Neutral Citation Number: [2017] EWHC 2057 (Admin)

Case No: CO/16/2017

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/08/2017

Before :

JOHN HOWELL QC
(Sitting as a Deputy High Court Judge)

- -

Between :

(1) BARONESS CUMBERLEGE OF NEWICK **(2) PATRICK CUMBERLEGE**	**Claimants**
- and -	
(1) SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT **(2) DLA DELIVERY LIMITED**	**Defendants**

- -
- -

Ms Heather Sargent (instructed by **DAC Beachcroft LLP**) for the **Claimants**
Mr Christopher Young and Mr James Corbet Burcher (instructed by **Irwin Mitchell LLP**) for the **Second Defendant**
The **First Defendant** did not appear and was not represented

Hearing dates: 20, 21 July 2017

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

Mr John Howell QC :

1. This is an application under section 288 of the Town and Country Planning Act 1990 ("*the 1990 Act*") to quash a decision of the Secretary of State for Communities and Local Government allowing an appeal made under section 78 of that Act by the Second Defendant, DLA Delivery Limited, against a decision of the local planning authority, Lewes District Council, refusing it planning permission. The Secretary of State decided to grant conditional outline planning permission for a residential development of up to 50 dwellings (including affordable housing), open space and landscaping, with new vehicular and pedestrian access and car parking, on land at Mitchelswood Farm, Allington Road, Newick.

2. The Claimants are Baroness Cumberlege of Newick and her husband, Mr Patrick Cumberlege. Both are residents of Newick and members of the Newick Village Society. The Society appeared at the local public inquiry into the Second Defendant's appeal, held by Mr Matthew Birkinshaw ("*the Inspector*"), objecting to the grant of planning permission. Mr Cumberlege is a former chairman of the Newick Village Society. Baroness Cumberlege has been a parish, district and county councillor representing the village. They were granted permission to make this application by Lewis J.

3. The grounds on which an application under section 288 of the 1990 Act may be made, and the court's powers under it, are well-established. They were summarised by Lindblom J in *Bloor Homes East Midlands Limited v Secretary of State for Communities and Local Government* [2014] EWHC 754 (Admin) at [19].

4. On behalf of the Claimants, Ms Heather Sargent contended that the Secretary of State's decision should be quashed given (i) his treatment of saved Policy CT1 of the Lewes District Local Plan ("*the LDLP*) and (ii) the relationship of the appeal site to a zone established to protect the Ashdown Forest Special Protection Area ("*SPA*") and Special Area of Conservation ("*SAC*").

5. In this case, in his decision letter dated November 23rd 2016 ("*the DL*), the Secretary of State decided that Policy CT1 was out-of-date (and had, accordingly, applied the "tilted balance" set out in paragraph [14] of the National Planning Policy Framework when determining the appeal). But, in a decision letter issued shortly before, dated September 19th 2016, in relation to a proposed residential development at Ringmer, the Secretary of State had found that Policy CT1 should be regarded as up-to-date (and, accordingly, that the "tilted balance" did not apply in determining that appeal). The first ground on which Ms Sargent contended that the Secretary of State's decision was flawed was that he had failed to take into account a material consideration in determining the appeal in this case, namely his earlier decision that Policy CT1 was up-to-date, and/or that he had failed to give any reasons why he had departed from that finding in this case.

6. Ms Sargent also contended that the Secretary of State's decision was flawed on the ground (i) that the Secretary of State had made a material error of fact in treating the appeal site as falling outside an area of 7km designated for the purpose of protecting the Ashford Forest SPA and SAC or (ii) alternatively, even if he had regarded it as sufficient if the proposed new dwellings were constructed outside that designated

area, he unlawfully granted permission without imposing a condition to secure that they would.

7. The Secretary of State has decided to submit to judgment on this application on the basis of the first ground on which it is made. In a letter to this court dated March 14th 2017, the Treasury Solicitor stated that the Secretary of State conceded that the decision should be quashed "because the Secretary of State failed to take into account the [Ringmer] decision and specifically the finding in that earlier decision that development plan policy CT1 "should be regarded as up-to-date for the purposes of this appeal". In the reasons attached to a draft consent order to quash the decision which the Treasury Solicitor had then proposed, it was stated that:

> "the Secretary of State should probably be cognisant of decisions in his own name, whether or not flagged up in the materials before him: Dear v Secretary of State [2015] EWHC 29 (Admin) at [32]. The conclusion as to policy CT1 in the [Ringmer] decision was in the circumstances obviously material to the present case (adopting the language of Derbyshire Dales DC v Secretary of State [2010] JPL 34 at [28]) such that the Secretary of State was required to take the [Ringmer] decision into account as a matter of legal obligation and provide reasons for departing from his prior conclusion as to Policy CT1. The Secretary of State did not take the [Ringmer] decision into account in determining the [Newick] appeal. He concedes that this was an error of law vitiating the [Newick] appeal."

8. The local planning authority, Lewes District Council, was not served with this application as it should have been. It has indicated, however, that it is happy to waive the requirement for it to be served and that it is content for this hearing to proceed in its absence. In those circumstances I have treated the application as having been made and sufficiently served on the relevant parties.

9. On behalf of the Second Defendant, Mr Christopher Young, contended that the Ringmer decision was not a material consideration that the Secretary of State was obliged to take into account when determining the Second Defendant's appeal and that there was no realistic prospect of dwellings being constructed within the 7km zone established for the protection of the Ashdown Forest SPA and SAC.

BACKGROUND IN RELATION TO THE FIRST GROUND ON WHICH THE APPLICATION IS MADE

i. the statutory framework for determining applications for planning permission

10. In determining any application for planning permission, planning authorities must have regard to "the provisions of the development plan, so far as material to the application" and to "other material considerations": see sections 70(2) and 79(1) of

the 1990 Act. Moreover "the determination must be made in accordance with the plan unless material considerations indicate otherwise": see 38(6) of the Planning and Compulsory Purchase Act 2004 ("*the 2004 Act*").

ii. the National Planning Policy Framework

11. As Lord Carnwath JSC pointed out in *Hopkins Homes Ltd v Secretary of State for Communities and Local Government* [2017] UKSC 37, [2017] 1 WLR 1865, at [21], the National Planning Policy Framework ("*the NPPF*")

> "itself makes clear that as respects the determination of planning applications (by contrast with plan-making in which it has statutory recognition), it is no more than "guidance" and as such a "material consideration" for the purposes of section 70(2) of the 1990 Act.... It cannot, and does not purport to, displace the primacy given by the statute and policy to the statutory development plan. It must be exercised consistently with, and not so as to displace or distort, the statutory scheme."

12. Thus the NPPF states that:

> "196. The planning system is plan-led. Planning law requires that applications for planning permission must be determined in accordance with the development plan, unless material considerations indicate otherwise. This Framework is a material consideration in planning decisions."
>
> 197. In assessing and determining development proposals, local planning authorities should apply the presumption in favour of sustainable development."

13. Paragraph [14] of the NPPF describes the "presumption in favour of sustainable development", which is said to be "[at] the heart of" the NPPF and which should be seen as "a golden thread running through both plan-making and decision-taking". It states that:

> "For decision-taking this means [unless material considerations indicate otherwise]:
>
> • approving development proposals that accord with the development plan without delay; and
>
> • where the development plan is absent, silent or relevant policies are out-of-date, granting permission unless:
>
> —any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole; or
>
> — specific policies in this Framework indicate development should be restricted".

The penultimate point ("any adverse impacts...") is referred to as "the tilted balance". It applies *inter alia* if relevant development plan polices are "out-of-date".

14. Generally the question whether a development plan policy is "out-of-date" is self-evidently a matter of planning judgment for the decision maker: see eg *Hopkins Homes Ltd v Secretary of State for Communities and Local Government* supra per Lord Carnwath JSC at [55]. Paragraph [49] of the NPPF states, however, that:

> "Housing applications should be considered in the context of the presumption in favour of sustainable development. Relevant policies for the supply of housing should not be considered up-to-date if the local planning authority cannot demonstrate a five-year supply of deliverable housing sites."

iii. the relevant development plan

15. The public local inquiry in this case was held from February 9th to February 12th 2016. After it closed, the Council adopted (as participants at the Inquiry had anticipated) the Lewes District Local Plan – Part 1 – Joint Core Strategy ("the *JCS*") on May 11th 2016. The appeal was subsequently "recovered" by the Secretary of State for his own determination. When the Inspector submitted his report on August 5th 2016 ("*the IR*") and the Secretary of State issued his decision dated November 23rd 2016 ("*the DL*"), therefore, the relevant development plan for the area comprised (a) the JCS; (b) certain "saved policies" of the Lewes District Local Plan ("*the LDLP*") and (c) the Newick Neighbourhood Plan ("*the NNP*").

16. Policy CT1 in the LDLP was one of these "saved policies". It provides that:

> "Planning Boundary and Key Countryside Policy
>
> Development will be contained within the Planning Boundaries as shown on the Proposals Map. Planning permission will not be granted for development outside the Planning Boundaries, other than for that specifically referred to in other chapters of the Plan or listed [in the Policy itself which include for example (h)] development in the countryside for which a specific policy reference is made else-where in the Plan...The retention of the open character of the countryside is of heightened importance where it separates settlements and prevents their coalescence. Development referred to above may not be acceptable where its scale would significantly erode the gap between settlements and detract from their separate identities."

17. The explanatory text to this Policy stated that:

> "7.1 This Policy covers the broad pattern of development across the District wherein development is generally acceptable within Planning Boundaries, although it will be tightly controlled outside such boundaries.

> 7.2 The District Council has, therefore, defined Planning Boundaries around towns and villages in the District. The boundaries do not necessarily reflect the physical and social form of the settlements, but indicate the areas in which development may be acceptable, subject to other District-Wide Policies. These aim to ensure, for instance, that the area within the Planning Boundaries is not subject to over-development and that development respects the character of the settlements.
>
> 7.3 The boundaries have been defined around individual towns and villages in order to identify the area beyond the boundaries where development would normally be unacceptable unless it is for uses compatible with the countryside. Development proposals which comply with the above Policy and the appropriate environmental standard policies are not prejudiced by the intention of Policy CT1 that the countryside will remain in use for agricultural, woodland and recreational uses which are compatible with the conservation of the area.
>
> 7.4 The open countryside can also form the rural setting for towns and villages. The protection of this countryside from encroachment by inappropriate development, therefore, also serves to safeguard the setting and character of these settlements, as well as preventing their coalescence which could erode their separate identities."

18. Newick, Ringmer and Ringmer (The Broyle) were all settlements with such boundaries shown on the Proposals Map of the LDLP.

19. The NNP was adopted by the District Council in July 2015. It covers the period from 2015 to 2030. It allocated sites to meet the minimum amount of new housing that it was anticipated (correctly) that its identified "planned growth" in JCS would be.

20. The JCS, which was subsequently adopted on May 11th 2016, is intended to form 'Part 1' of the new Local Plan, with a Site Allocations and Development Management Policies Development Plan Document ("DPD") providing the non-strategic policies in 'Part 2' of the new Local Plan. In the JCS Newick and Ringmer were both identified as "rural service centres" (below primary and secondary regional centres and district centres in the settlement hierarchy) that might accommodate 100+ dwellings in the plan period between 2010 and 2030.

21. In relation to the provision of new dwellings:

    (1) Spatial Policy 1 of the JCS stated that, in the plan period, a minimum of 6,900 net additional dwellings will be provided in the plan area (the equivalent of approximately 345 net additional dwellings per annum).

    (2) Spatial Policy 2 identified planned growth on a number of strategic sites and in certain settlements over the plan period. This included "planned housing growth" at Newick for a minimum of 100 net additional units. The "planned housing growth"

for Ringmer & Broyle Side is for a minimum of 215 net additional units in addition to the allocation of a specific strategic site providing 110 net additional units.

(3) Spatial Policy 2 also provided for "about 200 net additional units in locations to be determined" in the plan area in the plan period.

(4) Spatial Policy 2 provided that individual sites to meet the planned levels of housing provision in the settlements mentioned, and to provide these 200 additional units, were to be identified in the District Council's Site Allocations and Development Management Policies DPD, the National Park Authority's Local Plan or Neighbourhood Plans.

22. On adoption a number of policies in the LDLP, that had been previously "saved" by the Secretary of State in 2007, were replaced by policies in the JCS. Others were not. The JCS states that those policies in the LDLP that were retained would be reviewed through the Local Plan Part 2 as appropriate.

23. One of the policies from the LDLP that was not superseded in the JCS was Policy CT1. This had two legal consequences. (i) The first was that the JCS could not lawfully have been adopted by the District Council unless the policies in the JCS were "consistent with the adopted local development plan", which included Policy CT1[1]. It may be noted that the person appointed to carry out the independent examination of the JCS had to be satisfied that it was reasonable to conclude that the JCS did that[2]. (ii) The second consequence was that the planning boundaries, previously shown on the LDLP's Proposals Map, had to be shown on the adopted policies maps, which themselves form part of the development plan once adopted[3]. The person appointed to carry out the independent examination of the JCS had to be satisfied that it was reasonable to conclude that the JCS and the adopted policies maps which formed part of it were "sound" before the Council could have adopted them[4].

iii. the Ringmer decision

24. The Ringmer decision concerned a proposal for the construction of up to 70 dwellings (including affordable housing), a sports and community building, tennis courts, and synthetic turf playing pitch, and the provision of amenity open space, vehicular access, parking and associated landscaping, at Broyle Gate Farm, Lewes Road, Ringmer.

25. In this case the inspector, Mr David Prentis, held a public local inquiry on May 10th 2016 to May 12th 2016. In his report dated June 15th 2016 Mr Prentis stated that:

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1 see section 17(7)(b) of the 2004 Act and regulation 8(4) and (5) of the Town and Country Planning (Local Planning)(England) Regulations 2012.

2 see sections 20(5)(a), 20(7)(b)(i), 20(7A) of the 2004 Act.

3 see regulations 9(1)(c) and 5(1)(b) of the Town and Country Planning (Local Planning)(England) Regulations 2012.

4 see section 20(5)(b), 20(7)(b)(i) and 20(7A) of the 2004 Act.

