



Neutral Citation Number: [2015] EWHC 655 (Admin)

Case No: CO/3953/2014

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/03/2015

Before:

MR. JUSTICE HOLGATE

Between:

ST ALBANS CITY AND DISTRICT COUNCIL

Claimant

- and -

- 1. SECRETARY OF STATE FOR COMMUNITIES
AND LOCAL GOVERNMENT**
- 2. HELIOSLOUGH LIMITED**
- 3. HERTFORDSHIRE COUNTY COUNCIL**
- 4. GOODMAN LOGISTICS DEVELOPMENT (UK)
LIMITED**

Defendants

and

STRiFE LIMITED

Interested Party

Matthew Reed and Sasha Blackmore (instructed by **St. Albans City and District Council**) for the **Claimant**
Stephen Whale (instructed by **The Treasury Solicitor**) for the **First Defendant**
Martin Kingston QC and David Forsdick QC (instructed by **Hogan Lovells**) for the **Second Defendant**
Paul Stinchcombe QC and Ned Helme (instructed by **Wayne Leighton LLP**) for the **Interested Party**

Hearing dates: 3rd and 4th February 2015

Approved Judgment

MR JUSTICE HOLGATE:

Background

1. The Claimant, St. Albans City and District Council (“the Council”), challenges the decision of the Secretary of State for Communities and Local Government given by letter dated 14 July 2014 to grant planning permission for a strategic rail freight interchange (“SRFI”) on land in and around the former Radlett Aerodrome, North Orbital Road, Upper Colne Valley, Hertfordshire. The Secretary of State allowed the appeal by the Second Defendant, Helioslough Limited (“Helioslough”) under section 78 of the Town and County Planning Act 1990 (“TCPA 1990”) against the refusal of planning permission by the Council. The challenge is brought under section 288 of the TCPA 1990.
2. STRiFE Limited (“Strife”) was set up to campaign against the SRFI proposal by channelling representations from local communities affected by the proposals. The organisation was formed in 2006 and appeared at the public inquiries into Helioslough’s proposals held in 2007 and 2009. On 29 December 2014 Stewart J ordered that Strife should appear in these proceedings as an Interested Party rather than as the Third Defendant.
3. The appeal proposal covers eight parcels of land referred to as Areas 1 to 8 and amounting in total to 419 ha. The whole of the site falls within the Metropolitan Green Belt and the Council’s administrative area. The SRFI and connecting roadways are proposed to be located in Area 1, which has an area of 146 ha. It is bounded by the A414 dual carriageway to the north, the Midland Main Line on an embankment to the east and the M25 to the south. The settlements of Park Street and Frogmore lie to the west. Area 2, occupying 26 ha, lies immediately to the east of the Midland Main Line. A new railway line would be provided through Area 2 to link the railway sidings in Area 1 to the existing main railway line. Areas 3 to 8 would generally remain in agricultural/woodland use with improved public access, and some more formal recreational uses, so as to form a country park. Additional landscaping would be provided in Areas 3 to 8.

Green Belt policy

4. At the time of the decision dated 14 July 2014 national policy on development in the Green Belt was set out in the National Planning Policy Framework (“NPPF”). The policy came into force on 27 March 2012. For the purposes of these proceedings, Green Belt policy prior to the NPPF was not materially different. Paragraph 87 states: “As with previous Green Belt policy, inappropriate development is, by definition, harmful to the Green Belt and should not be approved except in very special circumstances.” It was common ground that Helioslough’s proposal fell within the definition of inappropriate development contained in paragraph 89. Paragraph 88 provides:

“When considering any planning application, local planning authorities should ensure that substantial weight is given to any harm to the Green Belt. ‘Very special circumstances’ will not exist unless the potential harm to the Green Belt by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations.”

First Appeal

5. The proposal has been the subject of two planning applications. The first was made on 26 July 2006 and refused by the Council. The public inquiry into Helioslough's appeal sat between November and December 2007. The main issue was whether the harm to the Green Belt and other harm was clearly outweighed by very special circumstances, notably the need for the SRFI in the proposed location. The Inspector, Mr. Andrew Phillipson, produced a report to the Secretary of State on 4 June 2008, in which he found that Helioslough's assessment of alternative sites for the SRFI was materially flawed. Because of that "critical" failing he recommended that planning permission should be refused (IR 16.203-16.204 and 17.1).¹
6. However, in IR 16.202 Inspector Phillipson stated:-
 - (i) The need for SRFIs to serve London and the South East was capable of being a very special circumstance clearly outweighing harm;
 - (ii) If it had been demonstrated that no other site would come forward to meet the need for further SRFIs to serve London and the South East that would be satisfied by the appeal proposal, he would have taken the view that the harm to the Green Belt and other harm identified from the proposal would be outweighed by the need to develop a SRFI on the appeal site, and would have recommended the grant of planning permission.
7. The Secretary of State's decision on the first appeal was issued on 1 October 2008. The then Secretary of State broadly agreed with her Inspector's conclusions and accepted the recommendation to dismiss the appeal and refuse permission. In DL 58 she stated:-

