaining development associated with Butterfly World, which is now closed. These defensible boundaries would define the extent of the site and separate it from the wider countryside, minimising any perception of uncontrolled sprawl. There would be moderate harm to this Green Belt purpose.

539. The second purpose is to prevent neighbouring towns merging into one another. The development would extend the settlement edge of Chiswell Green, which is located in close proximity to St Albans. The urban edge would be brought marginally closer to Hemel Hempstead but the size of the site, in the context of the vast gap between St Albans and Hemel Hempstead, is such that there would be little contribution to any perceived merging of the towns. The harm to this purpose would be very limited.

540. The third purpose is to assist in safeguarding the countryside from encroachment. The development would obviously encroach on the countryside, albeit contained by Butterfly World and Miriam Lane. Having regard to the considerations I have set out above, the development would result in moderate harm to this purpose.

541. No party argues that there would be any harm to the remaining Green Belt purposes, as contained in the Framework. [68, 72-75, 331-342, 353-360]

542. It is notable that the Council's GB Review found the part of sub-area S8, within which the appeal site falls, to be the least sensitive part of the sub-area. Nevertheless, the Appeal A scheme would result in definitional harm of the Green Belt, as well as harm to its openness and purposes. I attach substantial weight to this harm. [76-78, 267-273, 309, 361-363, 532]."

25. The inspector then considered Appeal B and said this:

"Appeal B

543. The appeal site is again largely open and undeveloped, albeit with a modest agricultural style building close to Chiswell Green Lane. Appeal B proposes less development than Appeal A, but the 330 dwellings sought would nevertheless have a considerable and permanent impact on openness in both a spatial and visual sense. This would result from the volume of built form to be introduced and the visibility of buildings from surrounding properties, highways and public rights of way. Again, activity within the site would increase greatly.

544. Unlike Appeal A, more open and longer-range views towards the site are available and the development would be seen more readily in the context of the wider Green Belt from the west, including from public rights of way. Conversely, views from Chiswell Green in the immediate locality of the site would be curtailed or filtered to a large extent by the boundary hedgerows and other landscaping, which includes thick evergreen hedges along the north and east boundaries that would largely be retained. It is likely that the upper parts of the buildings would still be visible however, even after further landscaping the site. The fact that the site is separated from the edge of Chiswell Green by a thick hedgerow and an intervening paddock gives a strong perception that it is part of the countryside beyond the settlement edge. The established urban edge has little impact on the visual openness of the site, though houses on Cherry Hill and The croft are a notable backdrop from the west.

545. In light of the above, the development would result in substantial harm to Green Belt openness and I attach this harm substantial weight.

546. Having regard to the purposes of Green Belt, the development would significantly harm the first purpose. It would introduce development beyond the established settlement edge and would remain separated from built form on the edge of Chiswell Green by a paddock. It would, to some extent, have the appearance of unrestricted sprawl, clearly protruding into the wider rolling countryside. This appearance might be reduced if the intervening paddock were subsequently developed as KCG anticipate, but that cannot be guaranteed. Public right of way 21 would provide the only form of defensible boundary to the west of the site, with its established hedgerow and tree planting, through additional landscaping could be introduced to reinforce this.

547. The effect of the second Green Belt purpose would be similar to that for Appeal A. The development would protrude in the general direction of Hemel Hempstead but there is no evidence of a proliferation of development in the separating gap that leads to any meaningful perception of coalescence, even on

an incremental basis. To the extent that the gap would be marginally reduced, very limited harm would result to the second purpose.

548. There is no disagreement between the parties that the third Green Belt purpose would also be harmed by the development, and having regard to my conclusions above, it is obvious that the development would encroach on the countryside. The quantum of development, its separation from the established settlement and visibility from the wider Green Belt are such that significant harm would result to the third purpose.

549. As with Appeal A, no party argues that there would be any harm to the remaining Green Belt purposes, as contained in the Framework.

550. The GB Review draws a distinction between the east and west parts of sub-area S8, noting that the western area, with which Appeal B is located, is more sensitive. This accords with my own findings that the Green Belt impacts would be much greater from Appeal B. The development would result in definitional harm to the Green Belt, as well as harm to its openness and purposes. I attach substantial weight to this harm. [76-78, 267-273, 267-273, 309, 361-363, 532].”

26. The inspector then considered other matters before turning to the issue of whether there were very special circumstances which justified inappropriate development in the green belt. In the case of both appeals he gave “substantial weight to the harm that would arise to the Green Belt” (paragraphs 606 and 609). In both appeals, he considered that there “would be very substantial benefits in terms of housing provision” (and other benefits too, see paragraphs 607 and 610). In both cases, his conclusion, as appears from paragraphs 608 and 611, was that:

“Overall, the harm by reason of inappropriateness, and any other harm, is very clearly outweighed by other considerations, so as to amount to the very special circumstances necessary to justify the development.”

27. The inspector therefore recommended that both appeals be allowed and planning permission be granted subject to conditions.

Post-Inquiry Correspondence

28. On 18 January 2024, the Secretary of State wrote to the parties asking for views on certain changes in the December 2023 version of the NPPF and the 2022 Housing Delivery Test figures. Neither matter related to the green belt.
29. Headlands answered by way of a statement made by Mr B. Parker, Planning Consultant, dated January 2024. The statement dealt with the matters raised by the Secretary of State but also included the following reference to the Arup Review:

“38. since the Inquiry, the latest [emerging local plan] has undergone a Regulation 18 Consultation. In this regard, however, the unresolved objections to it [see Paragraph 48(b)] are extensive and significant. For instance:

...

- Despite assuring the Inquiry of the veracity of the SKM Green Belt Review, the Council is now informed by a second Green Belt Review which identifies different sites for consideration (the Council will have to explain why SKM and Arup have arrived at different conclusions and which should take priority);"

30. On or before 12 February 2024, Mr Parker made further representations on behalf of the Third Defendant in which he made the following observations about the Arup Review:

“12. Secondly, the site south of Chiswell Green Lane is no longer “the top-performing candidate GB release site”. In June 2023, the Council published a new Green Belt Review by Arup. In addition to noting the presence of the popular Chiswell Green Riding School on the site (the loss of which, without being replaced locally, would be contrary to Paragraph 103 of the NPPF [previously, Paragraph 101]), the Arup report concluded that the Stantec site was now "Not recommended for further consideration.

13 The Arup report is not referenced to give any weight to the draft allocations in the [emerging local plan] because the current allocation process is as flawed as the one for the last abortive Local Plan. It merely serves to do demonstrate how little reliance can be placed on the actions of what the Secretary of State rightly called “*one of the worst authorities in terms of plan-making*”.”

31. On 31 January 2024 and 12 February 2024, the Council responded to the issues raised by the Secretary of State. It did not ask the Secretary of State to consider the Arup Review. It did not respond substantively to the comments about the Arup Review and invited the Secretary of State to disregard the submissions from the other parties as they went beyond the remit of the Secretary of State’s letter and the case put forward by Cala and Headlands at the inquiry.
32. On 12 February 2024, the appellant sent detailed submissions to the Secretary of State about the matters raised by him. It did not respond to the comments about the Arup Review but stated that both Cala and Headland had “commented outside the remit above and our lack of response to their comments on subjects outside the requested areas does not imply that we are in agreement with them, nor that we attribute any veracity or validity to them”. The appellant did not ask the Secretary of State to consider the Arup Review.
33. Cala responded to Mr Parker’s reference to the Arup Review, by a letter from its planning consultants, Stantec UK Limited, dated 16 February 2024, which stated:

“

I have consciously steered away from providing new evidence. However, paragraph 12 of Mr Parker's Statement makes reference (for the first time) to a Green Belt Review published by Arup in June 2023 ('the Arup GBR') that was not presented nor discussed at the Public Inquiry.