"10.39 The appellant agreed that the Council is able to demonstrate a five year supply of deliverable housing sites in accordance with the requirements of the Framework. It was not suggested that there is any objection in principle to a planning boundary policy such as Policy CT1. Nevertheless, the appellant argued that the Policy CT1 planning boundaries should be regarded as out-of–date on the basis that they were drawn in the context of the LP03 for the purposes of meeting housing requirements up to 2011. Further, it was argued that the boundaries would not meet housing requirements up to 2030, that they would need to be varied to accommodate the JCS strategic allocations and neighbourhood plan allocations and that they are bound to be reviewed in the LPPt2. [5.1, 6.25, 6.27]

10.40 The first point to note is that the CT1 planning boundaries have been retained in the JCS, pending review through the LPPt2. Although originally defined in relation to the LP03, they must now be considered in the context of a development plan context which also includes:

- the JCS strategic allocations
- the JCS planned growth targets for specified settlements
- neighbourhood plan allocations

At the Inquiry the Council accepted that the JCS Inspector did not find the retained policies sound in the sense of examining them individually against an evidence base. However, he found the JCS as a whole sound, including its provisions to save certain policies pending review under LPPt2. To my mind that is an important point, particularly given that the JCS was adopted as recently as May 2016. It seems to me that, in finding the JCS as a whole sound, the JCS Inspector was accepting the approach of allocating some of the development sites now, whilst retaining the CT1 boundaries for the time being pending review through LPPt2. That is a strong indication that the CT1 planning boundaries should be regarded as up-to-date. [6.10, 7.26]

10.41 Nevertheless, it is relevant to consider the practical consequences of the approach that has been taken. The JCS housing requirement up to 2030 is 6,900 dwellings, or around 345 dwellings per year. After making allowances for completions, commitments, windfalls and rural exception sites there is a balance of 3,597 dwellings which is to be met from strategic site allocations, (which have already been identified), planned growth at specified levels in identified settlements and about 200 units in locations to be determined. The residual

> figure of 200 is therefore a relatively small amount, amounting to less than one year's requirement. [3.3]
>
> 10.42 The JCS requirement for Ringmer and Broyle Side is 385 dwellings. Allowing for commitments, completions and the strategic allocation at Bishops Lane leaves a balance of 217 units. The RNP has already allocated sites for 184 units leaving just 33 still to be determined. The Council suggested that all of these could be accommodated by increasing delivery at Caburn Field, a site currently allocated for 40 units. Given that the site extends to some 1.3ha, and is centrally located within the village, it seems reasonable to assume some uplift on the current figure101. However, in the absence of further information about the prospective scheme for this site it is not possible to form a view on whether as many as 70 is likely to be achievable. That said, even if no allowance is made for additional delivery at Caburn Field, 33 is still a relatively small number amounting to less than 10% of the total growth planned for Ringmer up to 2030. [3.4, 6.28, 7.16, 7.17, 7.18, 7.21, 7.22]
>
> 10.43 It is possible that some of the 200 units in locations still to be determined will ultimately be allocated to Ringmer and/or Broyle Side. However, it seems likely that the local planning authority would look first to the four towns in the District, as these are likely to offer the most sustainable locations. Moreover, the exercise of seeking locations for those units will no doubt have regard to the infrastructure constraints at Ringmer identified by the JCS Inspector. [7.19, 7.15, 7.20]
>
> 10.44 The broad conclusion is that a large proportion of the total growth planned, or likely to be planned, for Ringmer up to 2030 has already been provided for in the JCS and RNP. Bearing in mind that:
>
> - the district has a five year supply of housing sites
> - the JCS has been adopted, and the RNP has been made, very recently and
> - there is an identified process for allocating the balance of the housing sites required
>
> I conclude that Policy CT1 should be regarded as up-to-date for the purposes of this appeal."

26. Mr Prentis then considered the decisions of other inspectors in which Policy CT1 had been considered and found that:

> "10.48 There was no suggestion from any party that any relevant policy other than Policy CT1 should be regarded as out-of-date or inconsistent with the Framework. I therefore

> conclude that the development plan context for this appeal should be regarded as up-to-date."

27. In his decision letter dated September 19th 2016, the Secretary of State dismissed the appeal against the District Council's decision. It was stated (at [14]) that:

> "Having carefully considered the Inspector's arguments at IR10.39-10.48, the Secretary of State agrees with his conclusion at IR10.42 and IR10.48 that JCS Policy CT1 should be regarded as up-to-date for the purposes of this appeal."

28. There would appear to be two errors in this paragraph: (i) the reference to paragraph [10.42] should be to paragraph [10.44] (as the latter contains a relevant conclusion whereas the former does not) and (ii) Policy CT1 was not a JCS Policy (although it was a policy retained by the JCS as paragraph [10.40], among others in the inspector's report, had made plain).

29. Having found that Policy CT1 was up-to-date, the Secretary of State did not apply the "tilted balance" in determining the appeal, noting (in his decision letter at [22]) that "the development plan is up-to-date and no reasons have been identified to reduce the weight to be attached to any of the policies relevant to this appeal" and finding that the balance of other material considerations was "not sufficient to indicate that the appeal should be determined other than in accordance with the development plan."

iv. the Newick decision

30. The public local inquiry in this case was held before that into the Ringmer development. But the Inspector's Report was submitted after Mr Prentis's Report and apparently in ignorance of it.

31. In this case the Inspector stated that:

> "148. It is common ground that the appeal site is located outside the settlement boundary for Newick, and thus, conflicts with LDLP Policy CT1. As identified by the Council [69-73], decisions should be made in accordance with the development plan unless material considerations indicate otherwise.
>
> 149. The Framework is one such consideration. Paragraph 214 confirms that for the first 12 months from its publication decision-takers may continue to give full weight to relevant policies adopted since 2004. Following this 12 month period it advocates that due weight should be given to relevant policies in existing plans according to their degree of consistency with the Framework. The closer the policies to the Framework, the greater weight they may be given.
>
> 150. Policy CT1 was assessed for consistency with the Framework as part of the preparation of the JCS. The assessment categorised CT1 as 'Amber' – defined as only

'partly consistent' with the Framework, with decision-makers advised to judge the weight applied to the policy alongside the Framework based on the specific circumstances of each case. In reaching this view the Council found that:

"The NPPF seems to allow us to identify where development would be inappropriate (para 157) and advocates the protection of the countryside throughout (including in para 17). The drawing of the planning boundary is therefore acceptable as it defines the area considered 'the countryside', helping to provide a basis for its protection. Thus, most parts of the policy can remain in use."

151. However, the Core Planning Principle referred to by the Council at paragraph 17 of the Framework states that planning should take account of the different roles and character of different areas, promoting the vitality of main urban areas, protecting the Green Belts around them, recognising the intrinsic character and beauty of the countryside and supporting thriving rural communities within it. The intrinsic 'protection' of the countryside referred to by the Council therefore relates to Green Belts and valued landscapes under paragraph 109. As such, Policy CT1 only has a limited degree of consistency with the Framework and does not reflect its presumption in favour of sustainable development.

152. Furthermore, the supporting text to CT1 confirms that the policy is intended to cover the broad pattern of development across the District and identify where development is generally acceptable. The boundaries aim to ensure that areas within settlements are not subject to over-development, whilst at the same time safeguarding their character and preventing any coalescence.

153. However, the LDLP was adopted in 2003 and covered the period up to 2011. The spatial distribution of development that Policy CT1 seeks to control is therefore based on the requirements of the previous plan for the District. As the Saving Direction [in 2007] points out; "Where policies were adopted some time ago, it is likely that material considerations, in particular the emergence of new national and regional policy and also new evidence, will be afforded considerable weight in decisions."

154. The JCS has now been adopted and sets out a requirement to provide at least 6,900 new homes in the District, with a minimum of 100 dwellings in Newick. Although the NNP has proactively allocated sites to meet this figure ahead of the Site Allocations process, it is clearly expressed as a 'minimum', and must be read in the context of a full objectively assessed need for some 10,900 new homes. With this in mind the Council

> accepts that more sites may be allocated for housing in the village in the Part 2 Site Allocations process [72]. JCS Policy SP2 also includes roughly 200 units in locations 'to be determined', some of which could be in Newick. As the NNP process demonstrates, achieving the strategic aspirations of the JCS cannot be met by only containing development within the planning boundaries.
>
> 155. In summary therefore, whilst the housing requirement for the District and its spatial distribution is up-to-date, the restrictive nature of Policy CT1, based on the old LDLP, is not. Along with its consistency with the Framework this point was acknowledged by the Council in preparation of the JCS, confirming that "The wording of Policy CT1 itself will need amending to ensure that it is consistent with the strategic policies of the Core Strategy and the more permissive approach to development in rural areas set out in the NPPF."
>
> 156. Where relevant policies are out-of-date, paragraph 14 of the Framework and its presumption in favour of sustainable development applies. In such circumstances it advocates that planning permission should be granted unless any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in the Framework taken as a whole, or when specific policies indicate that development should be restricted."

32. In his conclusions the Inspector stated *inter alia* that

> "227 ....Policy CT1 was adopted in 2003 and seeks to limit development within the planning boundaries defined under the LDLP, which expired in 2011. It does not reflect the housing requirement or spatial distribution set out in the recently adopted JCS, and its protection of the countryside from encroachment by inappropriate development is not, as the Council contend, entirely consistent with the Framework. Based on the evidence provided the weight which can be attributed to this policy conflict is therefore reduced, and for the purposes of the Framework it is out-of-date.
>
> 228. In saving CT1 beyond 2007 the Secretary of State confirmed that it must be read in the context of other material considerations. This includes the Framework, and where relevant policies are out-of-date, its presumption in favour of sustainable development..."

33. After the Inspector's Report was submitted, the Secretary of State took his decision on the Ringmer appeal. His subsequent decision letter in this case, however, made no reference to it and he has accepted that it was not taken into account. It was stated in paragraph [27] of the DL,

> "For the reasons given by the Inspector at IR227-228 the Secretary of State agrees that saved LDLP Policy CT1 is out of date. As such the Secretary of State considers that paragraph 14 of the Framework is engaged. He has therefore considered whether the adverse impacts of granting permission would significantly and demonstrably outweigh the benefits, when assessed against the Framework policies as a whole."

34. It was also stated (in the DL at [33]) that the Secretary of State found that "the weight that can be given to the conflict with LDLP Policy CT1 is reduced for the reasons set out by the Inspector or IR227, and he gives only limited weight to this conflict." The insertion of "or" is again plainly a typographical error.

v. the Wivelsfield decision

35. The third, recent decision of the Secretary of State that has addressed Policy CT1 concerned an application for planning permission to erect 95 dwellings at land east of Ditchling Road, Wivelsfield. In this case a Public Local Inquiry was held on September 16th and 17th 2016 but the inspector's report was submitted on October 25th 2016, that is to say after the Secretary of State's decision letter in the Ringmer appeal had been issued. In the event the Secretary of State's decision on this appeal was only issued on March 14th 2017, that is to say some months after his decision in the Newick appeal had been issued.

36. In the Secretary of State's decision letter on this appeal it was stated (at [15]) that:

> "For the reasons set out at IR327-328, the Secretary of State agrees that LP policy CT1 is not out of date (either by operation of paragraph 215 or paragraph 49 of the Framework) and that the conflict with it should be given significant weight in the decision."

37. It was then stated (at [18]) that:

> "the Secretary of State considers that the appeal scheme is not in accordance with saved policies CT1 and WNP Policy 1, that these policies should be considered up to date, and is therefore not in accordance with the development plan as a whole[5] He has gone on to consider whether there are material considerations which indicate that the proposal should be determined other than in accordance with the development plan."

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[5] In the decision letter at [10] it was stated that the Secretary of State agreed that, despite the degree of compliance with other polices, and given the fundamental nature of the conflict with policy CT1, the proposal was not in accordance with the development plan as considered at the inquiry". WNP1 was a policy in the Neighbourhood Plan adopted after the Inquiry but before the Secretary of State's decision.

38. The Secretary of State did not, therefore, apply the "tilted balance" and, in the event, he concluded that the material considerations weighing in favour of the appeal scheme were not sufficient to outweigh the conflict with the development plan.

39. The reasons given by the inspector in the Wivelsfield appeal for regarding Policy CT1 as being up-to date were that:

> "328. ....While policy CT1 gives blanket protection to countryside, the NPPF directs specific protection to valued landscapes. Nevertheless, a core planning principle of the NPPF includes recognising the intrinsic character and beauty of the countryside. Policy CT1 is expressed as the 'key countryside policy' in the Local Plan. The proposal would involve the incursion of development on a greenfield area of countryside. Taking into account also the finding above that a five-year housing land supply is demonstrated, I consider that policy CT1 is not out-of-date for the purposes of paragraph 14 of the NPPF, and that the conflict with it should be given significant weight in the decision."

POLICY CT1 AND THE SECRETARY OF STATE'S DECISIONS

i. submissions

40. Ms Sargent submitted that, whether or not a development plan policy is out-of date for the purpose of paragraph [14] of the NPPF is a matter of pure planning judgment: *Hopkins Homes Ltd v Secretary of State for Communities and Local Government* supra per Lord Carnwath JSC at [55]. It was not necessary for the Claimants to show that the Secretary of State's conclusion in this case that Policy CT1 was out-of-date was irrational. His planning judgement could be flawed on other grounds such as a failure to have regard to a material consideration. Where a particular consideration is not required to be taken into account by an enactment expressly or by necessary implication, the issue is whether it is unreasonable not to have taken it into account. That should be determined, so she submitted, by asking if, as Cooke J suggested in *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 at p183, it is a matter that is "so obviously material to a decision on a particular project that anything short of direct consideration of them by Ministers would not be in accordance with the intention of the Act". That approach was one that the House of Lords had applied in *R (Hurst) v HM Coroner for the Northern District London* [2007] UKHL 13, [2007] 2 AC 189, at [57]-[59].

41. Ms Sargent submitted that there is no reason why a previous decision cannot meet this "obviously material" test even if it is not drawn to the attention of the decision maker. That was the case in *Bath Society v Secretary of State for the Environment* [1991] 1 WLR 303. A precious decision will be "obviously material", so she submitted, either (a) if it is indistinguishable in some relevant respect (see *North Wiltshire District Council v Secretary of State for the Environment* (1993) 65 P&CR 137 per Mann LJ at p145) or (b) if it is "sufficiently closely related" to the issues in the later decision as to require it to be dealt with: see *R v Secretary of State for the Environment ex p*

Baber (1996) JPL 1034 at p1040; *St Albans City and District Council v Secretary of State for Communities and Local Government* [2015] EWHC 655 (Admin) at [88]-[101]; *Moulton Parish Council v Secretary of State for Communities and Local Government* [2017] EWHC 1047 per Gilbart J at [136]. Which of these two tests should be applied would depend on the circumstances.