"The Secretary of State considers that the need for SRFIs to serve London and the South East is a material consideration of very considerable weight and, had the appellant demonstrated that there were no other alternative sites for the proposal, this would almost certainly have led her to conclude that this consideration, together with the other benefits she has referred to above were capable of outweighing the harm to the Green Belt and the other harm which she has identified in this case (IR 16.202). However, like the Inspector, she considers the appellant's Alternative Sites Assessment to be materially flawed and its results to be wholly unconvincing (IR 16.203). She considers this failing to be critical. In view of this, she concludes that the appellant has not shown that the need for the proposal or the benefits referred to above constitute other considerations which clearly outweigh the harm to the Green Belt and other harm which this development would cause, and that very special circumstances to justify the development have not been demonstrated."

¹ I adopt the convention of referring to paragraph numbers in the Inspector's Report and Secretary of State's decision letter with the prefixes IR and DL respectively.

Second Appeal

8. On 9 April 2009 Helioslough lodged a second application which was identical to the first. It was refused by the Council on 21 July 2009 and the subsequent appeal under section 78 was considered at a public inquiry between November and December 2009. The Inspector, Mr. A. Mead, produced his report to the Secretary of State on 10 March 2010. In that report the Inspector accepted that Helioslough had demonstrated a lack of suitable alternative sites. In particular he concluded that the location of the Colnbrook site in a Strategic Gap between Slough and London as well as in the Green Belt “weighed heavily” against it being preferred to the appeal site (IR 13.115). Having balanced the various planning considerations in IR 13.118 to 13.119, Inspector Mead concluded that very special circumstances had been shown to outweigh harm and recommended that planning permission be granted.
9. The Secretary of State’s first decision letter on the second appeal was issued on 7 July 2010. He broadly agreed with Inspector Mead’s conclusions save in one respect. He disagreed that the location of the Colnbrook site within the Green Belt and a Strategic Gap “weighed heavily” against it being preferred to the appeal site. He considered that an SRFI at Colnbrook could be less harmful and consequently he was not satisfied that very special circumstances had been demonstrated so as to outweigh the harm. He therefore dismissed the second appeal. Also on 7 July 2010 the Secretary of State issued a decision letter on Helioslough’s application for costs in which he accepted Inspector Mead’s recommendation in a separate report that a partial award be made against the Council.

Challenge in the High Court to the dismissal of the second appeal

10. Helioslough brought a challenge to the Secretary of State’s decision under section 288 of the TCPA 1990. On 1 July 2011 HH Judge Milwyn Jarman QC ordered that the Secretary of State’s decision be quashed ([2011] EWHC 2054 (Admin)). In summary the Judge held that the Secretary of State had misconstrued the Strategic Gap policy in Slough’s Core Strategy and consequently had failed to treat that as an additional policy restraint over and above the Green Belt designation. The Secretary of State had failed to appreciate that the Strategic Gap policy had been formulated because of the special sensitivity of the tightly defined area to which it applied and the “very high bar” set by that policy, namely that development must be shown to be “essential” (paragraphs 79 to 88 of the judgment).

Redetermination of the second appeal

11. The process of redetermining the second appeal began with a letter from the Secretary of State dated 15 September 2011. Substantial written representations were submitted and exchanged in several rounds. The parties had access to the 2010 report of Inspector Mead as well as the 2008 report of Inspector Phillipson.
12. In a letter dated 19 September 2012 the Secretary of State indicated that the Helioslough appeal should be conjoined with an appeal into a proposal for an SRFI at Colnbrook and that the inquiry into the Helioslough appeal should be reopened. However, after representations had been made, the Secretary of State wrote on 14 December 2012 to say that he had changed his mind and had decided not to conjoin

the appeals or to reopen the inquiry into Helioslough's appeal. No challenge has been brought in these proceedings by the Claimant to that procedural decision.