The Arup GBR was prepared as part of the Council's emerging evidence base in support of their draft Regulation 18 Local Plan. This evidence base and emerging plan carried no material weight in the determination of this appeal. We highlight the following points in particular:

- It was the subject of consultation and the consultation responses included vigorous objections to it. The Council's response to the consultation has not yet been published.
- It has not been relied upon by the Council in the context of the present appeal.
- It is inconsistent with the Council's evidence in this appeal (including concessions made in cross-examination).
- Is not referred to or relied upon in the Council's response letter dated 31st January 2024 which rightly invites the Secretary of State to ignore any new evidence outside the scope of DLUHC's request for comments on the implications of the revised NPPF and HDT results.

In agreement with the Council, I therefore respectfully request that the DLUHC disregards the comments made by Mr Parker in paragraph 12 of his statement.

If any reliance is to be placed upon those comments, the inquiry would need to be re-opened so that they could be the subject of cross-examination (which may also result in an application for costs). Reliance upon the Arup GBR without giving the Appellant the opportunity to cross-examine on it would be unlawful.”

The Secretary of State's decision

34. By a decision dated 22 March 2024, the Secretary of State agreed with the recommendation to allow the appeals and he granted planning permission in relation to both proposed developments.
35. The decision letter made no express reference to the Arup Review. At Annex A, the decision letter included a list of the correspondence the Secretary of State had received in response to the request for information. That list included the correspondence referred to in paragraphs 29 to 33 above. Paragraph 9 of the decision letter said:

“9. A list of other representations which have been received since the inquiry is also at Annex A. The Secretary of State is satisfied that the issues raised do not affect his decision, and no other new issues were raised in this correspondence to warrant further investigation or necessitate additional referrals back to parties. Copies of these letters may be obtained on request to the email address at the foot of the first page of this letter.”

36. The decision letter then considered policy and statutory matters. It referred to the fact that the previous emerging local plan had been withdrawn in 2020 and that the Council was in the early stages of preparing a new local plan. It noted that the Council had completed consultation on a draft local plan. The decision letter refers to the NPPF and the weight to be given to relevant policies in emerging plans. It concluded by saying at paragraph 15 that the “Secretary of State considers that the emerging Local Plan is at an early stage and therefore carries limited weight”.

37. The decision letter dealt with the green belt at paragraphs 17 to 20 and said this:

"Green Belt

17. The Secretary of State agrees with the Inspector that both proposals represent inappropriate development in the Green Belt (IR528). For the reasons given in IR530-534, the Secretary of State agrees with the Inspector that the Green Belt Review is a material consideration relevant in considering Green Belt matters in the district, and that the relative suitability of strategic sub-area S8 (which both appeal sites fall within), as defined by the Green Belt Review, is an important consideration.

18. Appeal A: For the reasons given at IR534 the Secretary of State agrees that Appeal site A is largely undeveloped and open at present, and that the introduction of 391 dwellings, a school and associated works would introduce a great deal of built volume to the Green Belt. For the reasons given in IR535-542, the Secretary of State agrees with the Inspector that the Appeal A scheme would result in definitional harm to the Green Belt, as well as harm to its openness and purposes (moderate harm to checking unrestricted sprawl, very limited harm to preventing neighbouring towns merging into one another, and moderate harm to safeguarding the countryside from encroachment). Like the Inspector he attaches substantial weight to this harm.

19. Appeal B: For the reasons given at IR543 the Secretary of State agrees that Appeal site B is largely open and undeveloped, and that the 330 dwellings sought would have a considerable and permanent impact on openness in both a spatial and visual sense. The Secretary of State agrees with the Inspector for the reasons given in IR544 that the development would result in substantial harm to Green Belt openness. For the reasons given at IR546-548 the Secretary of State agrees with the Inspector that there would be significant harm to the purpose of checking

unrestricted sprawl, very limited harm to preventing neighbouring towns merging into one another, and significant harm to safeguarding the countryside from encroachment. Like the Inspector at IR550, the Secretary of State concludes that the development would result in definitional harm to the Green Belt, as well as harm to its openness and purposes, and he attaches substantial weight to this harm.

20. Both Appeals: The Secretary of State has gone on to apply national Green Belt policy. Paragraphs 152-153 (formerly 147-148) of the Framework state that inappropriate development is, by definition, harmful to the Green Belt and should not be approved except in very special circumstances. 'Very special circumstances' will not exist unless the potential harm to the Green Belt and any other harm resulting from the proposal, is clearly outweighed by other considerations. The Secretary of State has gone on to consider these matters. His conclusion on whether very special circumstances exist is set out in para 42 below."

38. The decision letter then dealt with other matters. At paragraphs 37 to 44, it considers the planning balance and set out the Secretary of State's overall conclusion. Paragraphs 38 to 42 state:

"38. Appeal A: Weighing in favour of the proposal is the provision of housing which carries very substantial weight; the provision of land for a primary school which carries significant weight; economic benefits which carry moderate weight; open space/recreation provision which carries limited weight; BNG provision which carries limited weight; and improved bus/cycleway provision which also carries limited weight.

39. Appeal A: Weighing against the proposal is the harm to the Green Belt from inappropriateness, harm to openness, and harm to three of the purposes of the Green Belt, which carries substantial weight. Landscape and visual harm, and the loss of BMV land each carry limited weight, and the impact on air quality which carries very limited weight.

40. Appeal B: Weighing in favour of Appeal B is the provision of 100% affordable housing which carries very substantial weight; economic benefits which carry moderate weight; open space/recreation provision which carries limited weight; BNG provision which carried limited weight; and improved bus/cycleway provision which also carries limited weight.

41. Appeal B: Weighing against Appeal B is the harm to the Green Belt from inappropriateness, harm to openness, and harm to three of the purposes of the Green Belt, which carries substantial weight. Landscape and visual harm carries

significant weight; the loss of BMV land carries limited weight; and the impact on air quality which carries very limited weight.

42. The Secretary of State has considered whether the harm to the Green Belt by reason of inappropriateness, and the other harms he has identified, are clearly outweighed by other considerations. He considers that they are, and therefore very special circumstances exist to justify permitting the development. As such, the proposed development accords with Policy S1 of the St Stephen Parish Neighbourhood Plan 2019-2036 and Policy 1 of the St Albans District Local Plan Review 1994, and national planning policy on Green Belt.”

The application for statutory review and the judgment below

39. The appellant applied for a statutory review of the decision of the Secretary of State. Permission to bring that application was granted by Eyre J. For present purposes, the relevant ground of appeal was that the Secretary of State unlawfully failed to have regard to a material consideration which arose after the inquiry had closed but before the decision was taken, namely the Arup Review.
40. The appellant had not, of course, asked the Secretary of State to consider the Arup Review when taking his decision. The judge, therefore, considered as a preliminary issue whether the appellant was permitted to advance an argument in the High Court based on material and argument that was not placed before the inspector or the Secretary of State. She noted the general rule that it was incumbent on the parties to a planning appeal to place before the decision-maker the material on which they rely, referring to the decisions of Richards J in *West v First Secretary of State* [2005] EWHC 729 (Admin) at paragraph 42, and Holgate J in *Mead Realisations Ltd v Secretary of State for Levelling-up, Housing and Communities* [2024] EWHC 279 (Admin), [2024] PTSR 1093 at paragraphs 178 to 182.
41. The judge considered that:
- “67. It is clear from *Mead*, at [178] and [179], that these principles are to be applied even where the new material is significant, could have been an “obviously material consideration” for which reasons were required and could have affected the outcome. The Court is applying a preliminary procedural bar, not making a determination on the merits of the new material. For this reason, the Claimant is mistaken in submitting that the *West/Mead* principles are not applicable, and the approach in the *Kides* line of cases is to be preferred.”
42. The judge then reviewed the facts, noting that the appellant was aware of the Arup Review and, although it could have asked the inspector to consider the Arup Review as new material published after the inquiry had closed, and to seek representations on it from the other parties, it did not do so. The judge noted that the Council, which was the primary party resisting the appeals and which had commissioned the Arup Review, did not ask the Secretary of State to consider the Arup Review. As the judge noted at paragraph 73 “No party provided the [Secretary of State] with a copy of the Arup