42. Whatever test was adopted including one of unreasonableness, however, it was met in this case, so Ms Sargent submitted, by the Ringmer decision. There is in the public interest a principle of consistency applicable to the making of planning decisions. She contended that the Secretary of State ought to be cognisant of his own decisions whether or not they are flagged up in the materials before him: *Dear v Secretary of State for Communities and Local Government* [2015] EWHC 29 (Admin) at [32]. He has an obligation to take reasonable steps to acquaint himself with the relevant information to enable him to decide relevant questions correctly: cf *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 per Lord Diplock at p1065. The Ringmer decision was "obviously material" to the Newick decision: it was sufficiently closely related to it to make it so. Here the Secretary of State has admitted that he had failed to have regard, as he should have done, to his conclusion in the Ringmer appeal that Policy CT1 was up-to-date. The reasoning in that decision was not specific to the facts of that case, in particular, (a) the inspector's reasoning in paragraph [10.40] about the significance of the retention of Policy CT1 when the JCS was adopted was general in its application and (b) the inspector's reasoning in paragraph [10.44] about the provision of dwellings in Ringmer was equally applicable to Newick. There was no more likelihood of the boundary being changed at Newick than at Ringmer: the "planned growth" identified in the JCS had been provided for at Newick (whereas it had not yet been accommodated at Ringmer). Other points relied on by the Inspector when considering whether Policy CT1 was out-of-date had equally been raised in the Ringmer appeal (such as conflict with the NPPF including what it said about the countryside) but they had not been found to be persuasive by the inspector in that case. An explanation by the Secretary of State of why the Ringmer decision was wrong was required.

43. On behalf of the Second Defendant Mr Young emphasised that the Claimants were not impugning the Secretary of State's planning judgment in this case that Policy CT1 was not up-to-date. It is axiomatic, so he submitted, that matters of planning judgment should only be subject to interference by the Court if the reasoning is perverse irrational or *Wednesbury* unreasonable. This application should fail on that basis alone.

44. Mr Young submitted that the considerations to which a public authority must have regard fall legally into two categories. The first category comprises both (a) matters which an enactment expressly or impliedly requires a decision-maker to take into account and (b), as Cooke J stated in *CREEDNZ Inc v Governor-General* supra at p183, those which are "so obviously material" to a particular decision "that anything short of direct consideration of them...would not be in accordance with the Act". The second category are those matters which are potentially material provided that they are drawn to the decision-maker's attention: see *Cotswold District Council v Secretary of State for Communities and Local Government* [2013] EWHC 3719 (Admin) per Lewis J at [55]-[57].

45. In the context of planning, Mr Young submitted that a previous decision may only fall into the second of these categories, not into the first, so that, if it is not drawn to the decision-maker's attention, the decision will not be unlawful if no regard is had to it. The Secretary of State was under no obligation to make any enquiries about whether he had himself taken any decision previously that would be relevant to his decision on the Newick appeal. Mr Young submitted that any obligation on a decision maker to consider his own previous decisions would be extremely onerous and ill-defined. In almost all the cases that had been referred to, the previous decision had in fact been placed before the decision-maker. What was said in *Dear v Secretary of State for Communities and Local Government* supra was *obiter*. The parties in this case had not placed the Ringmer decision before the Secretary of State for his consideration. He was not required, therefore, to take it into account.

46. Mr Young submitted that, in any event, there were two fundamental distinctions between the two decisions. (i) The first was that the inspector in the Ringmer appeal had thought that Policy CT1 was consistent with the NPPF. By contrast the Inspector in the Newick appeal did not consider that it was with respect to protection of the countryside. (ii) The second fundamental distinction concerned the contribution that each settlement was making to housing needs. Both are Rural Service Centres required to deliver 100+ homes over the plan period but there the similarity ends. Newick had seen hardly any new housing development (completions and commitments) since the start of the JCS plan period in 2010 whereas Ringmer has seen various additional completions and commitments granted. Newick received no strategic allocations in the JCS whereas Ringmer is identified for 385 dwellings and has a strategic allocation. The NNP allocated land only for the "bare minimum of new dwellings (101)" which the JCS required, whereas Ringmer's Neighbourhood Plan had allocated land for 240. Thus the amount of committed and allocated development at Ringmer is nearly four times greater than at Newick, although both have an "equal status" in the settlement hierarchy. Further incursions beyond the planning boundary there were, therefore, so he submitted, "unlikely". The settlement boundary could be considered up-to-date in that context: Ringmer was taking its fair share of development. By contrast Newick was not making a similar contribution. The different conclusions were based on different evidence, different cross-examination and different submissions about two different settlements, albeit of the same planning status, which are to accommodate two very different levels of proposed development. Each planning judgment was based on such evidence and the claim should fail on this basis alone. The Inspector's decision in the Ringmer appeal was one only made "in the context of this appeal". The conclusion in the Ringmer appeal that Policy CT1 was up-to-date was thus not relevant to the Newick appeal, as a careful reading of the two Inspector's reports discloses.

47. Mr Young further submitted that, if a previous decision is drawn to the decision-maker's attention, then the question whether he needs to deal with it in his reasons will depend on the circumstances. Although the test in *North Wiltshire District Council v Secretary of State for the Environment* supra was correct in principle, the case law had moved beyond that. Where reference had been required, the fact that the sites the subject of the decisions were the same or had overlapped or were in close proximity was of particular significance. As George Bartlett QC had stated in *JJ Gallagher Ltd v Secretary of State for Local Government, Transport and the Regions* [2002] EWHC 1812 (Admin),[2002] 4 PLR 32, at [58] (in a passage endorsed by the

Court of Appeal in *R (Fox Strategic Land and Property Ltd) v Secretary of State for Communities and Local Government* [2012] EWCA Civ 1198, [2013] 1 P&CR 6), where the inconsistency between two decisions is "stark and fundamental", it will usually not be enough to leave the explanation for the inconsistency to be inferred by the reader. That was not the case here. Thus, so Mr Young contended, the Secretary of State was not required to address and distinguish his conclusion in the Ringmer decision about Policy CT1 even had it been placed before him by the parties. There were fundamental differences between the two cases and the judgment that Policy CT1 was out-of-date in relation to Newick was explained in considerable detail by the Inspector.

48. In any event Mr Young submitted that the conclusion in the Ringmer decision that Policy CT1 was up-to-date was "perverse, irrational and Wednesbury unreasonable" and could not lawfully have been taken into account by the Secretary of State in his Newick decision. With each new development plan, the majority of settlements grow larger. As a consequence a new Local Plan will set a new planning boundary line, incorporating new development and new allocations within the boundary of the settlement. That, he submitted, is certainly true of settlements such as Newick and Ringmer that are expected to grow in size. In this way the planning boundary expands around a settlement and is then considered up-to-date. But even now, so he contended, the planning boundaries around settlements in the district of Lewes are not remotely up-to-date. They date back to the Local Plan adopted in 2003, some nine years before the NPPF was issued, a plan which was only ever intended to cover development needs in the period to 2011. From April 2011 the planning boundary around each settlement was self-evidently out of date. It has not been updated by the neighbourhood plans or by the JCS. It does not even reflect the strategic allocations in the JCS in settlements, such as Ringmer, that have them. The task of updating the boundaries has been left to the Part 2 Plan. Further Policy CT1 is inconsistent with the NPPF (as set out above). No decision-maker could take into account such an irrational decision lawfully even if it was his own.

49. Finally Mr Young contended that it would not have made any difference to the decision had the view been taken that Policy CT1 was up-to-date given the finding that the proposal was "sustainable development". Pursuant to paragraph 187 of the NPPF, permission was bound to be granted.

50. Ms Sargent submitted that it is no answer to the Claimants' case to seek (as the Second Defendant does) to infer reasons why the Secretary of State disagreed with his earlier decision. He had not had regard to it and in any event the Secretary of State had not provided the reasons required. In response to the contention that the Ringmer decision was irrational, Ms Sargent submitted that, on the contrary, it was cogent, entirely rational and in fact correct. Indeed the Secretary of State had recently again found in the Wivelsfield decision that Policy CT1 was not out-of-date. It was not possible to say that, had the Secretary of State taken the Ringmer decision into account, the Newick decision would necessarily have been the same.

ii. the test for determining when a decision may be invalid when a consideration that is capable of being material is not taken into account

51. When an enactment does not require a specific consideration to be taken into account either expressly or by necessary implication, the question whether that consideration

is relevant when taking a decision involves two distinct questions that need to be distinguished. The first is whether the specific consideration is one capable in law of being relevant. The second is whether in fact it is relevant in the circumstances. The first is plainly a question of law for the court to determine. The second involves a question of judgment for the decision-maker subject to review by the court on conventional public law grounds.

52. A decision-maker may fail to take into account such a specific consideration which is capable in law of being relevant but to which regard is not required to be had by an enactment, whether expressly or by implication. The allegation that such a failure renders his decision unlawful may be of one of two distinct types. (i) The first arises when a decision maker has had regard to the consideration in question but has decided that it is not relevant to his decision (rather than merely deciding to give it no weight). In that case the decision-maker's judgment is one that can be reviewed on conventional public law grounds, such as a misdirection in law or on the basis that no reasonable person could have taken that view in the circumstances. Whether any such error by the decision-maker was immaterial then depends (as it does if a consideration which the decision-maker is obliged to take into account by an enactment is not considered) on whether the decision would in any event have been the same had the error not been made. (ii) The second type of case (and the one with which this application is concerned) arises when the decision-maker has not addressed such a specific consideration which it is alleged should have been taken into account. In this type of case, unlike the others to which I have referred, there is no judgment by the decision-maker for the court to review.

53. The issue for the court in this second type of case is when it should treat that failure as one that may make the decision unlawful. Given that the allegation is one that concerns how a decision-maker has exercised a discretion that it has when taking the decision, it might be thought that the answer would reflect the basic principle in public law that statutory discretions must not be exercised unreasonably. Just as a decision is unlawful if the decision-maker takes a matter into account which no reasonable person would do in the circumstances, so equally a decision should be unlawful if the decision-maker fails to take into account a matter that no reasonable person would fail to take into account in the circumstances. As stated in Wade and Forsyth *Administrative Law* 11th ed at p324, "a decision to take into account (or not to take into account) a permissible consideration will only be challengeable on *Wednesbury* grounds." Even if no reasonable person would have failed to take a matter into account, however, that failure may nonetheless be immaterial in the sense that the decision would in any event have been the same had it been considered.

54. Unfortunately, as the submissions in this case illustrate, it is necessary to examine the case-law in more detail to ascertain whether or not this principled solution represents the law.

55. Before doing so, it has to be noted that these issues all arise in planning law. There are specific considerations, such as the desirability of preserving a listed building and its setting, that are expressly required to be taken into account when taking a decision on an application for planning permission. Regard is also required to be had, for example, to "the provisions of the development plan so far as material to the application" and to "any other material considerations": see section 70(2)(a) and 70(2)(c) of the 1990 Act. A consideration is "material" for the purpose of section

70(2)(c) of the Town and Country Planning Act 1990, however, if it is "relevant", as the House of Lords decided in *Tesco Stores v Secretary of State for the Environment* [1995] 1 WLR 759 per Lord Keith at p764g-h; *R (Watson) v Richmond on Thames LBC* [2013] EWCA Civ 513 at [25]. As Lord Carnwath JSC has pointed out, here "the word "material considerations" is treated as it is elsewhere in administrative law: that is to say, as meaning considerations material (or relevant) to the exercise of the particular power in its statutory context and for the purposes for which it was granted": *R (Health and Safety Executive v Wolverhampton City Council* [2012] UKSC 34, [2012] 1 WLR 2264 at [49]. Whether any provision of the development plan or any other consideration is material (or relevant) to a particular application for planning permission inevitably involves the exercise of planning judgment for the decision-maker.

56. It is nonetheless sometimes said, as, for example, Lewis J did in *Cotswold District Council v Secretary of State for Communities and Local Government* supra at [56]), that:

> "The question of whether a consideration is a material consideration is a matter of law for the court to determine. The question of the weight, if any, to attach to a material consideration is a matter for the decision-maker: see *Tesco Stores Ltd. v Secretary of State for the Environment* [1995] 1 W.L.R. 759 at page 780E-H."

57. The decision in that *Tesco Stores* case undoubtedly establishes that the question, whether a consideration is capable in law of being material, is one of law for the court to determine. But it did not establish that it is for the court (rather than the decision-maker) to determine whether a consideration is in fact material (or relevant) in the circumstances. The only questions in issue in that case were (i) in what circumstances was an offer to fund or to provide a public benefit (in that case a road) capable in law of being a material consideration and (ii) whether the Secretary of State had in fact taken it into account[6]. There was no issue in that case, once the question of law had

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[6] The contention before the Appellate Committee was that the Secretary of State had failed to have any regard, when refusing planning permission for a superstore (but granting such permission to another operator), to an offer that Tesco had made to fund fully a link road. The Secretary of State agreed with his Inspector that fully funding the link road was not fairly and reasonably related in scale to the amount of additional traffic which that store would generate and considered that the offer should not be treated as a reason for granting Tesco permission for a superstore or refusing to grant permission to others. The issue of law that the Committee addressed was when such an offer could in law be material. It held that it could be a material consideration if it has some connection with the proposed development which is not *de minimis* and it rejected a test that such an offer was required to render the development acceptable: see p 779H to 781C, 783D to E. There was no issue in that case, given that the offer had been found to have at least some relationship to the proposed development, that, if such an offer was capable of being material, Tesco's offer was a material consideration in the determination of its application for planning permission. The Secretary of State accepted that the offer was a material planning consideration in that case and that he had had regard to it: see p 780A to B. The Appellate Committee held that the Secretary of

been determined, whether the specific offer was material in the circumstances of that case. Had it been, that would have involved a planning judgment and, as Lord Hoffman stated in that case, "if there is one principle more firmly settled than any other, it is that matters of planning judgment are within the exclusive province of the local planning authority or the Secretary of State": see [1975] 1 WLR 759 at p780f. The statements in the speeches of Lords Keith and Hoffmann in that case on relevance being a question of law need to be read in the context of the issues which they were addressing on that appeal. As Scott Baker LJ stated in *South Cambridgeshire District Council v Secretary of State for Communities and Local Government* [2008] EWCA Civ 1010, [2009] PTSR 37 at [36], for example, "it is a matter for the planning authority, or in this case the inspector, to decide what are the material considerations and, having done so, to give each of them such weight as she considered appropriate. That, so it seems to me, is a matter of planning judgment."

58. In *R (Cooper) v Ashford Borough Council* [2016] EWHC 1525 (Admin), [2016] PTSR 1455, I considered three different tests, which had been endorsed by the Court of Appeal, for determining when a decision may be invalid when regard has not been had to a specific consideration that is capable in law of being material in the determination of a planning application. These were (i) that the decision may be invalid if no reasonable authority would have failed to take the consideration into account; (ii) that the decision may be invalid if the court considers that there is a real possibility that the authority would have reached a different decision if regard had been had to it; and (iii) that the decision may be invalid if the consideration is one that would have tipped the balance to some extent, or would have had some weight, one way or another, if it had been taken into account without necessarily being determinative.