13. On 20 December 2012 the Secretary of State issued a letter stating that he was minded to allow Helioslough's second appeal and grant planning permission, subject to a satisfactory section 106 obligation being entered into. An obligation was submitted to the Secretary of State on 20 December 2013 and on 14 February 2014 representations thereon were invited. That final stage led to the issuing of the decision letter dated 14 July 2014 which the Council now challenges.

Grounds of challenge

14. In summary the Council puts forward two grounds of challenge:-
- (i) The Secretary of State erred by setting a legal test requiring a "very good reason" to be shown for departing from a conclusion reached in the 2008 Inspector's Report and the 2008 decision letter on the first appeal. In this way the Secretary of State improperly fettered his discretion when determining the second appeal;
 - (ii) The Secretary of State failed to take into account his decision dated 7 July 2014 in which he refused the application by Veolia ES (UK) Limited for planning permission for a waste management facility on a site at New Barnfield, 4 miles away from the Helioslough site.

Relevant legal principles

15. Section 288 of the 1990 Act provides as follows:-

“(1) If any person –

(a).....

(b) is aggrieved by any action on the part of the Secretary of State to which this section applied and wishes to question the validity of that action on the grounds –

(i) that the action is not within the powers of this Act, or

(ii) that any of the relevant requirements have not been complied with in relation to that action,

He may make an application to the High Court under this section.

(2), (3), (4)

(5) On any application under this section the High Court –

(a)

(b) if satisfied that the order or action in question 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 requirement in relation to it, may quash that order or action.”

16. The general principles concerning the grounds upon which a Court may be asked to quash a decision of an Inspector or the Secretary are well-established. I gratefully adopt the summary given by Lindblom J at paragraph 19 of his judgment in Bloor Homes East Midlands Ltd v Secretary of State for Communities and local Government [2014] EWHC 754 (Admin).

Ground 1

The issue

17. The Council, supported by Strife, challenges DL 22 of the decision dated 14 July 2014. In that paragraph the Secretary of State agreed with Inspector Mead’s reasoning at IR 13.8 to 13.18 on how the decision in the first appeal should be approached in the determination of the second appeal and with the conclusion at IR 13.19 that the Secretary of State would be able to differ from conclusions reached in the 2008 decision if there was “a very good planning reason for doing so”.
18. The Council’s complaint is that the approach taken by the Secretary of State involved a self-misdirection on a question of law. Mr. Reed submits that the Secretary of State went beyond simply explaining the *weight* he would give to conclusions reached in the decision on the first application; instead he imposed a legal test requiring a very good planning reason to justify modifying one of those earlier conclusions. It is said that by imposing that incorrect legal test the Secretary of State improperly fettered the scope of his discretion or his ability to make judgments on the issues arising on the second application.
19. It is common ground between the parties that there could be no justification for imposing a legal test requiring “a very good planning reason” to be shown before a second decision-maker is able to depart from a conclusion reached by a first decision-maker, whether generally or in this particular case. None of the authorities dealing with the importance of consistency in decision-making, whether in planning or other areas of public law, could support any such proposition. Accordingly, the central issue is whether the Secretary of State’s decision letter dated 14 July 2014 is to be interpreted as if it purported to impose such a *legal* test for departing from conclusions reached in the 2008 decision.

The King’s Cross case

20. The submissions before Inspector Mead focussed upon one authority, the decision of Sullivan J (as he then was) in R (King’s Cross Railway Land Group) v Camden LBC [2007] EWHC 1515 (Admin). Inspector Mead at IR 13.16 indicated that he would follow “findings” in the King’s Cross case and so this is where the analysis should begin.

21. The judicial review sought to quash the planning permission and consents granted by Camden LBC for the redevelopment and regeneration of 26 hectares of land at King's Cross. Following a meeting on 8 and 9 March 2006, and with the benefit of an officer's report and appendices nearly 900 pages long, the relevant committee resolved to grant planning permission subject to the completion of a section 106 agreement. Before that agreement could be concluded local elections took place in May 2006 and the composition of the committee changed. When the agreement was completed the matter was put before the new committee on 16 November 2006 so that it could decide whether planning permission should still be granted. That committee was dealing with the same application as had been considered by the former committee only 8 months beforehand.
22. For present purposes the relevant ground of challenge to the November 2006 decision was that the committee's ability to reach a different conclusion had been improperly fettered by a direction they should not reach a different decision unless a change of circumstances had occurred (paragraphs 21 and 61). The judge rejected that contention (paragraph 65).
23. Much of the discussion before the Inspector and in this Court centred on paragraphs 17 to 20 of the judgment which read as follows:-