Review or requested that he should obtain one”. The appellant only sought to rely on the Arup Review after the decision letter was issued. The judge did not accept that the explanation offered for not doing so – that the appellant’s members were unaware that it could raise new material – was an adequate explanation for not raising the matter with the Secretary of State. At paragraph 78 to 79, the judge said:

“78. In this case, the Claimant is not in breach of an express procedural requirement in the CPR but it has failed, without good reason, to comply with the fundamental obligation on parties to a planning appeal to place before the decision maker the material on which they rely, and not to raise points for the first time in a High Court challenge. It is commonplace for parties to be unrepresented in planning appeals, and planning procedures and hearings are arguably easier for unrepresented parties to navigate than court proceedings, as they are more informal. The *West/Mead* principles have been applied to unrepresented claimants: e.g. *R (Akhtar) v Secretary of State for Communities and Local Government* [2017] EWHC 1840 (Admin).

79. The Claimant's claim, if successful, will have the following consequences:

- i) The Inquiry would have to be re-opened.
- ii) The Inspector would have to receive further evidence, and, as the Second Defendant indicated in its letter of 16 February 2024, there would have to be an opportunity for cross-examination. Further submissions would have to be made.
- iii) The Inspector would have to make new findings and evaluations, on the basis that the Arup Review had superseded the 2nd Stage SKM Review, and strike the overall planning balance, in a revised IR.
- iv) The First Defendant would have to re-make his decision, on the basis of the revised IR, and the Inspector's recommendations, and issue a revised DL.
- v) Alternatively, the parties may contend that a fresh appeal process with a new Inspector is required, in the interests of fairness.”

43. Consequently, the judge concluded at paragraph 80 that:

“80. As the Court held in *Mead*, resources for planning inquiries are finite and there is a strong public interest in the finality of proceedings. No proper justification has been advanced by the Claimant for the Court to exercise its discretion exceptionally to consider new evidence and grounds which were not raised or relied upon by the Claimant in the appeal to the First Defendant.”

44. For completeness, the judge considered the other ground of review. She considered whether the Arup Review was “so obviously material” that it amounted to a mandatory material consideration, that is, a consideration which the Secretary of State was bound to take into account. She concluded that it was not, and that the Secretary of State had acted rationally in the exercise of his discretion in not taking the Arup Review into account for the following reasons:

“87. The Arup Review was not relied upon by the Claimant, or the Council (by whom it was commissioned), or even supplied to the First Defendant.

88. The Arup Review was at an early stage of the emerging local plan process, and consultation was ongoing. Unlike the SKM Review, it had not been tested by independent examination. The value of the 1st Stage SKM Review was not challenged. The Inspector found that the concerns about methodology in the 2nd Stage SKM Review raised by the Examining Inspectors had no bearing on these appeals (IR/531).

89. The Claimant emphasised that the Arup Review did not recommend either Appeal Site for release from the Green Belt, whereas the SKM Review found sub-area S8 to be the most suitable area for release, with Appeal A Site located in the least sensitive part of the area. It found that Appeal B Site was located in a more sensitive part, and therefore it was not recommended for release. However, these changes in the Green Belt assessment were primarily of significance to the preparation of the emerging local plan, not to the appeals, since the Inspector and the First Defendant found that there would be harm to the Green Belt at both sites, and they attached substantial weight to that harm. The Arup Review did not address the main issue identified by the Inspector and the First Defendant, namely, whether the harm by reason of inappropriateness, and any other harm, was clearly outweighed by other considerations, in particular housing, so as to amount to the very special circumstances necessary to justify development (IR/525(e), DL/16).

90. The Inspector found that the conclusions in the SKM Review could not be “directly applied to the appeal proposals” (IR/531; accepted at DL/17). Whilst the Inspector had regard to the SKM Review, he made his own assessment of the suitability of the appeal sites for the proposed development, and came to his own judgment, at IR/527 – 612. As a result, the First Defendant had the benefit of a detailed report from the Inspector who had considered the Green Belt issues following a site inspection, oral evidence, written evidence and submissions. This case-specific consideration removed any need to consider the higher-level and more generalised analysis in the Arup Review, in addition to the SKM Review which had already been taken into account.

91. For these reasons, the Arup Review was not "obviously material", that is to say, a mandatory material consideration which the First Defendant was required by law to take into account, and therefore the first element of the *Kides* test was not met.

92. I accept that the second element of the *Kides* test was met as the First Defendant was aware of the Arup Review because it was raised in the post-Inquiry correspondence."

THE ISSUES ON THIS APPEAL

45. The appellant advances two grounds of appeal. First, the appellant submits that the judge was wrong to hold that the fact that the appellant had not raised the Arup Review with the inspector or Secretary of State operated as a preliminary procedural bar which prevented the appellant from arguing that the Secretary of State had failed to have regard to a material consideration when reaching his decision. Secondly, the appellant submitted that the Arup Review was so obviously material to the decision that the Secretary of State should have had regard to it before reaching a decision on the appeal.

THE FIRST ISSUE – THE EXISTENCE OF A PROCEDURAL BAR

46. Mr Riley-Smith for the appellant submitted that the Secretary of State was obliged by sections 70(2) and 79(4) of the 1990 Act to have regard to material considerations when deciding an appeal. That, he submitted, meant that the Secretary of State must have regard to a material consideration which arose after the conclusion of the inquiry but before the decision was taken at least where the Secretary of State knew, or ought reasonably have known, of the existence of that material consideration, applying the reasoning of the Court of Appeal in *R (Kides) v South Cambridge District Council* [2002] EWCA Civ 1370, [2003] 1 P & CR 19.
47. Mr Riley-Smith submitted that the decisions of the High Court in *West* and *Mead* applied in circumstances where an argument or evidence was available during the course of an inquiry and a party did not raise that with the inspector at the time. The position was different in relation to a material consideration which arose after the inquiry had closed but before the decision was taken. There the fact that the appellant had not raised the matter with the Secretary of State did not operate as a procedural bar preventing the appellant from arguing before a court that the failure to have regard to a material consideration amounted to a breach of section 70(2) of the 1990 Act. That failure may be relevant in the assessment of whether the consideration is so obviously material as to amount to a material consideration. It may be relevant to whether the Secretary of State knew, or ought to have known, of the existence of the consideration before reaching a decision. But it did not operate as a procedural bar to a claimant raising an alleged breach of section 70(2) in a claim for statutory review. Mr Riley-Smith also relied upon the decisions of this Court in *The Bath Society v Secretary of State for the Environment* [1991] 1 WLR 1303, and *Baroness Cumberlege v Secretary of State for Communities and Local Government* [2018] EWCA Civ 1305, [2018] PTSR 2063.
48. Mr Simons KC for the Secretary of State submitted that, by analogy, the decisions in *West* and *Mead* required a party to draw the decision-maker's attention to a material

consideration that existed at the time of the inquiry. That principle applied equally to matters arising after an inquiry had closed and before the decision-maker had made a decision. If a party did not do so, the court had a discretion to refuse to allow the claimant to rely on evidence and grounds not relied upon before the decision-maker. The judge correctly identified the existence of that discretion and exercised it properly here.