59. In that case I concluded that the first of these three alternatives was the test that I was bound to apply on the authorities: see at [71]-[89]. In this case neither party invited me to adopt the second or third test that I considered.

60. Instead Mr Young submitted that the test should instead be whether the matter not taken into account is one of those matters which, as Cooke J put it in *CREEDNZ Inc v Governor-General* supra at p183, are "so obviously material" to a particular decision "that anything short of direct consideration of them...would not be in accordance with the Act". That was the test that Lewis J endorsed in *Cotswold District Council v Secretary of State for Communities and Local Government* supra at [55] as being applicable to matters not drawn to the decision-maker's attention. Similarly it was also on the basis of Cooke J's statement that Carnwath LJ stated, in *Derbyshire Dales District Council v Secretary of State for Communities and Local Government*, [2009] EWHC 1729 (Admin), [2010] 1 P&CR 19[7], at [28], that

> "Short of irrationality, the question is one of statutory construction. It is necessary to show that the matter was one which the statute expressly or impliedly (because "obviously

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State had not treated Tesco's offer as being incapable of being material but had given it little or no weight as a matter of planning judgment in the circumstances.

[7] In the event Carnwath LJ's decision was consistent with the interpretation of *In re Findlay* as imposing a *Wednesbury* test: see [36]-[37].

> material") requires to be taken into account "as a matter of legal obligation"."

Holgate J followed this approach, distinguishing this question of construction from that of unreasonableness in *St Albans City and District Council v Secretary of State for Communities and Local Government* supra at [74]-[76] and he observed, in *R (Faraday Development Ltd) v West Berkshire Council* [2016] EWHC 2166 at [134], that the *Wednesbury* unreasonableness test (which I had suggested) was "more restrictive" than a "so obviously material" test. On this basis, therefore, it is not necessary to show that the matter not taken into account is one that no reasonable decision-maker would have failed to take into account. Something less may suffice to make the decision unlawful.

61. In my judgment, however, this view of the legal effect of what Cooke J said in *CREEDNZ Inc v Governor-General* is inconsistent with authority, which is binding on me, in which his statement has been taken to support a test that the decision may only be invalid if no reasonable authority would have failed to take the consideration into account.

62. Thus, in *In re Findlay* [1985] AC 318, for example, the complaint was that the Secretary of State had failed to consult the parole board before adopting a new policy governing the release of certain prisoners on licence. As Lord Scarman stated (in a speech with which the other members of the Appellate Committee agreed), at pp 333-334:

> "there is no express statutory requirement for such consultation... and … I find it impossible to imply any such requirement into the statute...But this is not the end of the contention. Mr Sedley also invoked the 'Wednesbury principle' (*Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223), submitting that no reasonable Home Secretary could have reasonably omitted to consult the board. He prayed in aid some observations of Cooke J in the New Zealand case of *CREEDNZ Inc v Governor General* [1981] 1 NZLR 172 . The facts of that case bear no resemblance to this case. But the judge did consider the question of the proper exercise of an administrative discretion in a situation where a statute permits but does not require consideration of certain matters. The judge said, at p 183:
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> > '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 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.'
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> These words certainly do not support Mr Sedley's submission. But, and it is this upon which Mr Sedley has to found his

> argument, the judge in a later passage at p 183, line 33, did recognise that in certain circumstances, 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 ministers … would not be in accordance with the intention of the Act'.
>
> These two passages are, in my view, a correct statement of principle. In the present case the statute neither prohibits the Secretary of State from consulting the board before adopting a policy change in the exercise of his discretionary power to grant parole nor requires him to do so. In deciding to adopt the new policy without consulting the board the Secretary of State took into account the factors of deterrence, retribution and public confidence in the administration of criminal justice. These were plainly material matters for his consideration in the exercise of his discretion. He cannot, therefore, be said to have acted unreasonably in having regard to them. Accordingly I reject the submission of unreasonableness and with it the contention that failure to consult the board was unlawful."

63. Lord Scarman thus applied an "unreasonableness test" and asked, in effect, whether the Secretary of State could not unreasonably have taken the decision that he did without regard to the views of the Parole Board. He thus rejected "the submission of unreasonableness" which was the test that he took Cooke J's statement to support.

64. There are difficulties, in addition to binding authority, in taking what Cooke J said in *CREEDNZ Inc v Governor-General* as establishing a test that is less stringent than one of unreasonableness. It is necessary to appreciate what these are in order to determine whether Ms Sargent's alternative way of seeking to rely on what Cooke J said successfully avoids them. These difficulties are ones of principle.

65. The consequence of adopting a test that is less stringent than one of unreasonableness is that a failure to take into account a particular matter that an authority could reasonably have decided not to take into account in the circumstances may nonetheless render the decision unlawful. But, assuming that there is no other flaw involved, in my judgment it is not for the court to find that what an authority could reasonably have done was unlawful.

66. Further, any test for determining when a decision may be unlawful when a particular matter has not been taken into account should in any event be clear and based on some recognisable principle.

    (1) Carnwath LJ considered in Derbyshire Dales District *Council v Secretary of State for Communities and Local Government* supra that the test was a matter "of statutory construction"[8]. But, with due respect, that cannot be

[8] Tthis was also the approach of Holgate J in *R (Luton Borough Council) v Central Bedfordshire Council* [2014] EWHC 4325 (Admin) at [151(ii)]. The issue was not the subject of argument on the appeal in that case to the Court of Appeal. It may be noted, however, that Holgate J has subsequently stated, however, in *R (Plant) v Lambeth Borough Council* [2016]

correct. Both Cooke J (in *CREEDNZ Inc v Governor-General* at p183) and Lord Scarman in *In re Finlay* (in the passage quoted above) regarded matters that might be "so obviously material" in the sense indicated as ones which were not themselves required to be taken into account expressly or by implication. Those matters are ones that an enactment permits, but does not require, a decision-maker to take into account in any particular decision. If the enactment on its true construction required the matter to be taken into account as a matter of legal obligation in any decision, the problem would not arise.

(2) But, whatever its basis, what does the test being suggested require for it to be satisfied? As Cooke J stated in another passage in *CREEDNZ Inc v Governor-General*, which Lord Scarman also cited with approval in *In re Finlay*, "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." It plainly is not enough, therefore, that a reasonable decision-maker would have taken it into account. The only remaining possibility appears to be that the matter is "so obviously material" in circumstances when no reasonable person would not have taken it into account. So interpreted a test that a matter is so "obviously material" in the sense indicated is merely a more opaque way of stating the unreasonableness test and one which is, as I shall explain below, potentially misleading.

67. Ms Sargent accepted that, in *In Re Findlay* supra, the Appellate Committee had treated the statement by Cooke J as supporting a test of *Wednesbury* unreasonableness. However, so she submitted, such unreasonableness was itself to be determined by asking whether a matter not taken into account was "so obviously material" that direct consideration of it was required: it provided a suitable test for such unreasonableness.

68. There is some support for such an approach in the case law, most notably in the speech of Lord Brown of Eaton-under-Heywood in *R (Hurst) v HM Coroner for the Northern District London* supra. The issue in that appeal was whether, in exercising his discretion under section 16(3) of the Coroners Act 1988 to resume an inquest, the coroner was required after the Human Rights Act 1998 came into effect to take into account the United Kingdom's obligations under article 2 of the ECHR to hold a particular type of inquest in respect of a death that occurred before that Act came into force. In the event the majority held that the kind of inquest sought was not one open to the coroner to hold in those circumstances so that the relevant issue for present purposes, whether the coroner was obliged to have regard to the United Kingdom's obligations under an unincorporated treaty, did not arise: see per Lord Brown at [53]. What Lord Brown said on the issue was thus *obiter*. It was also the case that the coroner had in fact had regard to article 2 of the ECHR, as Lord Brown himself pointed out (at [38]) and as Baroness Hale (at [18]) and Lord Mance (at [78]) emphasised. Be that as it may be, Lord Brown stated that, given the decision in *R v*

EWHC 3324 (Admin), [2017] PTSR 453 at [62] and [63] that the question is one of irrationality or whether no reasonable authority would have failed to take into account the specific consideration.

Secretary of State for the Home Department ex p Brind [1991] 1 AC 696, a decision-maker is not bound to have regard to an unincorporated treaty in exercising a discretion. He then cited the passages from Cooke J's judgment that Lord Scarman had quoted in *In re Findlay*, stating that

> "58 .....it seems to me quite impossible to say that the unincorporated international obligation on the United Kingdom here was "so obviously material" to the coroner's decision whether or not to resume this inquest that he was required to give it "direct consideration".
>
> 59 Even, therefore, had the coroner recognised and felt able to satisfy the international law obligation upon the United Kingdom by reopening the inquest, I for my part would not hold his refusal to do so irrational or otherwise unlawful."

His conclusion following that route on that issue in this case, therefore, was that any failure to have regard to the unincorporated treaty was not irrational.

69. More recently, Holgate J has stated, in *R (Plant) v Lambeth Borough Council* [2016] EWHC 3324 (Admin), [2017] PTSR 453, at [63], that

> "The test is whether, in the circumstances of the case, no reasonable authority would have failed to take into account the specific consideration relied upon by the claimant, or to obtain further information. Lord Scarman held in *In re Findlay*, at p 334, that this test is satisfied where, in the circumstances, a matter is so "obviously material" to a particular decision that a failure to take it into account would not be in accordance with the intention of the legislation "notwithstanding the silence of the statute"[9].

70. In fact what Lord Scarman did was different. He did not ask in that case whether the views of the Parole Board would have been so "obviously material" to the decision of the Secretary of State that he was obliged to consider them. No doubt, if they had

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[9] Holgate J cited in support of this approach in addition to *Hurst* (i) *Derbyshire Dales District Council v Secretary of State for Communities and Local Government* supra in which Carnwath LJ took this "obviously material" test to be a test for something "short of irrationality", not one for it; (ii) *R (National Association of Health Stores) v Secretary of State for Health* [2005] EWCA Civ 154 in which the status and research undertaken by an eminent objector, whose objection was taken into account ,were not communicated to the Minister. In that case Sedley LJ held (at [62]) that "what it was relevant for the Minister to know was enough to enable him to make an informed judgment " and that (at [63]) these matters were not "so relevant" that in the circumstances a lawful decision could not be taken in ignorance of them (which is consistent with the analysis of *In re Findlay* given above). Keene LJ at [76] did not consider them to be matters of "such significance as to render invalid the decision". Neither they nor the other member of the court, Bennett J, specifically applied what Cooke J said in relation to permissible considerations: in fact none referred to it; and (iii) the *Faraday Development Ltd* case supra was one in which Holgate J had said that a "so obviously material" test was "less restrictive" than a *Wednesbury* test, not that it was a test for it.

been obtained, it is likely that they would have been in relation to a decision on policy governing the release of certain prisoners on licence. As noted above, Lord Scarman considered whether or not, without their views, the Secretary of State could take that decision not unreasonably.

71. As I noted in *R (Cooper) v Ashford Borough Council* supra, the decision in *In re Findlay* has been taken in cases, a number of which are binding on me, to establish that the relevant test is whether no reasonable person could have failed to take a matter into account[10]. The question is then whether, instead of simply applying that test, the court should instead use another test, some "so obviously material "test, to identify when such unreasonableness occurs and whether doing so has any advantage or carries any risk.

72. The professed object of the "so obviously material" test (on this approach) is simply to identify those matters that no reasonable person could have failed to take a matter into account. If it led to a different result, it would lead to the first of the two difficulties in principle which that test might have which I identified in paragraph [65] above, namely that it could result in the court finding that what an authority could reasonably have done was unlawful. It was in recognition of this difficulty that Ms Sargent ultimately proposed it as a means of identifying an unreasonable failure to consider a matter.

73. In my judgment it is nonetheless unhelpful and potentially misleading to use the "so obviously material" test as a test for such unreasonableness.

74. There is inevitably a risk, if a test that does not itself embody the relevant criterion for determining when a decision may be unlawful is applied, that the result will be different from that that would have been obtained had the relevant criterion itself been applied. That risk will be accentuated if the test is not itself clear. In my judgment the proposed test, namely whether a matter is "so obviously material to a decision...that anything short of direct consideration of [it]… would not be in accordance with the intention of the Act", is far from being self-explanatory. As discussed in paragraph [66(2)] above, on analysis it seems that the matter is "so obviously material" in such circumstances when no reasonable person would have failed to take it into account. If that is correct, nothing is gained by adopting a less clear formulation as the test to be applied in practice. If it does not mean that, then it will be a test that will not establish what it is supposed to do. There are moreover two reasons why that is likely to occur in any event. The first is that the formulation invites the Court itself to say what was, or was not, *in its view* "so obviously material" in the relevant sense, rather than focussing on what the decision maker might or would have thought (which is what the

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[10] see eg. *R (J (A Child)) v North Warwickshire Borough Council* [2001] EWHC Admin 315, [2002] 2 PLCR 31, at [20]-[21]; *R (Khatun) v Newham London Borough Council* [2004] EWCA Civ 55, [2005] QB 37 at [34]-[36]; *R (Al Rawi) v Secretary of State for Foreign and Commonwealth Affairs (United Nations High Commissioner for Refugees intervening)* [2006] EWCA Civ 1279, [2008] QB 289, at [131]-[132]; *R (Langley Park School for Girls Governing Body) v Bromley London Borough Council* [2009] EWCA Civ 734, [2010] 1 P & CR 10, at [37] and [41]; *R (London Criminal Courts Solicitors Association v Lord Chancellor* [2015] EWHC 295 (Admin) per Laws LJ at [32]-[35]; *R (South Staffordshire and Shropshire NHS Foundation Trust v Managers of St George's Hospital* [2016] EWHC 1196 (Admin), [2017] 1 WLR 1528 per Cranston J at [34].

court is required to do when reviewing the exercise of an administrative discretion). The second is that, given its opacity, there may well be a temptation to clarify what that formulation means in other words (as illustrated in other cases) which will further remove the formulation to be applied from the criterion to which it is intended to give effect.