“17. I accept the submission of Mr Hobson, QC, on behalf of the Claimant, that the weight to be attached in any particular case to the desirability of consistency and decision-making, and hence the weight to be attached to the March 2006 resolution, was a matter for the Committee to decide in November 2006. However, given the desirability in principle (to put it no higher) of consistency in decision-making by local planning authorities, Mr Hobson rightly accepted that in practice the Committee in November 2006 would have to have a “good planning reason” for changing its mind. That is simply a reflection of the practical realities. If a local planning authority which has decided only eight months previously, following extensive consultations and very detailed consideration, that planning permission should be granted is unable to give a good and, I would say, a very good planning reason for changing its mind, it will probably face an appeal, at which it will be unsuccessful, following which it may well be ordered to pay costs on the basis that its change of mind (for no good planning reason) was unreasonable.

18. Mr Hobson submits, correctly, that while a material change of circumstances since an earlier decision is capable of being a good reason for a change of mind, it is not the only ground on which a local planning authority may change its mind. A change of mind may be justified even though there has been no change of circumstances whatsoever if the subsequent decision taken considers that a different weight should be given to one or more of the relevant factors, thus causing the balance to be struck against rather than in favour of granting planning permission.

19. An example canvassed during the course of submissions was that of a local planning authority which resolved to grant planning permission for an inappropriate development in the green belt, subject to a section 106 agreement, on the basis that the very special circumstances prayed in aid by the applicant outweighed the harm to the green belt and other harm. On revisiting the matter when the section 106 agreement was finalised, that local planning authority could properly reverse its earlier decision if, on reflection, it considered the harm was not outweighed by the special circumstances. Thus, it was not necessary for the Committee in November 2006 to be satisfied that there had been any material change of circumstances since March 2006. It was entitled to conclude that, having regard to all the circumstances considered in March 2006, a different balance should be struck.

20. Neither the defendant nor the interested party dissented from the proposition that, as a matter of law, there did not need to have been a material change of circumstances in order to justify a different decision in November 2006. A change in circumstances was one of the more obvious reasons which might justify a change of mind by a local planning authority, but it was not the only possible reason.”

24. From these paragraphs it can be seen that Sullivan J’s reasoning included the following points:-
- (i) There did not have to be a material change of circumstance to justify a change of mind on the part of the Council (paragraph 18);
 - (ii) Absent a material change of circumstances a subsequent decision-maker may be justified in reaching a different conclusion because he considers that a different weight should be given to one or more relevant factors, thus resulting in the planning balance being struck in a different way and a different outcome (paragraph 18). The Judge gave a practical example of how such a situation could arise (paragraph 19);
 - (iii) In view of the “desirability in principle... of consistency in decision-making by local planning authorities” the Claimant accepted that the Council would have to have a good reason for changing its mind. The Judge added that bearing in mind the “practical realities”, namely that a decision to refuse might well lead to a successful appeal to the Secretary of State and an order for costs, the Committee would have to have “in practice” “a very good planning reason” for changing its mind (paragraphs 18 and 26).
25. It is plain from the phrases “practical realities” and “in practice” that Sullivan J’s comments did not involve laying down any legal test as to the basis upon which a decision-maker could change its mind in that kind of situation. Instead, the Judge’s remarks reflected the weight which should be attached to the Committee’s earlier “detailed consideration” of the merits of the application “following extensive consultations”, and thus the strength (i.e. weight) to be expected of any change of

opinion in the evaluation of those merits. That is reinforced by the context in which the judge's remarks were made as set out in paragraphs 15 and 16 of the judgment. It was common ground that the Committee's resolution in March 2006 engaged the consistency principle laid down in North Wiltshire District Council v Secretary of State for Environment (1993) 65 P. &C.R. 137.

26. Having regard to "the importance of consistency" (per Mann LJ) will often involve deciding how much weight to give to an earlier relevant decision. Where a decision-maker accepts that its earlier decision involved a very careful evaluation of the merits of an application, *a fortiori* after thorough testing, it may well decide *as a matter of judgment* that it should not come to a different evaluation, for example on visual impact, without having "weighty" or "very weighty" grounds for doing so. A judgment of that nature would be a perfectly permissible outcome when applying the consistency principle.
27. Ultimately this issue in the King's Cross case turned upon a statement made by a Councillor during the second meeting to the effect the Council could not change its mind unless a very clear justification could be found in some change of circumstances (paragraph 61). Sullivan J held that that had not been a statement of legal principle but rather a summary of the advice received that "in the real world", absent a material change of circumstances, it would not be possible as a *matter of fact*, not law, to provide a clear justification for a change of mind. The judge held that that *factual* conclusion was wholly unsurprising, given the length of the consultation process up until March 2006 and the very detailed consideration given to the issues at the first meeting and the Officers' reports (paragraph 65).