49. Lord Banner KC, with Mr Henderson, for Cala and Mr Stinchcombe KC for Headlands adopted Mr Simons' submissions.

Discussion

50. The context here is a decision taken by the Secretary of State to allow appeals against the refusal of planning permission where it is said that a material consideration first arose after the close of the inquiry considering the appeals but before the decision was taken. Two questions arise. The first is whether the decision is unlawful if the Secretary of State failed to take into account a material consideration, that is a consideration which was so obviously material that it was irrational not to take that into account before reaching a decision. The second question is whether a person can bring a claim for a statutory review on that basis if the person did not make the decision-maker aware of the material consideration before the decision was taken.
51. The starting point is to consider the statutory framework. In determining planning applications or appeals, the decision-maker is to have regard to material considerations and must decide the application or appeal in accordance with the development plan unless material considerations indicate otherwise (see sections 70(2) and 79(4) of the 1990 Act and section 38(6) of the 2004 Act).
52. The Rules govern the conduct of inquiries including, amongst other things, appearances at the inquiry, the provision of statements of case, and the provision of evidence. The position after the inquiry is closed is governed by rule 17 of the Rules. That does not specifically provide a mechanism for parties to make representations or provide further evidence, even evidence which was not available at the time of the inquiry. Rather rule 17(4) provides that the Secretary of State may disregard representations, evidence and documents submitted after the inquiry has closed. He has a discretion, however, and he may choose to have regard to new evidence. Rule 17(5) provides that if he considers new evidence, and is for that reason disposed to disagree with a recommendation of the inspector, he must give written notice to the persons entitled to appear at the inquiry and give them an opportunity to make written representations and to request that the inquiry is re-opened. Rule 17(7) provides that the Secretary of State may cause an inquiry to be re-opened and must do so if the new evidence is a reason for disagreeing with a recommendation and the parties request it. If the new evidence does not cause the Secretary of State to disagree with the recommendation of the inspector, then he does not have to provide written notice to the parties nor does he have to re-open the inquiry: see, by analogy, *R (Dawes) v Secretary of State for Transport* [2024] EWCA Civ 560, [20224] PTSR 2033 at paragraphs 59-62.
53. Next it is appropriate to consider the case law governing situations in which the Court of Appeal has considered whether an inspector, or the Secretary of State where he has decided to make the determination himself, has failed to comply with section 70(2) of

the 1990 Act by failing to have regard to material coming into existence after an inquiry was closed.

54. The first case for consideration is the *Bath Society* case. There, the local planning authority had refused an application for planning permission to build a block of flats on land which was a field. The developers appealed against that decision. An inquiry was held in May 1988. The Bath Society were represented at the inquiry. Before the inquiry was held, the local planning authority had published a local plan which showed the field but without any notations, i.e. it was not described, or classified, as open space. Objections to the local plan were made by the Bath Preservation Trust who argued that the field should be described as open space. An inquiry was held into objections to the local plan in April 1988.
55. The inspector who held the inquiry into the appeal against the refusal of planning permission reported to the Secretary of State in July 1988 recommending that the appeal be allowed and planning permission granted for the proposed development. In his report, he referred to the local plan which showed the field but did not classify or describe it as open space. He noted that objections had been made to the effect that the local plan should show the site as open space. On 25 November 1988, the Secretary of State allowed the appeal and granted planning permission. Meanwhile, on 30 August 1988, the inspector who had held the inquiry into the objections to the local plan reported to the local planning authority (which was responsible for the local plan) and recommended that the field be classed as open space. That recommendation was accepted by the local planning authority on 20 December 1998. No one had, it seems, drawn the recommendation to the relevant decision-maker acting on behalf of the Secretary of State before he allowed the appeal against the refusal of planning permission.
56. Glidewell LJ, with whom Stocker LJ and Sir Denys Buckley agreed, held that it was open to the court to determine if the recommendation that the local plan should show the site as open space was a material consideration. He held that it was saying, at page 1311B-C:

“It was a recommendation which, if accepted by the city council, as it now has been, could lead to the local plan containing an allocation of the site as open space with which the proposed development would be totally inconsistent. In *In re Findlay* [1985] A.C. 318, 333–334, Lord Scarman, in a speech with which the other members of the House agreed, quoted with approval two short passages from the judgment of Cooke J. in *CREEDNZ Inc. v. Governor-General* [1981] 1 N.Z.L.R. 172, 183. The second passage included the observation that, though the relevant statute does not refer expressly to a particular consideration, nevertheless

“there will be some matters so obviously material to a decision on a particular project that anything short of direct consideration of them by the ministers... would not be in accordance with the intention of the Act.”

In my view the recommendation of the local plan inspector came within this description.

The combined effect of sections 29(1) and 36(5) of the Act of 1971 is that the Secretary of State, in deciding whether or not to allow an appeal under section 36, is required to have regard to the provisions of the development plan and to any other material considerations. So it appears that, if the view I have expressed above is correct, the Secretary of State failed to comply with the statutory requirement. Nevertheless, from that fact alone, the court is not *obliged* to quash his decision — it *may* do so, in its discretion. In exercising that discretion, a relevant question for the court is whether the Secretary of State knew, or ought reasonably to have known, of the matter which was material to his decision.”

57. The reference to the provisions of the 1971 Act is a reference to the materially similar predecessor section to section 70(2) of the 1990 Act. Glidewell LJ then considered the decision of the court below, which had refused to quash the decision. He set out an extract of the judgment below from which it appears all parties (including the *Bath Society*) knew of the inquiry into objections into the local plan but did not ask the inspector to adjourn the inquiry or postpone his report until the result of the local plan inquiry was known. The local planning authority, who had the inspector’s recommendation about the local plan (and presumably knew their likely response to it), did not make representations to the Secretary of State nor did they request that he postpone a decision on the appeal until they had formally resolved what to do about the inspector’s recommendation on the local plan. Ultimately, Glidewell LJ concluded at page 1313B-D that:

“On the one hand, it would have been a simple matter for the city council to draw the attention of Mr Rollinson or somebody else in the decision-making branch of the Department of the Environment, the “open space” recommendation, and perhaps to ask for the appeal decision to be deferred until the city council had decided whether to accept the recommendation. The fact that the city council failed to do so is not the fault of the Secretary of State. On the other hand, the appeal inspector did report that there had been an objection relating to the field at the local plan inquiry, and it would have been equally easy for Mr. Rollinson, or one of his colleagues, to have studied the local plan inspector’s report to ascertain what he recommended in relation to this site, and then to take that recommendation into account in some way.

On balance I conclude that the failure of those who were deciding the appeal to take these simple steps resulted in the Secretary of State failing to comply with his duty to have regard to this material consideration.”

58. In summary, therefore, the Court of Appeal held that the failure by the Secretary of State to have regard to a material consideration which was obviously relevant to the appeal decision, and which emerged after the closure of the inquiry, did amount to a

breach of the relevant statutory provision. It dealt with the question of the lack of knowledge on the part of the Secretary of State when taking his decision as something relevant to the remedial discretion of the court when deciding whether or not to quash the decision.