75. There is a further serious problem with a formula using "obvious materiality" as a test. There are at least three distinct, but interrelated, aspects that may need to be addressed when considering whether no reasonable decision maker would have failed to take a matter into account. These are (i) the significance that the matter (if it exists) may have in relation to the decision; (ii) whether the decision-maker was or ought to have been aware that the matter may exist; and (iii) what steps may have been required to ascertain whether or not it did and to obtain it. Questions about "obvious materiality" relate to the first of these aspects but do not address the other two. As a matter of public law, it is not sufficient for a decision-maker merely to ask the correct question. As Lord Diplock put it in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 at p1065, the decision-maker must also "take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly". In considering whether that requirement has been satisfied, the court must establish what material was before the authority and the court should only strike down a decision by the authority not to make further inquiries if no reasonable authority possessed of that material could suppose that the inquiries they had made were sufficient: see *R (Plantagenet Alliance Ltd) v Secretary of State for Justice* [2014] EWHC 1662 (QB), [2015] 3 All ER 261, at [100]. Whether further inquiries may be required may depend, however, not only on the significance of the information that might be obtained if they are made but also on the likelihood that such information exists and such difficulties as there may be in finding out whether it does and obtaining it. Accordingly, when considering whether no reasonable decision-maker would have failed to take a matter into account that it has not addressed, it may be necessary to consider, from the decision-maker's perspective, not merely how significant (or obviously material) its content might have been in relation to the decision but also its likely availability and any difficulties there may have been in ascertaining its existence and obtaining it.

76. For these reasons not only is the "so obviously material" formulation unhelpful and potentially misleading as a test for whether the failure to take a specific matter into account was unreasonable in the circumstances but it also fails to capture all the matters that may be relevant in answering that question. It is not, therefore, a test that necessarily provides an answer to the relevant question.

77. In my judgment, therefore, it is simpler and less likely to mislead or produce an incorrect result to ask (as the court has done on other occasions[11] relying on *In re Findlay* supra) only whether the matter is one that no reasonable decision-maker would have failed to take into account in the circumstances. That test accurately reflects a basic principle in public law that, absent any other flaw, a statutory discretion has to be exercised unreasonably in some respect if it is to be treated as having been exercised unlawfully.

iii. consistency in decision-making

[11] see footnote 10 above.

78. When an administrative discretion is vested in a public authority that falls to be exercised on a potentially indefinite number of occasions, the law requires steps be taken to achieve reasonable consistency and avoid arbitrariness in its exercise. As Lord Dyson JSC stated in *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 AC 245, (at [34]),

> "the rule of law calls for a transparent statement by the executive of the circumstances in which the broad statutory criteria will be exercised."
>
> "Policies are an essential element in securing the coherent and consistent performance of administrative functions"[12].

Moreover, as Lord Dyson said (in *Lumba* supra at [26])

> "the principle that policy must be consistently applied is not in doubt: see *Wade & Forsyth, Administrative Law*, 10th ed (2009), p 316. As it is put in *De Smith's Judicial Review* , 6th ed (2007), para 12-039: "there is an independent duty of consistent application of policies, which is based on the principle of equal implementation of laws, non-discrimination and the lack of arbitrariness."

79. That does not mean, of course, that policies may not be departed from in particular cases provided that there is reason to do so. But it is unlawful to do so without such a reason. As Lord Hoffmann stated, when giving the judgment of the Board of the Privy Council in *Matadeen v Pointu* [1999] 1 AC 98 at p109[13],

> "treating like cases alike and unlike cases differently is a general axiom of rational behaviour. It is, for example, frequently invoked by the courts in proceedings for judicial review as a ground for holding some administrative act to have been irrational".

80. The grant or refusal of planning permission under Part III of the 1990 Act remains an exercise of discretion but one to be exercised in accordance with the development plan unless material considerations indicate otherwise. Such considerations may include not only policies promulgated by the Secretary of State, such as the NPPF, but also other guidance issued by local planning authorities. These all serve to promote or sustain the pattern of development or land use that such authorities regard as being in the public interest but they also help to avoid arbitrariness and promote consistency in exercise of development control. Having regard to previous decisions may likewise do so and it may be unreasonable not to do so.

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[12] See *R (Alconbury Developments Ltd and Others) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295, per Lord Clyde at [143].

[13] This passage was cited with approval by Lords Sumption and Hodge JSC in *R (Rotherham MBC) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 6, [2015] PTSR 322, at [26].

81. It is common ground, and well established, that previous decisions on applications for planning permission are capable of being a material consideration in the determination of a subsequent application. As Mann LJ stated in *North Wiltshire District Council v Secretary of State for the Environment* supra at p145,

> "One important reason why previous decisions are capable of being material is that like cases should be decided in a like manner so that there is consistency in the appellate process. Consistency is self-evidently important to both developers and development control authorities. But it is also important for the purpose of securing public confidence in the operation of the development control system."

82. Moreover, as development control is exercised in any particular area both by a local planning authority and by the Secretary of State, consistency in the decisions of each and consistency in the approach of each is equally desirable.

83. Many of the decisions to which I have been referred concern decisions taken by the Secretary of State or one of his inspectors when they have been referred specifically to a previous decision taken by them or by the local planning authority. Such decisions include: *North Wiltshire District Council v Secretary of State for the Environment* supra; *R (Baber) v Secretary of State for the Environment* supra; *JJ Gallagher Limited v Secretary of State for Local Government Transport and the Regions* supra; *Dunster Properties Limited v First Secretary of State* [2007] EWCA Civ 236, [2007] 2 P&CR 26; *R (Fox Strategic Land and Property Limited) v Secretary of State for Communities and Local Government* supra; *Pertemps Investments Limited v Secretary of State for Communities and Local Government* [2015] EWHC 2308 (Admin); and *Moulton Parish Council v Secretary of State for Communities and Local Government* supra.

84. In such cases the substantive complaint in practice is that no, or no sufficient, reasons have been given why the later decision departed from some aspect of the previous decision. Such cases focus, therefore, on when such reasons have to be given and in what detail any explanation for any difference in approach must be provided. Thus, for example, in *North Wiltshire District Council v Secretary of State for the Environment* supra, in which the only ground on which the decision was challenged was a failure to comply with the requirement to provide reasons[14], Mann LJ stated (at p145) that:

> "Where [the earlier decision] is indistinguishable then ordinarily it must be a material consideration. A practical test for the inspector is to ask himself whether, if I decide this case in a particular way am I necessarily agreeing or disagreeing with some critical aspect of the decision in the previous case? The areas for possible agreement or disagreement cannot be defined but they would include interpretation of policies, aesthetic judgments and assessment of need. Where there is disagreement then the inspector must weigh the previous decision and give his reasons for departure from it. These can

[14] see (1993) 65 P&CR 137 at p142.

> on occasion be short, for example in the case of disagreement on aesthetics. On other occasions they may have to be elaborate."

In R (Baber) v Secretary of State for the Environment supra Glidewell LJ stated that:

> "I would suggest that the test which the inspector ought to have posed to himself is slightly different. It is: a previous decision having been drawn to my attention, do I take the view that it may well be sufficiently closely related to the matters in issue in my appeal that I ought to have regard to it and either follow it or distinguish it?"

Morritt LJ stated that:

> "1 agree with my Lord that the practical test is too high if it is posed as being, to the second inspector, "Whether I necessarily agree or disagree with some critical aspect of the decision in the previous case." It ought to be, and for present purposes is sufficient if it is, the question: "May the earlier decision be sufficiently related to the decision I have to make? That is something that I should properly comment on either following or, if disagreeing, saying why."

85. It is unfortunate that in such cases the same approach is referred to on occasion as if it also provided a test for whether the previous decision could be taken into account as a material consideration by the decision-maker. It does not follow, however, that, because reference is not required to be made in the reasons for a decision to a previous decision, that it would be unreasonable for the decision-maker to take that previous decision into account, for example if no departure from the previous decision is involved but it reinforces the decision-maker's own view. Moreover there is every reason to adopt a more stringent test of what reasons have to deal with than for what is capable of being a material consideration on the facts. Previous decisions are not legal precedents that have to be distinguished and it would not be in the public interest to add a requirement to the existing burdens placed on planning authorities to address every previous decision placed before them that they regard not unreasonably as relevant in some way in the circumstances whenever they provide reasons for a decision. There is no requirement to refer in any reasons provided for a decision to every material consideration that may have been taken into account in reaching it.

86. In any event the issue is different when (as in this case) the previous decision has not been placed before the decision maker. Mr Young submitted that, in the context of planning, unless the previous decision is drawn to the decision-maker's attention, its decision will not be unlawful if no regard is had to it.

87. In my judgment the notion that an administrative decision-maker has no obligation to take any reasonable steps to acquaint itself with relevant information to enable the decision with which it has been entrusted to be made in the public interest is plainly untenable, as Lord Diplock's statement in *Secretary of State for Education and Science v Tameside Borough Council* quoted above illustrates. A local planning

authority has to do so when dealing with any planning application. Nor are the Secretary of State and his inspectors immune from any such requirement. When the Secretary of State or one of his inspectors are considering a planning appeal, they are not presiding over a merely adversarial process. It is for them to determine the appeal in accordance with the law, not unreasonably and in the public interest. To adopt an absolute rule such as that for which Mr Young contends would be inconsistent in my judgment with the proper discharge of the function with which they have been entrusted.

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[15], 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.

89. If Mr Young's submission were correct, for example, the Secretary of State could issue decisions on the same day lawfully granting planning permissions on two separate sites for the same development in an area in which, in terms of its proper planning, there is capacity for only one of them, provided that the decision in one was not drawn to the attention of the decision-maker in the other and vice versa. No party interested in the development of either site would have had any opportunity to draw the irrationality of the result and the damage to the public interest to the decision-makers' attention. But the decision in each, if Mr Young were correct, would be unimpeachable. In my judgment the absurdity that results from applying Mr Young's proposed rule simply illustrates that it is flawed in principle.

90. Mr Young sought to rely in support of his submission, however, on the statement by Lewis J in *Cotswold District Council v Secretary of State for Communities and Local Government* supra at [61] that:

> "In general terms, however, the Secretary of State (or an inspector) is not obliged to take into account previous planning decisions if they are not drawn to his attention. The Secretary of State (or an inspector) is not required to make his own inquiries in order to establish if there is a previous decision which may be potentially relevant."

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15 see eg rule 17 of Town and Country Planning (Inquiries Procedure) (England) Rules.

91. Lewis J took the "general position" to be set out in Granchester Retail Parks plc v Secretary of State for Transport, Local Government and the Regions and Luton Borough Council [2003] EWHC 92 (Admin) and to be reflected in London Borough of Hounslow v Secretary of State for Communities and Local Government and Kapoor [2009] EWHC 1055. I have checked the cases referred to by Jackson J in the Granchester decision at [26]. In my judgment none of them establishes the proposition that a planning inspector's obligation to take into account relevant decisions of his colleagues only extends to decisions drawn to his attention. The Hounslow case in fact indicates otherwise. In that case, although mention of a previous appeal had been made in the notice of appeal to the Secretary of State, the local planning authority had informed the Inspectorate that there had not been any previous appeal (which in fact there had been, refusing planning permission) with the result that the previous decision was not taken into account. Collins J nonetheless quashed the decision on the application of the local authority which had made the false statement on the basis of the inspector's failure to take into account the previous decision.

92. Be that as it may be, however, what Lewis J was expressing was his view of the "general position", not necessarily an invariable rule. That is confirmed by the fact that he recognised that the Court of Appeal had quashed a decision of the Secretary of State in *Bath Society v Secretary of State for the Environment* [1991] 1 WLR 1303 for his failure to take into account a recommendation by a local plan inspector that had not been drawn to his attention: see at [66]-[67].

93. In the *Bath Society* case supra the Society wanted a field in Bath to be kept open. It objected to the draft Local Plan, in which the field was shown without any notation, urging that it should be kept as open space. The Society also objected to its proposed residential development when there was an appeal to the Secretary of State against the City Council's refusal to grant planning permission for such development. Shortly before the inspector on the planning appeal submitted his report to the Secretary of State, the inspector considering the draft Local Plan recommended to the City Council that the field should be shown as open space in the Local Plan, as it was necessary to the setting and character of the buildings in the locality. The inspector reporting to the Secretary of State was unaware of this recommendation when he submitted his report. In it he mentioned the objection, but without giving any detail about it, and recommended the grant of planning permission. Before the Secretary of State took his decision the City Council sent the local plan inspector's report to the regional office of the Department of the Environment in confidence for purposes wholly unconnected with the planning appeal and did not draw their attention to the recommendation. The Secretary of State then issued his decision granting planning permission without having taken into account the recommendation with respect to the Local Plan that, at that time, the City Council had not yet accepted. The Court of Appeal quashed that decision. It thought that it would have been "easy" for those in the Department to have studied the local plan inspector's report to ascertain what he had recommended and to have taken that recommendation into account in some way and 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": see at p1313c-d. The content of the recommendation was material as "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": see at p1311c[16].

94. In my judgment the decision in *Bath Society* case is one that illustrates that, if a decision-maker may have grounds for considering that there may be a decision that has not been drawn to his attention that could be significant on a particular matter in relation to the decision it has to make, then the decision-maker may be required to take reasonable steps to discover whether or not there is such a decision. Whether that is so will depend on the circumstances.

95. In my judgment that principle also explains the decision in *Dear v Secretary of State for Communities and Local Government* supra in which a prospective decision had been referred to but not in relation to what transpired to be the relevant matter in the decision impugned. An issue in the planning appeal in that case was whether planning permission for a limited period should be given for a residential caravan site for travellers within the Green Belt. The inspector in his report to the Secretary of State recommended that such permission should be refused as he did not consider that there was a realistic prospect of travellers sites coming forward elsewhere in such a period (as planning policy required if temporary permission was to be granted). After his report had been submitted, but before the Secretary of State issued his decision, another inspector granted temporary planning permission for a similar development, as he considered that there was in fact such a prospect. In his decision letter, issued some two months after that decision, the Secretary of State refused to grant temporary planning permission for the reasons given by the inspector in his report to him. HHJ Belcher said (at [32]) that:

> ".....the awaited decision in this case was clearly flagged in the materials, albeit on a different point [namely whether there was an unmet need]. In my judgment the Secretary of State should have had regard to the [Inspector's] Decision. Had he done so he would then have had to address the issue of consistency

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16 There are three points about this decision that may be noted: (i) Glidewell LJ thought that it was for the court itself to decide whether a consideration was material in the circumstances, rather than considering whether the failure to consider it was unreasonable. In that respect the decision is inconsistent with the decisions considered above. (ii) Glidewell LJ also thought that, whether or not the Secretary of State knew or ought to have known of the recommendation merely went to the court's discretion to quash the decision. In my judgment it was relevant to whether it was unreasonable for the Secretary of State not to take it into account, as the Society itself had contended. Although it would have made no difference to the outcome in the *Bath Society* case, the analysis would matter in cases in which the court has to determine the legal effect of a decision by a public authority without having any relevant discretion in respect of relief. Moreover relief is not normally refused merely because the legal flaw in the decision was not the decision-maker's fault, as numerous cases testify, and a failure to take reasonable steps to acquire information required if a decision is to be taken lawfully is itself a failure that may invalidate the decision: see eg *R (Khatun) v Newham London Borough Council* [2004] EWCA Civ 55, [2005] QB 37, at [35]-[36] and subsequent cases. (iii) What the Department was taken to be aware of at the time of the decision was not the recommendation itself but the existence of a report that *might* contain a recommendation of relevance.