59. The second decision is the *Cumberlege* case. There, a planning authority refused an application for planning permission for residential development in Newick. The developers appealed and an inquiry was held in February 2016. One of the relevant issues was whether a particular policy in the development plan, policy CT1, was up to date. That policy provided that development would be contained within the planning boundaries of certain settlements including Newick and Ringmer. On 6 August 2016, the inspector reported. He concluded that policy CT1 was out of date, that there was now a presumption in favour of sustainable development and recommended that the appeal be allowed and planning permission granted. By a decision letter dated 23 November 2016, the Secretary of State accepted those recommendations and allowed the appeal.
60. In an earlier appeal against the refusal of an application for planning permission for residential development in Ringmer, different conclusions were reached in relation to policy CT1. An inquiry was held in the Ringmer appeal in May 2016 and the inspector reported in June 2016. In his report, he concluded that policy CT1 in the development was up to date. He considered that the proposed development conflicted with policy CT1, which was part of the development plan, and so planning permission should be refused. In his decision letter issued in September 2016, the Secretary of State agreed with the inspector and allowed the appeal. The Secretary of State in the Newick appeal did not take his earlier decision in the Ringmer appeal into account and no one involved in the Newick appeal drew his attention to the decision in the Ringmer appeal. Lindblom LJ, with whom Moylan and Peter Jackson LJ agreed, identified the issue in paragraph 1 of his judgment as:
- “Did the Secretary of State for Communities and Local Government, when determining an appeal against the refusal of planning permission for a development of housing, err in law in failing to take into account a recent decision of his own – even though he had not been asked to do so?”
61. Lindblom LJ considered that the appropriate approach to determining whether a consideration was so obviously material was to ask “whether the matter is one that no reasonable decision-maker would have failed to take into account in the circumstances” (paragraphs 22 to 23). At paragraph 31 and 32 Lindblom LJ said:
- “31. In these proceedings we are concerned with a previous appeal decision of the Secretary of State issued after the close of the inquiry in the case under consideration, and not relied upon by any of the parties in further representations to the Secretary of State before he made the challenged decision. How should the court approach such a case?
32. Rightly in my view, the judge rejected a submission made to him on behalf of DLA Delivery that, as a matter of law, when the previous decision in question has not been placed before the

Secretary of State by one or more of the parties, he is never obliged to have regard to it. There can be no “absolute rule” to that effect—as the judge demonstrated (in paras 86–106 of his judgment), having regard to a decision-maker's general obligation to take reasonable steps to acquaint himself with the relevant information to enable him to decide relevant questions correctly, an obligation emphasised by Lord Diplock in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014, 1065. As the judge concluded, the relevant authorities do not establish so rigid a principle: see, in particular, the first instance judgments in *St Albans City and District Council v Secretary of State for Communities and Local Government* [2015] EWHC 655 (Admin) at [88]–[101], *Cotswold District Council v Secretary of State for Communities and Local Government* [2013] EWHC 3719 (Admin) at [61], *Hounslow London Borough Council v Secretary of State for Communities and Local Government* [2009] EWHC 1055 (Admin) at [13]–[19] and *Grantchester Retail Parks plc v Secretary of State for Transport, Local Government and the Regions* [2003] EWHC 92 (Admin) at [26]–[28]. And the decisions of the Court of Appeal in *The Bath Society v Secretary of State for the Environment* [1991] 1 WLR 1303 and *R (Connolly) v Havering London Borough Council* [2010] 2 P & CR 1 seem incompatible with it. In *Connolly's* case the judge at first instance had quashed an inspector's decision on the ground of a mistake of fact concerning the existence of a relevant previous decision to which the local planning authority had failed to refer. The judge's decision was upheld by this court. In *The Bath Society* case [1991] 1 WLR 1303 the Secretary of State allowed an appeal and granted planning permission for a housing development without taking into account the recommendation in the local plan inspector's report that the land should be allocated as open space. The appeal inspector had been unaware of the local plan inspector's report; the Secretary of State had received it, but not in connection with the appeal. Glidewell LJ concluded, at p 1313c-d, that he had erred in “failing to comply with his duty to have regard to this material consideration”.

62. It is noteworthy that Lindblom LJ expressly endorsed paragraph 88 of the judgment of Mr Howell QC sitting as a deputy High Court. That is to be found at [2017] EWHC 2057 (Admin), [2017] PTSR 1513. At paragraph 88, the deputy High Court judge said this:

“88. The obligation not to act unreasonably in reaching a decision is one imposed on the decision-maker. When considering the discharge of that obligation in the context of a planning appeal, however, there is a difference in practice between the position that applies until the end of an inquiry or hearing or the final submission of written representations and the

position that applies after that and until a decision is issued. Before the close of the “adversarial” part of the proceedings, the Secretary of State and his inspectors can normally rely, not unreasonably, on participants to draw attention to any relevant decision. That is because the prescribed procedures for the conduct of the appeal are designed to ensure all the information that the participants consider may be relevant when determining the appeal is provided by them by that stage. It is unlikely that they may all omit to refer to something that no reasonable decision-maker would fail to take into account. Although the prescribed procedures that apply after the close of the “adversarial” part of the procedure do not necessarily preclude the submission of further relevant information, they are not designed to secure that the participants provide it. In that situation further steps may reasonably be required to be taken by the Secretary of State or one of his inspectors depending on the circumstances.”

63. Returning to the judgment of Lindblom LJ in the Court of Appeal, he said this at paragraph 34:

“34. I would accept three general propositions, which I think accord with the basic principles referred to by Mann LJ in the *North Wiltshire District Council* case 65 P & CR 137 and applied since in several decisions of this court, and which align with the judge’s conclusions in this case (in particular, at [2017] PTSR 1513, paras 100–105). First, because consistency in planning decision-making is important, there will be cases in which it would be unreasonable for the Secretary of State not to have regard to a previous appeal decision bearing on the issues in the appeal he is considering. This may sometimes be so even though none of the parties has relied on the previous decision or brought it to the Secretary of State’s attention: para 100. And it may be necessary in those circumstances, in the interests of fairness, to give the parties an opportunity to make further representations in the light of the previous decision. Secondly, the court should not attempt to prescribe or limit the circumstances in which a previous decision can be a material consideration. It may be material, for example, because it relates to the same site, or to the same or a similar form of development on another site to which the same policy of the development plan relates, or to the interpretation or application of a particular policy common to both cases: see para 92 of Holgate J’s judgment in the *St Albans City and District Council* case [2015] EWHC 655. Thirdly, the circumstances in which it can be unreasonable for the Secretary of State to fail to take into account a previous appeal decision that has not been brought to his notice by one of the parties will vary. But in tackling this question, it will be necessary for the court to consider whether the Secretary of State was actually aware, or ought to have been aware, of the previous decision and

its significance for the appeal now being determined: paras 100, 101 and 105 of the judgment. As the judge said at para 101:

“Before the close of the ‘adversarial’ part of the proceedings, the Secretary of State and his inspectors can normally rely, not unreasonably, on participants to draw attention to any relevant decision[, but] that does not mean that they are never required to make further inquiries about any matter, including about other ... decisions that may be significant”.”

64. Lindblom LJ then dealt with the particular appeal. He considered that the decision in the Ringmer appeal was “undoubtedly a material consideration” in the Newick appeal. There was “an obvious and unexplained difference” in the approach to policy CT1 in the development plan (see paragraph 41). Lindblom LJ then identified the factors which “taken together, made it unreasonable for the Secretary of State not to have regard to the Ringmer decision before determining the Newick appeal” (paragraph 42). These were that (1) the two proposals were for the same form of development in the same district involving housing on unallocated sites outside planning boundaries as defined in policy CT1, (2) the Secretary of State had recovered both appeals for determination by him, which implicitly indicated the need for a consistent approach in their determination, and (3) the appeals were before the Secretary of State at the same time and the two decision-making processes were largely concurrent. In those circumstances, and given the clear and irreconcilable differences between the two appeal decisions, Lindblom LJ concluded that the Secretary of State had erred in failing to have regard to the earlier decision in the Ringmer appeal when deciding the Newick appeal. The Secretary of State’s decision in the Newick appeal was quashed.
65. The next step is to consider what, precisely, the High Court decided in *West*, and *Mead*. Dealing first with *West*, Mrs West appealed against a decision refusing planning permission to retain a mobile home and hardstanding for a temporary period on particular land in the green belt. The appeal was considered and determined by an inspector using the written procedure (that is, without holding an inquiry). Mrs West relied amongst other things on her own health, and her daughter’s education, as being material considerations sufficient to amount to very special circumstances justifying development in the green belt. The inspector considered those arguments, and the evidence from the general practitioner and the school, but decided that the evidence did not establish the existence of very special circumstances. Mrs West brought a claim for statutory review contending that if the inspector had any doubts about the adequacy of the supporting evidence, he should have raised those concerns with her so that further evidence could be adduced. It was in that context that Richards J observed that “the general rule is that it is incumbent on the parties to a planning appeal to place before the inspector the material on which they rely” and that applied both in the context of an oral hearing and the written procedure and that the process “does not require anything beyond proper consideration of the material put forward by the parties” (see paragraphs 42 to 45 of his judgment). That case, in my judgment, was dealing with the obligations on an inspector when conducting an inquiry. It was not concerned with the different question of the approach to be taken when matters arise after the close of the inquiry but before the decision.
66. The next decision is *Mead*. That case concerned appeals against a refusal of an application for planning permission for residential developments at sites subject to a

risk of flooding. The material provision of the relevant planning guidance provided for the adoption of a sequential test aimed at steering new developments to the areas with the lowest risk of flooding. Consequently, developments “should not be allowed or permitted if there are reasonable available sites appropriate for the proposed development in areas with a lower risk of flooding”.

67. The particular ground of claim in the High Court in *Mead* was that the inspector had wrongly failed to assess housing need when he applied the policy guidance. In particular, it was said that where there was unmet housing need which could not be allocated to areas satisfying that sequential test, that may lead an inspector to conclude either that not all of the housing need could be met or that some of the housing need should be met and development allowed on sites even if the sequential test was not met in relation to those sites (see paragraph 172 to 173 of the judgment).
68. As part of its case in the High Court in *Mead*, the developer contended that if the inspector had been entitled to treat 13 particular sites as sequentially preferable, the houses that could be built on those sites would “not come close to meeting the housing needs of the borough” as the inspector had identified a shortfall of between 2,104 and 2,875 dwellings. New homes would be required on many more sites which would necessitate the use of land where flood risk was the same, or worse than, the risk at the appeal sites (paragraph 175 of the judgment). The decision-maker, the Secretary of State said in his grounds of resistance to the High Court claim that the evidence to the inquiry was that the 13 sites referred to had a capacity for 4,105 dwellings, well in excess of the need identified by the inspector. The developer put in a further witness statement in the High Court proceedings from a planning consultant putting forward arguments as to why the capacity of 4,105 dwellings should not be compared with the shortfall of 2,104 to 2,875 identified by the inspector.
69. It was in that context that Holgate J. said this:
- “178. I can see that if Redrow had submitted to the inspector that there was a substantial need for housing which could not be met entirely on sequentially preferable sites (and even more so in the next five years), so that additional sites with a similar or worse flood risk would need to be developed, that would be a significant factor to be addressed in the overall planning balance. It could reduce the weight to be given to the failure to satisfy the sequential test. Here the inspector gave that failure “very substantial weight” (DL 100). It would have been arguable that the flood risk implications of satisfying the unmet need for housing land was an “obviously material consideration”, such that it was irrational for the inspector not to have taken it into account (*R (Friends of the Earth Ltd) v Secretary of State for Transport* [2021] PTSR 190, paras 116–120). Alternatively, it could have been said that there was a failure to comply with the duty to give reasons in relation to a “principal important controversial issue” between the parties.
179. The problem faced by Redrow is that, as Mr Simons accepted, this argument was not put before the inspector. Redrow did not consider it to be material, let alone obviously

material. It was not raised as a substantial issue between the parties. The inspector cannot be criticised for acting irrationally, or for failing to give reasons, in relation to an argument of this kind which the claimant did not see fit to rely upon at any stage in its appeal. Ground 3 must therefore be rejected for this reason alone.

180. There is also an objection to the raising of a new point of this kind in a statutory review in the High Court. If Redrow had raised at the public inquiry the point now advanced under ground 3, HBC and any other participant would have had an opportunity to adduce evidence if thought appropriate, or, at the very least, to make submissions. Just as important is the point that the matter could have been addressed in a single appeal process. The inspector would have been able to make any additional findings of fact, to evaluate the weight to be given to the outcome of the sequential test and to strike the overall planning balance, taking into account Redrow's additional point as part of its entire case.

181. If the court were to quash an inspector's decision because of a new point of this kind, it would probably be necessary for the appeal process to be repeated in its entirety or in large part. At the very least, the same inspector, or a new inspector, would have to receive fresh submissions and prepare a new decision letter and evaluate the various policy and planning considerations all over again. The general principle is that new evidence and/or new submissions should not be entertained as a basis for quashing an inspector's decision if this would mean an inspector would have to make further findings of fact and/or reach a new planning judgment (see for example *Newsmith Stainless Ltd v Secretary of State for the Environment, Transport and the Regions* [2017] PTSR 1126, para 15).

182. As in civil proceedings more generally, resources for planning inquiries and hearings are finite and need to be distributed efficiently between all parties seeking to have planning issues resolved. There is therefore a strong public interest in the finality of such proceedings. Parties are generally expected to bring forward their whole case when a matter is heard and determined. No proper justification has been advanced by Redrow for the court to exercise its discretion exceptionally to entertain a new point which could have been, but was not, raised before the inspector.”

70. *Mead*, therefore, was a case concerned with the arguments that were available, and could have been put, to the inspector. Had those arguments been put, and if any factual issue had to be resolved, it could have been done as part of the inquiry itself. It was in that context that the judge considered whether it could be said that the inspector acted irrationally, or had failed to give reasons, in relation to a particular issue (i.e. whether the refusal of planning permission would leave an unmet need for housing which could not be accommodated on sites with a lower risk of flooding than the appeal sites).

Further, it was in that context that the judge emphasised the fact that there was an objection to raising of a new point “of this kind” in the High Court. As the judge said, if the matter had been raised before the inspector (as it could have been), then the inspector would have been able to make any additional findings of fact, and to evaluate the weight to be given to the sequential test and to strike the planning balance “as part of its entire case”. It was not for the High Court to entertain factual challenges to matters that could have been dealt with by the inspector. The case was not concerned with new material that first arise after the close of the inquiry.