> head on, either by accepting and following the findings in the [Inspector's] Decision as to future traveller sites coming forward, or to have expressly departed from that decision giving clear and proper reasons for doing so. He has done neither."

96. In two cases cited to me decisions on planning appeals have withstood challenges for a failure to take into account a previous decision that was not drawn to the decision-maker's attention.

97. In *Cotswold District Council v Secretary of State for Communities and Local Government* supra the Secretary of State granted planning permission for residential development on two sites in Tetbury agreeing with his inspector's conclusion in each that the local authority could not demonstrate that it had a five year supply of deliverable housing sites. Between the submission of the inspector's reports on those appeals and the Secretary of State's decision, an inspector granted permission for residential development on another site in the authority's area also concluding that the local authority could not demonstrate such a supply. The authority challenged the Secretary of State's decisions on the basis that, in calculating the housing requirement, the inspector in that decision had only added a 5% "buffer" whereas the Secretary of State had accepted the inspector's recommendation to add a 20% "buffer"[17]. In fact the authority could not have demonstrated such a supply even if no "buffer" at all had been added to the requirement which its supply of housing sites had at least to match: see at [28] and [29]. Lewis J dismissed the authority's application to quash the Secretary of State's decisions on the basis that the inspector's decision was not so obviously material in his view that the Secretary of State was obliged to have regard to it. In fact the amount of the "buffer' to be added was self-evidently immaterial. The conclusion, that there was no five-year supply of deliverable housing sites, would necessarily have been the same regardless of the application of any additional buffer.

98. In *St Albans City and District Council v Secretary of State for Communities and Local Government* supra the Council impugned the Secretary of State's decision to grant planning permission for a strategic rail freight interchange within the Metropolitan Green Belt. He had granted permission as in his view there were very special circumstances justifying the grant in that case. The Council impugned the decision on the ground that the Secretary of State had failed to take into account another decision, issued seven days earlier, refusing planning permission for different type of development, a waste management facility, on another site in the Green Belt four miles away. In that case the Secretary of State considered that there were not very special circumstances sufficient in the circumstances to justify the grant of permission. The Council contended that this decision should have been taken into account because of the way in which Green Belt policy had been applied in that case. Holgate J approached the issue on the basis that it was for him to decide whether or not the other decision was so obviously material that it should be taken into account as a matter of statutory construction and that this was a less restrictive test that one of unreasonableness: see [72]-[77]. This also appears to have been the approach of

[17] Lewis J found that, looking at the relevant reports, there was in any event "no unexplained inconsistency" between them: see [69].

Lewis J in *Cotswold District Council v Secretary of State for Communities and Local Government* supra. For the reasons given above, however, that is not an approach that is open to me on the authorities.

99. Holgate J then held that the "so obviously material test" "should be applied in this case" by asking "whether [the] aspects [of the other decision] relied upon by the Council were sufficiently closely related to the..appeal proposal as to oblige the Secretary of State to deal with them in his decision on the latter": see [101]. He thus took a test which the Court of Appeal had suggested in *R (Baber) v Secretary of State for the Environment* supra as one that the decision-maker might use to determine whether it needed to address a previous decision (that had been drawn to its attention) in the reasons for its decision as being the test which the court should apply, at least in this case, to determine whether a decision (which had not been drawn to the Secretary of State's attention by the parties) was one that the Secretary of State was required to take into account (regardless of whether or not it was unreasonable of him not to have taken steps to discover it). Holgate J found that the circumstances of the earlier decision on the waste management facility were not sufficiently similar or related to the issues on the appeal in respect of the strategic rail freight interchange that the Secretary of State was obliged to take that decision into account when he determined the appeal: see [122]. Given that the test Holgate J was applying was one he considered to be less restrictive than a test of unreasonableness, the result would not have been different had he applied that test.

100. In summary, therefore, in my judgment there is a public interest in securing reasonable consistency in the exercise of administrative discretions that may mean that it is unreasonable for a decision-maker not to take into account other decisions that may bear in some respect on the decision to be made. There is no exhaustive list of the matters in respect of which a previous decision may be relevant. That must inevitably depend on the circumstances. Whether a decision with which the decision-maker has not been supplied is one that no reasonable decision-maker would have failed to take into account will likewise depend on the circumstances. These may include (like any other matter to which a decision-make may have regard) whether the decision-maker was or ought to have been aware that such a decision may exist, the significance that any such decision might have in relation to the decision to be made and what steps may have been required to ascertain whether or not it did exist and to obtain it. Such principles apply to all planning authorities.

101. When the Secretary of State or one of his inspectors is considering a planning appeal, they are not presiding over a merely adversarial process. The function vested in them is one to be discharged in accordance with the law, not unreasonably and in the public interest. When considering the discharge of that function, 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. But that does not mean that they are never required to make further enquiries about any matter, including about other possible decisions that may be significant. 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 depending on the circumstances (as, for example, the decisions in *Bath Society v Secretary of State for the Environment* supra *London Borough of Hounslow v Secretary of State for Communities and Local Government and Kapoor* supra, and *Dear v Secretary of State for Communities and Local Government* supra illustrate). Whether or not they are required to do so depends on the circumstances.

102. In Dear v Secretary of State for Communities and Local Government supra HHJ Belcher said (at [32]) that:

> "I tend towards the view that [the] proposition that the Secretary of State should be cognisant of decisions in his name, whether or not flagged up in the materials before him, is correct."

For my part, however, I would reject that proposition. It would involve the adoption in practice of an indefensible fiction. Decisions taken in the name of a minister by an inspector or by the minister himself on planning appeals and applications called in for the ministers own determination date back to the coming into force of the Town and Country Planning Act 1947. They may now cover sites throughout England. The numbers each year are not inconsiderable. In the year 2015-16, for example, the Planning Inspectorate received 11,778 appeals under section 78 of the 1990 Act[18]. Treating the Secretary of State and his inspectors as being cognisant of the content of the decisions in all such appeals would itself be unreasonable and not in the public interest. There is no evidence, for example, that the Secretary of State and his inspectors are now able to ascertain how each and every part of any extant guidance issued by the Secretary of State, whether in the NPPF or otherwise, has been applied in the Secretary of State's name insofar as it may be relevant to the decision they have to make. But, even if such inquiries were feasible, a requirement to check all cases throughout the country would not merely be likely to be significantly time-consuming but also so often barren in useful results, since all the cases they consider are invariably different to some extent, that any requirement to do so would be contrary to the public interest in the expeditious determination of planning applications and appeals.

103. Ms Sargent sought to limit her submission that the Secretary of State should be cognisant of decisions taken in his own name, however, to decisions taken by the Secretary of State to the exclusion of those deemed to be taken by him but in fact taken by his inspectors.

104. The number of such decisions is relatively small. The published official statistics show that, in the year 2015-2016, for example, the Secretary of State received 92 reports from inspectors on applications which had been called in, or on planning appeals which had been "recovered", for the Secretary of State's own determination[19]. More significantly, however, such cases represent a class of planning

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[18] see Planning Inspectorate Statistics Table 2.1 accessible at Gov.UK.

[19] see Planning Inspectorate Statistics Table 1.4 accessible at Gov.UK. Lord Slynn noted in *R (Alconbury Developments Ltd and Others) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295, at [10] that "The Divisional

decision that the Secretary of State himself considers to be of such significance that he ought himself to determine whether or not permission should be granted. They may, of course, include decisions about specific developments that are of importance in themselves but which do not have wider ramifications for decision-making in other cases. But they may also include ones that do. "By means of a central authority some degree of coherence and consistency in the development of land can be secured": per Lord Clyde *R (Alconbury Developments Ltd and Others) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295, at [140]. Thus, as Gilbart J stated in *Moore and Coates v Secretary of State for Communities and Local Government* [2015] EWHC 44 (Admin), [2015] JPL 762, at [18],

> "[a] route by which the [Secretary of State] can set out his views on planning policy is in decision letters issued by him. It has been the practice of successive Secretaries of State to call in some applications..or recover a set of appeals so that he can set out his approach. That will then carry great weight in other development control decisions (whether made by local planning authorities or on appeal). Thus, for example, the Secretary of State might call in a group of applications or appeals for determination by him, or arrange that a number of proposals be heard at one inquiry. In doing so, he of course reduces the chances that subsequent applicants, appellants or local planning authorities might seek to avoid adherence to the line he has taken on the basis that he had only considered one application."

That function would be frustrated were the Secretary of State himself to issue apparently inconsistent decisions on matters that may have ramifications for decision-making in other cases.

105. In my judgement it does not follow, however, that the Secretary of State is required (or must be taken as a matter of law) to be aware of the content of each and every decision on the grant or refusal of planning permission that he or one of his predecessors has ever himself taken. That would again be an indefensible fiction. But in my judgment what it does do is to indicate that the steps that the Secretary of State ought reasonably to take to avoid apparently inconsistent decisions on matters that may have ramifications for other cases may be greater, and the obligation to explain any reasons for a different approach in such cases (rather than allowing others to infer what they may be) may be more stringent in practice, than the steps and explanation that might be reasonably required of an inspector with respect to decisions of other inspectors. Avoiding apparent and unexplained inconsistencies in the Secretary of State's own decisions on matters that may have ramifications for decision-making in other cases is an important consideration in determining what may required of him if he is not to act unreasonably.

Court [in that case] found that of some 500,000 planning applications each year about 130 were "called in" by the Secretary of State and of some 13,000 appeals to the Secretary of State each year about 100 were "recovered" by the Secretary of State.

106. Finally it may be noted that, even if the decision-maker on a planning appeal may normally rely, not unreasonably, on participants to bring any relevant decision to his attention in their written representations or evidence or at a hearing, that does not necessarily mean that the decision is immune from challenge on other grounds when the decision-maker has not taken a previous decision into account. That is illustrated by another case to which I was referred in relation to the second ground on which this application is made, *R (Connolly) v Havering London Borough Council* [2009] EWCA Civ 1059, [2010] 2 P&CR 1. In this case the local planning authority refused a planning application for extensions and alterations to the south and north sides of the applicant's property. The Claimants who lived on the north side of the property were unaware of the application. Permission was refused by the authority only because those on the south side were unsuitable. The applicant then applied for permission only for those works on the north side in a form which was materially identical to the first application. That second application was refused after the Claimants had objected. The applicant then appealed to the Secretary of State against the refusal of his first application. The authority failed to include any details of the second application in its description of the planning history for that appeal. The Claimants objected to the proposal but did not give details of the Council's decision on the second application as they assumed that the Council would have done so. The inspector noted that the main issue related to the extension on the south side as the authority had raised no objection to that on the northern side. She agreed with the authority's analysis in its officer's report on the first application and did not consider the Claimants' objection well founded. Accordingly she granted permission only for the extension on the north side of the property. The Court of Appeal upheld the decision of Pickford J quashing the inspector's decision on the basis that there was an established mistake about the planning history, the omission of a reference to the authority's negative views about a materially identical proposal for an extension on the north side of the property, which was not the Claimants' fault, but which had played a material part in the inspector's reasoning which it was not possible to say was immaterial. In this case, therefore, the inspector's decision was quashed on the ground of mistake of fact about the existence of a previous relevant decision which she had no reason to suspect existed but which the authority were at fault in not bringing to her attention.

iv. application of the relevant principles in this case

107. It is true, as Mr Young pointed out, that the Claimants are not claiming that the Secretary of State's planning judgment in this case, that Policy CT1 was not up-to-date, was one a reasonable person could not have reached. But that does not mean that their claim must fail. That depends on whether it was unreasonable for the Secretary of State not to have taken into account the Ringmer decision before reaching that conclusion and whether, had he done so, he might have reached a different conclusion.

108. The Ringmer and Newick appeals were both "recovered" by the Secretary of State for his own determination because the appeals in each involved a proposal for residential development of over 10 units in an area in which a qualifying body had submitted a neighbourhood plan or such a plan had been made. They would both, therefore, necessarily involve consideration of the Secretary of State's policies for delivering a wide choice of high quality homes, including whether there was a five year supply of

deliverable housing sites in the same district, and any tension which they might have with one of the Secretary of State's own core planning principles, that "planning should...be genuinely plan-led, empowering local people to shape their surroundings, with succinct local and neighbourhood plans setting out a positive vision for the future of the area".

109. The decision maker on the Newick appeal was aware that the JCS had been adopted on May 11th 2016 after the public local inquiry had been closed by the Inspector on February 12th 2016 (although further written representations had been provided). It was plainly desirable in the public interest for the Secretary of State to avoid reaching a conclusion, about the existence of a five-year land supply and the significance of the JCS for any neighbourhood plan in the district, that was apparently inconsistent with another one of his own decisions without any explanation. Ascertaining whether there had been any such decision since the inquiry had closed should not have been difficult: there is a list of decisions on called-in applications and "recovered" appeals in date order and giving their location (with links to the decisions themselves) that the Government itself makes available on the internet[20]. There is no evidence, however, about what measures (if any) the Secretary of State has taken to ensure that his own decisions on the same class of case are not apparently inconsistent. But in my judgment no reasonable Secretary of State, one of whose functions in the public interest is to secure some degree of coherence and consistency in the development control, would fail to take reasonable steps to ensure that his own decisions on the same class of case are not apparently inconsistent at least in the same district. Had that been done by ascertaining whether any such decision had been issued after the Inspector had closed the Inquiry in this case, the decision in the Ringmer appeal would have come to the attention of the decision-maker in the Newick appeal.

110. Mr Young submitted, however, in effect that it was for the parties to monitor what decisions the Secretary of State or his inspectors may take and bring them to his attention. In this case the local planning authority had not informed the Secretary of State that he had issued the decision on the Ringmer appeal that the authority would have received and it must be assumed that it did not consider it necessary to do so. In my judgment that submission begs the question. The obligation to act not unreasonably in reaching his decision is that of the Secretary of State. Reliance on the participants to an appeal after an Inquiry has been closed may be insufficient. In this case the local planning authority may have assumed, not unreasonably, that the Secretary of State would have had measures in place to ensure that his own decisions on the same class of case in the same district are not apparently inconsistent and that they did not need to make any further representations in respect of the Newick appeal, as the decision in the Ringmer appeal supported their case that there was a five year supply of deliverable sites, that Policy CT1 was to be treated as being up-to-date and that the "tilted balance" did not apply. Moreover there is no suggestion that the Claimants or the Village Society were aware of the Ringmer decision.

111. In my judgment, therefore, had the Secretary of State acted not unreasonably, the decision in the Ringmer appeal would have come to the attention of the decision-maker in the Newick appeal. He would inevitably have appreciated, had the earlier

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[20] see https://www.gov.uk/government/collections/planning-applications-called-in-decisions-and-recovered-appeals.

decision then been read, that the Secretary of State had reached a different conclusion in the Ringmer appeal, on whether Policy CT1 was up-to-date and whether or not accordingly the "tilted balance" was to be applied, than the Inspector had done in the Newick appeal.

112. Mr Young contended that the Secretary of State was not entitled to take his own decision 10 weeks before in the Ringmer appeal into account as it was itself "perverse, irrational and *Wednesbury* unreasonable" and that, in any event, it was so different that the Secretary of State was not obliged to take it into account. In my judgment neither of these contentions has any merit.

113. Mr Young's case, that the Ringmer decision was irrational, was advanced principally on the basis that any planning boundary must be adjusted to take into account growth in any settlement to which it relates; that Policy CT1 was only ever intended to cover such growth until 2011; that it was plainly out-of-date by the time of the Ringmer decision, as it had not been revised in the neighbourhood plan and the JCS, even to accommodate strategic allocations; and that that task had been left to the Local Plan Part 2. This argument is very similar to that which the inspector recorded that the appellant in the Ringmer appeal had advanced: see his report at [10.39][21].

114. This argument ignores certain matters. (i) As I have explained (in paragraphs [22] and [23] above) Policy CT1 was not superseded, but was retained, on the adoption of the JCS and the planning boundaries to which it refers were shown on the adopted policies maps which formed part of the JCS. The Inspector examining the JCS found it to be sound as a whole. In my judgment it was open to the Inspector in the Ringmer appeal to consider (as he did at paragraph [10.40][22]) that

> "in finding the JCS as a whole sound, the JCS Inspector was accepting the approach of allocating some of the development sites now, whilst retaining the CT1 boundaries for the time being pending review through LPPt2. That is a strong indication that the CT1 planning boundaries should be regarded as up-to-date".

(ii) Secondly the Inspector in the Ringmer appeal also found[23] that "a large proportion of the total growth planned, or likely to be planned, for Ringmer up to 2030 has already been provided for in the JCS and RNP" (both of which had been adopted or made "very recently") and that "there is an identified process for allocating the balance of the housing sites required" (which was "likely" to "look first to the four towns in the district").

115. In those circumstances, in my judgment, it cannot be contended that the inspector and the Secretary of State in that case were irrational to "conclude that Policy CT1 should be regarded as up-to-date for the purposes of this appeal". Of course it may not be up-to-date with respect to a site allocated in the JCS for development on the countryside

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21 See paragraph [25] above.

22 See paragraph [25] above.

23 See paragraphs [10.43] and [10.44] quoted in paragraph [25] above.

side of the planning boundary[24], but it does not follow that, if it is not up-to-date there, it is not up-to-date anywhere else.

116. The other argument that Mr Young advanced for contending that the Ringmer decision was irrational was that the protection of the countryside from encroachment by inappropriate development in Policy CT1 was not consistent with the NPPF. This argument, which appears to have found favour with the Inspector at the Newick Inquiry is that the only protection of the countryside referred to in the NPPF relates to Green Belt and valued landscapes under paragraph [109] of the NPPF[25]. Although Ms Sargent sought to persuade me that this argument had been rejected in the Ringmer appeal, the material on which she relied does not appear to support that contention. But, in any event, in my judgment this argument does not show that the Secretary of State's conclusion on the Ringmer appeal was irrational. The Secretary of State agreed, for example, with the Inspector in the Wivelsfield decision[26] that

> "While policy CT1 gives blanket protection to countryside, the NPPF directs specific protection to valued landscapes. Nevertheless, a core planning principle of the NPPF includes recognising the intrinsic character and beauty of the countryside. Policy CT1 is expressed as the 'key countryside policy' in the Local Plan. The proposal would involve the incursion of development on a greenfield area of countryside. Taking into account also the finding above that a five-year housing land supply is demonstrated, I consider that policy CT1 is not out-of-date for the purposes of paragraph 14 of the NPPF."

One way in which the intrinsic character and beauty of the countryside is thus recognised in the NPPF is the well-known advice given (in paragraph [55]) that "local authorities should avoid new isolated homes in the countryside unless there are special circumstances such as" those listed in that paragraph. Accordingly in my judgment it cannot be considered irrational to regard a policy that was designed (as the explanatory text stated) "to identify the area beyond the boundaries where development would normally be unacceptable unless it is for uses compatible with the countryside"[27] as being out-of-date merely because the NPPF directs specific protection to Green Belts and valued landscapes and the planning boundary does not follow the boundaries of those areas.

117. For these reasons Mr Young's contention that the Ringmer decision was itself "perverse, irrational and *Wednesbury* unreasonable" and that it could not lawfully be taken into account must be rejected.

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[24] If Policy CT1 and the planning boundary and the policy with respect to a strategic site were inconsistent to any extent, the conflict would be resolved in favour of the JCS policy: see sections 17(5) and 38(5) of the 2004 Act. But, where they are not in conflict, both remain applicable parts of the development plan.

[25] See [IR150]-[IR151] quoted in paragraph [31] above.

[26] See paragraph [39] above.

[27] See paragraph 7.3 of the LDLP quoted in paragraph [17] above.

118. The question remains, however, whether the Ringmer decision was so different that the Secretary of State could reasonably not take it into account.

119. For this purpose it is convenient to consider the reasons why the Secretary of State decided that Policy CT1 was out-of-date in his Newick decision. Those reasons were the ones that the Inspector gave in [IR227] and [IR228][28]. To repeat, but inserting roman numerals for convenience to identify separate reasons, these paragraphs stated that

> "227 ....(i) Policy CT1 was adopted in 2003 and seeks to limit development within the planning boundaries defined under the LDLP, which expired in 2011. (ii) It does not reflect the housing requirement or spatial distribution set out in the recently adopted JCS, and (iii) its protection of the countryside from encroachment by inappropriate development is not, as the Council contend, entirely consistent with the Framework. Based on the evidence provided the weight which can be attributed to this policy conflict is therefore reduced, and for the purposes of the Framework it is out-of-date.
>
> 228. (iv) In saving CT1 beyond 2007 the Secretary of State confirmed that it must be read in the context of other material considerations. This includes the Framework, and where relevant policies are out-of-date, its presumption in favour of sustainable development..."

120. Reason (i) reflects the same argument that was rejected in the Ringmer appeal. Reason (ii) is not obviously reconcilable with the responses to that argument that commended themselves to the Inspector, and thus the Secretary of State, when rejecting that argument in the Ringmer appeal, namely (a) the implications of the assessment of the JCS as a whole, including retention of the planning boundaries for the time being, as sound; (b) that a large proportion of the total planned growth in the JCS up to 2030 had already been provided for and (c) that "there is an identified process for allocating the balance of the [planned] housing sites required" (which was "likely" to "look first to the four towns in the district"). Ms Sargent submitted that the same could be said of Newick, which had in fact made provision for all the identified planned growth for the settlement in the JCS and which was also subject to constraints in allocating further sites. In my judgment what is apparent is that in relation to reasons (i) and (ii) the two inspectors appear to have taken a radically different approach to the significance of the retention of Policy CT1 and the inclusion of the planning boundaries in the JCS in May 2016 and that the Newick Inspector gave no apparent consideration to the finding by the inspector who considered it that the JCS as a whole was sound. They also took a radically different approach to the significance of the provision that had been made for the planned growth for each settlement identified in the JCS. I have considered reason (iii) above. But given the conclusion in the Newick decision that Policy CT1 was out-of-date appears to have been one reached on the basis of all three reasons, it is impossible to say whether the same conclusion would necessarily have been reached had the Secretary of State

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[28] See paragraph [33] above.

adopted in the Newick decision the same approach to the question that he and his inspector had done some ten weeks earlier.

121. Whether (iv) is an additional reason for the conclusion that Policy CT1 was out-of-date must be doubtful and it might be said to neglect the fact that the Policy had been retained in 2016 (as mentioned above), but in any event it would have been equally applicable to each decision. Mr Young also suggested that the result in each case was merely the result of the evidence provided and submissions made in each appeal. That may be so but it does not explain why the apparently inconsistent conclusions reached in the light of them are explicable in the light of the reasons given for each and which approach should be preferred when considering Policy CT1 in future.

122. In my judgment, therefore, it cannot be said that the Ringmer decision was so different that the Secretary of State could reasonably not take it into account. On the contrary no reasonable decision-maker could not have taken it into account and considered whether or not they agreed with the reasons for regarding Policy CT1 as being up-to-date given in it and whether they were equally applicable in the Newick appeal. Moreover, had the Secretary of State acted reasonably having considered the Ringmer decision, he could not have failed to provide reasons why his conclusion in that decision, that Policy CT1 was up-to-date and that the "tilted balance" should not be applied in that case, should not equally be reached in the Newick decision, if that was his conclusion. It can only undermine public confidence in the operation of the development control system for there to be two decisions of the Secretary of State himself, issued from the same unit of his department on the same floor of the same building within 10 weeks of each other, reaching a different conclusion on whether or not a development plan policy is up-to-date without any reference to, or sufficient explanation in the later one for the difference.

123. Such confidence can only be further undermined (although it is irrelevant to the decision in this case) that in his Wivelsfield decision, about four months after the Newick decision, the Secretary of State once again found that Policy CT1 was up-to-date.

124. For the reasons given above, therefore, in my judgment the Secretary of State unlawfully failed to take into account his own Ringmer decision when determining the Newick appeal.

GROUND 2

i. background

125. Ashdown Forest is a SAC and a SPA forming part of *Natura 2000*, a collection of sites of EU-wide importance. Article 6 of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora ("*the Habitats Directive*") provides inter alia that:

> "3. Any plan or project not directly connected with or necessary to the management of [such a] site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of

> the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.
>
> 4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected."

126. In relation to these provisions the Court of Justice has stated in C-127/02 Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris van Landbouw, Natuurbeheer en Visserij [2005] 2 CMLR 31,

> "43 .....the first sentence of Art.6(3) of the Habitats Directive subordinates the requirement for an appropriate assessment of the implications of a plan or project to the condition that there be a probability or a risk that the latter will have significant effects on the site concerned.
>
> 44 In the light, in particular, of the precautionary principle, which is one of the foundations of the high level of protection pursued by Community policy on the environment, in accordance with the first subparagraph of Art.174(2) EC, and by reference to which the Habitats Directive must be interpreted, such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have significant effects on the site concerned. Such an interpretation of the condition to which the assessment of the implications of a plan or project for a specific site is subject, which implies that in case of doubt as to the absence of significant effects such an assessment must be carried out, makes it possible to ensure effectively that plans or projects which adversely affect the integrity of the site concerned are not authorised, and thereby contributes to achieving, in accordance with the third recital in the preamble to the Habitats Directive and Art.2(1) thereof, its main aim, namely, ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora.
>
> 45 In the light of the foregoing, the answer to Question 3(a) must be that the first sentence of Art.6(3) of the Habitats Directive must be interpreted as meaning that any plan or project not directly connected with or necessary to the management of the site is to be subject to an appropriate assessment of its implications for the site in view of the site's

> conservation objectives if it cannot be excluded, on the basis of objective information, that it will have a significant effect on that site, either individually or in combination with other plans or projects."

127. JCS Core Policy 10.3 seeks to give effect to those principles[29] It provides that:

> "To ensure that the Ashdown Forest (SAC and SPA) is protected from recreational pressure, residential development that results in a net increase of one or more dwellings within 7km of the Ashdown Forest will be required to contribute to:
>
> i. The provision of Suitable Alternative Natural Greenspaces (SANGs) at the ratio of 8 hectares per additional 1,000 residents; and
>
> ii. The implementation of an Ashdown Forest Strategic Access Management and Monitoring Strategy (SAMMS).
>
> Until such a time that appropriate mitigation is delivered, *development that results in a net increase of one or more dwellings within 7km of Ashdown Forest will be resisted.* Applicants may consider mitigation solutions other than SANGs in order to bring forward residential development. Such solutions would need to be agreed with the District Council and Natural England." (Emphasis added)

128. Regulations 61 and 68 of the Conservation of Habitats and Species Regulations 2010 apply to the granting of planning permission on an application under Part 3 of the 1990 Act (by virtue of regulations 59 and 60 of those Regulations).

129. Regulation 61 of the 2010 Regulations provides that:

> "(1) A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which—
>
> (a) is likely to have a significant effect on a European site or a European offshore marine site (either alone or in combination with other plans or projects), and
>
> (b) is not directly connected with or necessary to the management of that site,
>
> must make an appropriate assessment of the implications for that site in view of that site's conservation objectives.

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[29] The policy was quashed by the Court of Appeal in *Ashdown Forest Economic Development LLP v Secretary of State for Communities and Local Government* [2015] EWCA Civ 681, [2016] PTSR 78, on the ground that reasonable alternatives to it had not been considered. It was adopted following a consideration of those.

> .....
>
> (6) In considering whether a plan or project will adversely affect the integrity of the site, the authority must have regard to the manner in which it is proposed to be carried out or to any conditions or restrictions subject to which they propose that the consent, permission or other authorisation should be given."

130. Regulation 68 provides *inter alia* that:

> "(2) Where the assessment provisions apply, the competent authority may, if they consider that any adverse effects of the plan or project on the integrity of a European site or a European offshore marine site would be avoided if the planning permission were subject to conditions or limitations, grant planning permission or, as the case may be, take action which results in planning permission being granted or deemed to be granted subject to those conditions or limitations.
>
> (3) Where the assessment provisions apply, outline planning permission must not be granted unless the competent authority are satisfied (whether by reason of the conditions and limitations to which the outline planning permission is to be made subject, or otherwise) that no development likely adversely to affect the integrity of a European site or a European offshore marine site could be carried out under the permission, whether before or after obtaining approval of any reserved matters.
>
> (4) In paragraph (3), "outline planning permission" and "reserved matters" have the same meanings as in section 92 9 of the TCPA 1990 (outline planning permission)."

ii. the Inspector's Report and the Secretary of State's decision

131. In his report the Inspector stated (at [IR29]) that there was no dispute about the fact that "the site is located outside the 7km zone of influence surrounding the Ashdown Forest Special Protection Area ('SPA')." He later added:

> "212. The Ashdown Forest SPA and SAC are located approximately 7km to the north of Mitchelswood Farm. I have therefore had regard to the effect of the proposal on the integrity of this European site, and considered the representations made at the Inquiry by Dr Kay in particular [112].
>
> 213. Although the appeal site is situated close to the boundary of the 7km 'Zone of Influence', it is nonetheless located outside the designated area. This led to the Council's conclusion that,

> following assessment by Natural England, the proposal would not result in any likely significant effects on the internationally important features the designated areas, either in isolation or combined with other projects. Based on the evidence provided I have no reasons to disagree."