71. In summary, therefore, the position where matters arise after an inquiry closes is as follows. First, there are circumstances where it would be irrational, and therefore unlawful, for a decision-maker to fail to have regard to a particular material consideration arising after the inquiry but before the decision is reached, even where the consideration was not drawn to the attention of the decision-maker. Those circumstances include, by way of example, allowing an appeal and granting planning permission for development on a site where that would be inconsistent with a recommendation as to how the site should be dealt with in a development plan (*Bath Society*) or where a recent decision deals with an issue as to the applicability of a particular development plan policy to similar developments in the area covered by that policy (*Cumberlege*). There is, however, “no absolute rule” as to when it would be irrational, and therefore unlawful, to fail to have regard to such a consideration (*Cumberlege*).
72. Secondly, the question will be whether the consideration is “so obviously material” that it would be irrational for the decision-maker not to take it into account. The fact that a party to the inquiry knew about the issue may, depending on the circumstances, be highly relevant to whether it can really be said that the consideration is “so obviously material” in that sense. It may also be that, in certain circumstances, the fact that the decision-maker did not know about, and could not reasonably have discovered, the new consideration is relevant to whether there has been a breach of section 70(2) of the 1990 Act, (see *Kides* at paragraph 124, although the relationship between that decision and the other case law may need further exploration).
73. Thirdly, it is possible that a court may as a matter of discretion refuse to quash a decision, or refuse to grant permission to bring a claim for a statutory review (*Bath Society*). That discretion could, in theory, be available if it was found that it was inappropriate for some reason to allow a person to bring a claim when the person knew of the new material consideration, knew that he could draw it to the attention of the Secretary of State but for some, possibly tactical, reason chose not to do so (a possibility raised in argument).
74. Fourthly, the decisions in *West* and, in particular, *Mead* do not mean that a person cannot bring a statutory claim based on new material becoming available only after an inquiry had closed but before the decision-maker reached a decision. Such an absolute position would be incompatible with the decisions of the Court of Appeal. Such an understanding of *West* and *Mead* would also fail to reflect the fact that they were both concerned with arguments or evidence that was or could have been made available at the time of the inquiry but a party did not do so.
75. In the light of that review of the case law, it is possible to consider ground 1 and the decision of the judge on that issue. First, the judge was wrong to describe the issue in

this case as a preliminary issue of whether the appellant was permitted to advance an argument based on new grounds and evidence not placed before the inspector or the Secretary of State. The judge's analysis of the position at paragraphs 65 to 67 and 78 does not fully reflect the case law analysed above. In particular it is wrong to approach the question on the basis that there is a "fundamental obligation on parties to a planning appeal to place before the decision-maker material on which they rely, and not to raise points for the first time in a High Court challenge".

76. There are good reasons why parties to an inquiry should ensure that material which is, or could be, available at the time of the inquiry present that material at the inquiry. Failure to do so might well lead a court to conclude that an inspector has not acted irrationally in not taking such matters into account. Furthermore, if the arguments rely on adducing evidence to the Court which could have been adduced before the inspector, it is unlikely that a Court would permit the use of evidence in that way. But the position here is different. The material arose after the conclusion of the inquiry. The question is whether the material was a material consideration to which the Secretary of State had to have regard. There are circumstances where a decision-maker may be found to have acted irrationally where he has failed to have regard to something obviously material to his decision even if it were not brought to his attention by the parties. The fact that they did not do so may be relevant to other matters, such as whether the consideration really is a material one, or whether there has been irrationality in not considering it. In addition, the judge did not recognise that there is no specific provision governing the provision of evidence after the inquiry and the process at that stage is not entirely adversarial as recognised in *Cumberlege*. The judge was wrong, therefore, to proceed on the basis that there was some breach of a fundamental obligation which operated as a preliminary procedural bar to allowing the claim for statutory review to proceed. She was wrong to exercise any discretion she had on that basis, rather than on the more nuanced basis described above.
77. Secondly, I consider that the judge was wrong to exercise any discretion she had on the basis that, if the appellant's claim was successful, that would have certain consequences, namely the inquiry would have to be re-opened, and the inspector would have to allow an opportunity for further evidence and cross-examination. That would be inconsistent with the provisions of rule 17(5). If the new material does not cause the Secretary of State to disagree with the inspector's recommendation, he does not have to notify the parties or re-open the inquiry. If the new material did, however, cause the Secretary of State to disagree with the recommendation of the inspector, then he would have to notify the parties of that and they would be able to require the inquiry to be re-opened. That, however, is why the Rules provide a discretion for the Secretary of State to consider new evidence and why it would be wrong for the court to prevent the consideration of such evidence in these situations. It is because the material may lead the Secretary of State to conclude that he now disagrees with the recommendation that it is important that the case law recognises the possibility that it would be unlawful for a decision to be reached without such crucially significant material being considered. It would not be in the public interest to prevent persons from raising a failure to have regard to a material consideration where that material consideration would result in the Secretary of State taking a different view from the inspector.
78. In the circumstances, the judge was wrong to exercise any discretion she had to refuse the claimant the opportunity to bring the claim. For my part, the sensible course of

action is, in fact, to consider whether the new consideration is a material consideration, that is, is one that is so obviously material to the decision that it would be irrational for the Secretary of State to reach a decision without taking it into account. There is nothing in the present case to suggest that any discretion, which I think must be a discretion to refuse a remedy or to refuse permission to bring the claim, should be considered first.

THE SECOND ISSUE – THE ARUP REVIEW

Submissions

79. Mr Riley-Smith, for the appellant, submitted that the Arup Review was so obviously material that it was unlawful for the Secretary of State not to take it into account when reaching his decision. He submitted that the Arup Review was realistically capable of causing the Secretary of State to reach a different decision. That, he submitted, flowed from the manner in which the Secretary of State treated the SKM Review and its findings and the role of the Arup Review. He submitted that the inspector had relied upon the SKM Review as showing that Appeal Sites A and B were in an area of green belt which was the most suitable area to develop and treated that as an important consideration. The Secretary of State accepted his conclusions. The Arup Review, however, superseded that conclusion and did not recommend the sites for release from the green belt for development.
80. In written submissions, counsel for each of the first three respondents made the following submissions. The question for the Secretary of State was whether very special circumstances outweighed the harm to the green belt and justified the grant of planning permission for these particular proposed developments. The Arup Review was not directly relevant to that question as it concerned the emerging local plan and the question of which areas should be released from the green belt. It had not been the subject of testing as part of the review process. It was not relied upon by the Council (which had refused the applications for planning permission and were opposing the appeals). Nor did the appellant ask the inspector or the Secretary of State to have regard to the Arup Review. No party to the inquiry supplied a copy of the Arup Review to the inspector the Secretary of State or suggested it was material to the decision. It was not, therefore, a mandatory material consideration to which the Secretary of State was required to have regard.

Discussion

The Correct Approach

81. The law governing when a decision-maker acts unlawfully by not taking a particular matter into account as part of the decision-making process is now well established. In *R (Friends of the Earth Ltd and another) v Secretary of State for Transport* [2020] UKSC 52, [2021] PTSR 190, the Supreme Court held:

“116. As it transpired, very little divided the parties under this ground. The basic legal approach is agreed. A useful summation of the law was given by Simon Brown LJ in *R v Somerset County Council, Ex p Fewings* [1995] 1 WLR 1037, 1049, in which he identified three categories of consideration, as follows:

“the judge speaks of a ‘decision-maker who fails to take account of all and only those considerations material to his task’. It is important to bear in mind, however ... that there are in fact three categories of consideration. First, those clearly (whether expressly or impliedly) identified by the statute as considerations to which regard must be had. Second, those clearly identified by the statute as considerations to which regard must not be had. Third, those to which the decision-maker may have regard if in his judgment and discretion he thinks it right to do so. There is, in short, a margin of appreciation within which the decision-maker may decide just what considerations should play a part in his reasoning process.”

117. The three categories of consideration were identified by Cooke J in the New Zealand Court of Appeal in *CREEDNZ Inc v Governor General* [1981] NZLR 172, 183:

“What has to be emphasised is that it is only when the statute expressly or impliedly identifies considerations required to be taken into account by the [relevant public authority] as a matter of legal obligation that the court holds a decision invalid on the ground now invoked. It is not enough that a consideration is one that may properly be taken into account, nor even that it is one which many people, including the court itself, would have taken into account if they had to make the decision.”

Cooke J further explained at p 183 in relation to the third category of consideration that, notwithstanding the silence of the statute:

“there will be some matters so obviously material to a decision on a particular project that anything short of direct consideration of them by [the public authority] ... would not be in accordance with the intention of the Act.”

119. As the Court of Appeal correctly held in *Baroness Cumberlege of Newick v Secretary of State for Communities and Local Government* [2018] PTSR 2063, paras 20–26, in line with these other authorities, the test whether a consideration falling within the third category is “so obviously material” that it must be taken into account is the familiar *Wednesbury* irrationality test (*Associated Provincial Picture Houses Ltd v Wednesbury Corp*n [1948] 1 KB 223; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410–411, per Lord Diplock).

120. It is possible to subdivide the third category of consideration into two types of case. First, a decision-maker may not advert at all to a particular consideration falling within that category. In such a case, unless the consideration is obviously

material according to the *Wednesbury* irrationality test, the decision is not affected by any unlawfulness. Lord Bingham deals with such a case in *Corner House Research* at para 40. There is no obligation on a decision-maker to work through every consideration which might conceivably be regarded as potentially relevant to the decision they have to take and positively decide to discount it in the exercise of their discretion.

121. Secondly, a decision-maker may in fact turn their mind to a particular consideration falling within the third category, but decide to give the consideration no weight. As we explain below, this is what happened in the present case. The question again is whether the decision-maker acts rationally in doing so. Lord Brown deals with a case of this sort in *Hurst* (see para 59). This shades into a cognate principle of public law, that in normal circumstances the weight to be given to a particular consideration is a matter for the decision-maker, and this includes that a decision-maker might (subject to the test of rationality) lawfully decide to give a consideration no weight: see, in the planning context, *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, 780 (Lord Hoffmann).

82. As is clear from paragraph 120, the test for determining whether a consideration is so obviously material is the public law test of irrationality, that is, whether it would be irrational, and therefore unlawful, for the Secretary of State not to take it into account. It is not simply a question of whether a new consideration might realistically be capable of causing the public authority to reach a different conclusion, as suggested at paragraph 46 of the decision of Lane J. in *R (Hayle Town Council) v Cornwall Council and others* [2023] EWHC 389 (Admin), adopting an earlier formulation of the test by Sir Ross Cranston in *R (Hardcastle) v Buckinghamshire Council* [2022] EWHC 2905 (Admin), [2023] Env LR 462. Determining whether it was irrational not to take a particular matter into account will involve consideration of, amongst other things, the nature of the issue being decided, and the relevance and importance of the new material to that issue. The fact that a party to the appeal knew about the material consideration, but did not take steps to inform the decision-maker of it, is also likely to be a powerful indicator that the new material is not a material consideration. Put simply, it is not enough that the new matter might be capable of causing a decision-maker to reach a different conclusion. It must be a gamechanger.

The Present Case

83. Applying the approach in *Friends of the Earth*, the conclusions in the Arup Review was not so obviously material to the decision being taken that it would be irrational, and therefore, unlawful for the Secretary of State not to take into account. I reach that conclusion for the following reasons.
84. The Secretary of State was concerned with an appeal against the refusal of each of two applications for planning permission. The proposed development was within the area of the green belt. The Secretary of State accepted the inspector's assessment that the proposed development would cause substantial harm to the green belt and attached substantial weight to that factor. The principal issue was whether other factors,

principally housing, amounted to very special circumstances which outweighed the acknowledged harm to the green belt and justified the grant of planning permission for the two proposed developments.

85. First, the Arup Review was not addressing that issue. It was a review commissioned by the Council as part of the process of adopting a local plan. It was concerned with making recommendations as to whether areas of land should be released from the green belt. It was not concerned with whether planning permission should be granted for particular developments at particular sites within the green belt. Further, the plan-making process was at an early stage. The conclusions and recommendations in the Arup Review had not yet been accepted and incorporated into a draft plan and they had not been tested at an examination by an independent examiner. In those circumstances, I do not consider that the Arup Review was so obviously material that it would be irrational for the Secretary of State not to have regard to it in deciding whether to allow these two appeals and whether to grant permission for each of these two proposed developments.
86. Mr Riley-Smith submitted that the inspector had regard to the second stage of the SKM review and regarded that as an important consideration in assessing the planning balance in deciding whether there were very special circumstances which outweighed the harm to the green belt. The Arup Review had been prepared for the same purpose as the SKM, and superseded it. The recommendations in the SKM review had not been accepted and had not formed the basis for the local plan (it had been subject to criticism and the draft local plan had been withdrawn) yet the inspector relied upon it as an important consideration. He submitted that the position was the same in relation to the Arup Review: it had been prepared for the purposes of a local plan but its recommendations have not been accepted. If the inspector had had both the 2nd stage SKM Review and the Arup Review before him, he could not have concluded that the conclusions in the areas identified in the 2nd stage SKM were the most suitable development in the green belt as the Arup Review came to a different view. That demonstrated that the Arup Review was so obviously material that it would be irrational and unlawful for the Secretary of State not to take it into account.
87. I do not accept that submission for the following reasons. Reading the inspector's report as a whole, it is clear that he considered that the conclusions of the 2nd stage SKM Review "cannot be directly applied to the appeal proposals" as it was looking at the district on a large and strategic basis and was considering the potential release of land from the green belt through the plan making process (see paragraph 531 of his report set out above). The inspector did refer at paragraph 533 of his report to the relative suitability of the areas identified in the 2nd stage SKM review as an important consideration. He then proceeded, however, to consider each site in turn at paragraphs 534 to 550 of his report. He analysed the harm that each of the proposed developments would do to the green belt in terms of the impact on the openness of, and purposes underlying, the green belt. He concluded in each case that that the harm would be substantial and attached substantial weight to that harm when carrying out the planning balance. He then considered the benefits that would result from the proposed developments, principally additional housing, and concluded that the benefits did amount to very special circumstances which outweighed the harm to the green belt in each case (see paragraphs 606 to 611). The 2nd Stage SKM review did not add to, or diminish the harm to the green belt.

88. As Mr Riley-Smith accepted, there is no reference to the conclusions in the 2nd stage of the SKM review in the assessment of the benefits, or in the overall planning balance. At most, as Andrews LJ observed in argument, the inspector referred to the conclusions in the 2nd stage of the SKM review to check his own evaluation of the two sites. That appears most clearly from paragraph 550 of the report where he said that he considered that the SKM Review “accords with my own findings that the Green Belt Impacts would be much greater from Appeal Site B”. In other words, the inspector himself assessed the harm and the benefits and weighed the benefits against the substantial harm, to determine whether these two appeals should be allowed and planning permission granted for these two developments. In those circumstances, the fact that the Arup Review reached different conclusions from the 2nd stage SKM review does not mean that the Arup Review was so obviously material to the decision that the Secretary of State had to reach that it was irrational for him not to have regard to it.
89. That conclusion is reinforced by the fact that the Council did not suggest to the Secretary of State that the Arup Review was material to his decision, still less so obviously material that he would be acting unlawfully if he failed to take it into account. The Council was the party who had refused planning permission and was opposing the appeals. It had commissioned the Arup Review as part of the emerging local plan process. It did not provide a copy to the Secretary of State. It has taken no active part in these proceedings. The question of whether a consideration is so obviously material that it would be unlawful for the decision-maker not to take into account is ultimately a matter for the court. The fact that the Council has not suggested, however, that the Arup Review is material to the issue that had to be decided reinforces the conclusion that I have reached. I also note that the appellant, which knew about and had commented on the Arup Review, did not suggest to the inspector or the Secretary of State that the Arup Review was material to the decision that he had to make. I would therefore dismiss the appeal on ground 2.

CONCLUSION

90. The appeal is dismissed. The conclusions in the Arup Review were not so obviously material to the decision that the Secretary of State had to take in this case that it was irrational not to have taken them into account.

LADY JUSTICE ELISABETH LAING

91. I agree.

LADY JUSTICE ANDREWS

92. I also agree.