132. In the DL it was stated (at [21]) that:

> "The Secretary of State notes that the Council has concluded (IR213) that the proposal would not result in any likely significant effects on the Ashdown Forest Special Protection Area or Special Area of Conservation, and agrees with the Inspector's conclusion that the proposal would not result in any likely significant effects on the internationally important features of the designated areas, either in isolation or combined with other projects."

iii. submissions

133. Ms Sargent submitted that the Inspector's conclusion was based on his view that the appeal site was "located outside" the designated 7km designated area but that that is wrong: part falls within it (as the information provided in support of the application showed). That was a material error of fact. Alternatively, if the Inspector and Secretary of State had accepted that it was sufficient for the construction zone to fall outside that area, then their approach in the light of the true facts was unlawful. The conditions imposed on the grant of planning permission do not require any such result to be achieved.

134. Mr Young contended that this ground lacks any merit as the housing applied for can be constructed outside the 7km zone as the illustrative plans produced at the Inquiry showed. There was no need to impose any condition on the grant of outline planning permission to that effect. No application for approval of reserved matters would be granted if new houses were proposed within the zone. But in any event condition (7) imposed by the Secretary of State would secure that result. Condition (7) provides that:

> "No development shall take place until a detailed scheme of ecological enhancements and mitigation measures, to include on-going management as necessary, based on the recommendations of the Ecological Assessment (September 2014) by Aspect Ecology Ltd has been submitted to and approved in writing by the local planning authority. The scheme shall be carried out and managed thereafter in accordance with the approved details."

iv. discussion

135. In my judgment it is clear that the Inspector and the Secretary of State made an error of fact for which the Claimants cannot be held responsible. Part of the site of this outline application for residential development for up to 50 dwellings lies within the 7km zone.

136. The 7km zone is one that seeks to identify a boundary beyond which it can be concluded that a development will not adversely affect the integrity of the Ashdown Forest SPA and SAC, giving effect to the "precautionary principle". Mr Young is plainly right that the new houses envisaged can be accommodated on that part of the site that lies outwith the 7km zone and it may well be the case that any application for the approval of reserved matters is very likely to be refused if it proposed a new dwelling within it. But that in my judgment is not sufficient.

137. Regulation 68(3) of the 2010 Regulations provides *inter alia* that

> "outline planning permission must not be granted unless the competent authority are satisfied (whether by reason of the conditions and limitations to which the outline planning permission is to be made subject, or otherwise) that no development likely adversely to affect the integrity of a European site…could be carried out under the permission, whether before or after obtaining approval of any reserved matters." (Emphasis added).

138. It is thus not sufficient that the local authority or the Secretary of State were satisfied (had they thought about the matter) that no such development *would* be carried out if outline planning permission were granted. They had to be satisfied that it *could not* be carried out if it was. That is consistent with the fact that article 6(3) of the Habitats Directive has only been transposed so as to apply the relevant test when an application for planning permission (not one for reserved matters) is under consideration. It is also consistent with the strict application of the "precautionary principle" required when the authorisation for a development is granted: cf *C-258/11 Sweetman and others v An Bord Pleanála* EU:C:2012:743, [2014] PTSR 1092, at [44]. It is, of course, possible to meet the prescribed precondition for the grant of outline planning permission (in suitable cases) by the imposition of a condition.

139. Mr Young submitted that condition (7) imposed by the Secretary of State would secure the result that no houses could be constructed within the 7km zone given the recommendations of the Ecological Assessment (September 2014) by Aspect Ecology Ltd. In my judgment the recommendations that he showed me would not necessarily secure that result.

140. It follows that in my judgment the Secretary of State's assessment of the implications of the proposed development was based on a mistake of fact for which the Claimants are not responsible. But, far more significantly, the result was that planning permission was granted in breach of regulation 68(3) of the Conservation of Habitats and Species Regulations 2010 that seeks to give effect to article 6(3) of the Habitats Directive.

RELIEF

141. Section 288(5) of the 1990 Act provides that:

> "On any application under this section the High Court—

> ...
>
> (b) if satisfied that [any action the validity of which is questioned by the application] is not within the powers of this Act, or that the interests of the applicant have been substantially prejudiced by a failure to comply with any of the relevant requirements in relation to it, may quash that...action."

142. The effect of my conclusions on Grounds 1 and 2 is that the Secretary of State's decision was "not within the powers" of the 1990 Act. Although the court has a discretion in such a case not to quash the Secretary of State's decision, it is a discretion that in my judgment should not normally be exercised. As Lord Bingham indicated in *Barclay v Secretary of State for the Environment (No 1)* [2001] 2 AC 603 (at p 608c), in a purely domestic context not involving EU law "the discretion of the court to do other than quash the relevant order or action where such excessive exercise of power is shown is very narrow". Similarly, as Lord Hoffmann observed in that case (at p 616f) "it is exceptional even in domestic law for a court to exercise its discretion not to quash a decision which has been found to be ultra vires". Further, as Carnwath LJ pointed out *Tata Steel UK Ltd v Newport City Council* [2010] EWCA Civ 1626 (at [15])

> "a planning permission is a public act and if it is found to be unlawful the normal result is it should be quashed and the matter should be regularised. That is not simply a matter of concern to [those involved]. It is a matter of public concern. That is why there are plenty of authorities which say that a normal rule is that unlawful permission should be quashed."

143. Mr Young contended, however, that no relief should be granted on this application on the ground that it would not have made any difference to the decision had the view been taken that Policy CT1 was up-to-date given the finding that the proposal was "sustainable development". Pursuant to paragraph 187 of the NPPF permission was bound to be granted. Alternatively he submitted that the planning permission granted by the Secretary of State should not be quashed, but instead only a declaration should be granted, since the reason why the Ringmer decision was not taken into account was the organisational fault of the Secretary of State in not ensuring that it was taken into account. To quash the Newick decision would be unfair to the Second Defendant.

144. Mr Young has failed to satisfy me that the Secretary of State's decision would necessarily have been the same regardless of the error made in this case. Paragraph [187] of the NPPF states that "decision makers at every level should seek to approve applications for sustainable development where possible." In this case, had the Secretary of State taken the Ringmer decision into account and decided that CT1 was up-to-date (which is a possibility that I cannot exclude), then the appeal proposal would not have enjoyed the "presumption in favour of sustainable development" contained in paragraph [14] of the NPPF. Nor am I prepared, nor would it be proper for me, to speculate whether or not such merits as the Secretary of State may have perceived in the appeal proposal would have been sufficient to persuade him that in all the circumstances they indicated that permission should be granted otherwise than in accordance with the development plan. That is a planning judgment that Parliament has entrusted to him, but which he did not, and I am not equipped, to make.

145. It is true that Patterson J considered, in *Wiltshire Council v Secretary of State for Communities and Local Government* [2015] EWHC 1459 (Admin), that the court has power on an application under section 288 of the 1990 Act to grant a declaration that the decision to grant the planning permission impugned was unlawful, rather than quashing it. She also exercised that power in that case on the ground of fairness to the developers who were in receipt of the permissions in question, as the unlawful decision in that case was not their fault but the result of the incompetence of the Department for Communities and Local Government.

146. I accept that the Second Defendant has no responsibility for the error with respect to the Ringmer decision and that it occurred as a result of what may be regarded as organisational failures on the part of the Secretary of State. But, even assuming that the court has jurisdiction under section 288 of the 1990 Act to do what Patterson J did, in my judgment it would be wrong not to quash the decision in this case on Ground 1. This is not merely because the fault was no more the fault of the Claimants than of the Second Defendant. More significantly, a planning appeal is not a mere adversarial dispute in which relief is merely a matter of what may be fair to the participants. It is concerned with ensuring that planning permissions are granted or refused in accordance with the law and the public interest. Not to quash an unlawful grant of planning permission when the court is not satisfied that the result would necessarily have been the same would put that public interest at risk. In my judgment there are no sufficiently exceptional grounds in this case to do so. The fact that the unlawful decision was the result of unreasonable conduct on the part of the Secretary of State provides no such grounds. Virtually every unlawful decision is in some sense the result of a "fault" on the part of the decision-maker. I can see no reason why the consequences should be different if the "fault" is organisational rather than one of any other kind.

147. Given my conclusions on whether or not relief should be granted having regard only to the first ground, it is unnecessary also to consider the consequences of my conclusions on the second ground on which this application is made. The error on which it rested could be attributed to what appears to have been agreed by the Second Defendant with the District Council at the Inquiry. But, be that as it may be, the fact that the outline planning permission was granted in breach of regulation 68(3) of the Conservation of Habitats and Species Regulations 2010 (which seeks to give effect to article 6(3) of the Habitats Directive) provides a further, independent reason why the decision should be quashed.

CONCLUSIONS

148. Given the unfortunate length of this judgment, it may be convenient to summarise the main reasons for the decision in this case.

i. the test to be applied when determining when a decision may be invalid when a consideration, that is capable of being material, is not taken into account

149. When a particular matter is not one that is required by an enactment to be taken into account expressly or by necessary implication, a decision may be invalid when no reasonable decision-maker in the circumstances would have failed to take that matter into account.

150. The legal test in such a case is not whether the matter was "so obviously material to a decision...that anything short of direct consideration of [it]… would not be in accordance with the intention of the Act". If that test is less stringent than such an "unreasonableness test", then a failure to take into account a particular matter that in the circumstances an authority could reasonably have decided not to take into account may nonetheless render the decision unlawful. That would be inconsistent with a basic principle in public law that, absent any other flaw, a statutory discretion has to be exercised unreasonably in some respect if it is to be treated as having been exercised unlawfully.

151. This "so obviously material" formulation is also not one that it is desirable to use as a test to identify what matters no reasonable decision-maker would have failed to take into account in the circumstances. It is a more opaque formulation of the relevant criterion and one that may tempt the court to say what was, or was, not *in its view* "so obviously material" in the relevant sense, rather than focussing on what the decision maker might or would have reasonably thought in the circumstances (which is what the court is required to do when reviewing the exercise of an administrative discretion). Moreover (and of significance in this case), when considering whether no reasonable decision-maker would have failed to take a matter into account that it has not addressed and of which it may be in ignorance, it may be necessary to consider, from the decision-maker's perspective, not merely how significant (or obviously material) its content might have been in relation to the decision but also its likely availability and any difficulties there may have been in ascertaining its existence and obtaining it. It is simpler, and less likely to mislead or produce an incorrect result, to ask only whether the matter is one that no reasonable decision-maker would have failed to take into account in the circumstances.

ii. consistency in decision-making

152. There is a public interest in securing reasonable consistency in the exercise of administrative discretions, which may mean that it is unreasonable for a decision-maker not to take into account other decisions that may bear in some respect on the decision to be made. There is no exhaustive list of the matters in respect of which a previous decision may be relevant. That must inevitably depend on the circumstances. Whether a decision with which the decision-maker has not been supplied is one that no reasonable decision-maker would have failed to take into account in the circumstances will depend on the circumstances, including those outlined above.

153. When the Secretary of State or one of his inspectors is considering a planning appeal, they are not presiding over a merely adversarial process. The function vested in them is one to be discharged in accordance with the law, not unreasonably and in the public interest. When considering the discharge of that function, 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 their attention to any relevant decision. But that does not mean that they are never required to make further enquiries about any matter, including about other possible decisions that may be significant. 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, depending on the circumstances, further steps may reasonably be required to be taken by the Secretary of State or his inspectors.

154. There is no principle that the Secretary of State should be taken to be cognisant of all the decisions taken in his name. There is equally no principle that the Secretary of State is to be taken to be cognisant merely of all his own decisions and no requirement that he should be. Given that one reason why the Secretary of State may "recover" planning appeals in order to determine them himself is to introduce coherence and consistency in development control, however, avoiding apparent and unexplained inconsistencies in the Secretary of State's own decisions on matters that may have ramifications for decision-making in other cases is an important consideration in determining what may required of him if he is not to act unreasonably.

iii. the application of these principles in this case

155. In this case no reasonable decision-maker would have failed to take reasonable steps to ensure that the Secretary of State had not issued any other decision on the same class of case for which he had "recovered" the Newick appeal, at least in the same district, since the Inquiry had closed. Had that been done, the decision in the Ringmer appeal would have come to the attention of the decision-maker in the Newick appeal. He would inevitably have appreciated, had the earlier decision then been read, that the Secretary of State had reached a different conclusion in the Ringmer appeal than the Inspector had done in the Newick appeal on whether Policy CT1 was up-to-date and accordingly on whether or not the "tilted balance" was to be applied when determining the appeal.

156. The Second Defendant's contention, that the Secretary of State was not entitled to take into account his own decision in the Ringmer appeal, as it was itself "perverse, irrational and *Wednesbury* unreasonable", is unsustainable. Further it cannot be said that the Ringmer decision was so different that the Secretary of State could reasonably not have taken it into account. On the contrary no reasonable decision-maker could not have taken it into account and provided reasons why the conclusion that Policy CT1 was up-to-date in the Ringmer decision was not equally applicable to the Newick appeal (if that was his view). It can only undermine public confidence in the operation of the development control system for there to be two decisions of the Secretary of State himself, issued from the same unit of his department on the same floor of the same building within 10 weeks of each other, reaching an apparently different conclusion on whether or not a development plan policy is up-to-date without any reference to, or sufficient explanation in the later one for, the difference.

157. Accordingly the Secretary of State unlawfully failed to take into account his own Ringmer decision when determining the Newick appeal.

iv. Ground 2

158. In addition the Secretary of State made a material mistake of fact for which the Claimants are not responsible, namely that no part of the site which was the subject of the appeal was within the 7km zone protecting Ashdown Forest SPA and SAC when part was. But, far more significantly, the result was that outline planning permission was granted by the Secretary of State without the imposition of a condition to secure

that no new dwellings could be constructed within that zone in breach of regulation 68(3) of the Conservation of Habitats and Species Regulations 2010, a provision that seeks to give effect to article 6(3) of the Habitats Directive.

v. result

159. The Secretary of State's decision was accordingly not "within the powers" of the 1990 Act. As there are no sufficient grounds not to quash his decision to grant planning permission, that decision is quashed.