The circumstances of the present case

28. A similar situation arose in the present case. The proposal involved a very large scheme. A substantial environmental statement was provided with the application and there would have been extensive statutory consultation (see e.g. Inspector Phillipson's IR 1.3 and 1.9). The first public inquiry sat for 26 days between 6 November 2007 and 20 December 2007 (IR 1.1). The Inspector made lengthy inspections of the site and surrounding area (IR 1.2). Evidence was called at the inquiry by the developer, the Council, Strife, and by representative bodies such as the St. Albans Civic Society and the Ramblers Association. Eighteen or so interested persons appeared at the inquiry, including MPs for St. Albans and Hertsmere, local Councillors and representatives of various residents' associations. The developer called nine expert witnesses and the Council eight. In the usual way the expert evidence would have been exchanged in advance and rebuttals produced. The evidence would have been tested at some length through cross-examination. The Inspector then produced a detailed report of some 206 pages on 4 June 2008. The Inspector's conclusions were set out in 205 paragraphs in section 16 of his report and occupied some 50 pages. Those conclusions were set out in a carefully structured manner, dealing with the various types of harm and the benefits of the proposal topic by topic, before coming to the overall balancing exercise at IR 16.175 to 16.205. The report then had to be considered by the Secretary of State and the decision letter was issued on 1 October 2008.
29. Given that the conclusions in 2008 of the Inspector and the Secretary of State were the result of that process it would be wholly unsurprising if considerable weight were

to be given to their judgment and evaluation in the determination of the identical second application. Some of their reasoning pointed in favour of the proposal and some against. On harm to the Green Belt for example, Inspector Phillipson and the Secretary of State identified some serious impacts. On the second application the Council itself relied upon a number of those earlier conclusions. As Inspector Mead recorded (IR 8.22):-

“...the Council has, to a considerable extent, followed the assessment of the Inspector in relation to the degree of impact on the Green Belt and has, accordingly, considered it appropriate to adopt those findings, but not wholly. It has decided that it is appropriate not to agree with Inspector Phillipson on the questions of whether the development will contravene the purpose of preventing settlements from merging with one another.”

30. In those circumstances Mr. Reed accepted that if Inspector Mead and the Secretary of State in his 2014 decision letter had simply said that, as a matter of fact or judgment rather than law, they would follow earlier conclusions unless persuaded that there was a very good reason not to do so, then no legal challenge would have been brought on this aspect. Accordingly, ground 1 depends upon the Court being persuaded that the Inspector and Secretary of State erred by adopting “good” or “very good” reasons as a *legal* test for determining whether to depart from earlier conclusions of their colleagues on the first application. Strife adopted the same position as the Council.

Could the Secretary of State simply have said “I disagree with the first decision”?

31. Mr. Stinchcombe QC (for Strife) submitted that Inspector Mead and the Secretary of State could have departed from earlier conclusions by simply saying “I disagree” and then going on to express their own conclusions. In his oral submissions that contention was said to be based upon the decision of the Court of Appeal in Dunster Properties Limited v First Secretary of State [2007] 2 P & CR 26. In paragraph 33 of his skeleton he relied upon R v Secretary of State for the Environment ex parte Gosport B.C [1992] J.P.L 476, 480. I cannot accept the submission. Indeed, if that approach had been followed by the Secretary of State in his 2014 decision so as to result in a refusal of permission, I suspect that Helioslough would have had a good case for seeking to have any such decision quashed.
32. Dunster was concerned with successive applications for permission to erect a first floor extension to a flat in a conservation area. A second Inspector stated in effect that he disagreed with his colleague’s view that an appropriately designed extension to that flat would be acceptable *in principle* but had given no reasons for taking that view. He merely stated that each case should be decided on its own merits and referred back to his own reasoning for rejecting the particular *design* he had to consider (paragraph 9). The Court of Appeal held that the second Inspector did not discharge his statutory obligation to give reasons. Lloyd LJ held that it was not sufficient for the Inspector in the second appeal, having disagreed on the question of principle, to decline to give any reasoning on that inconsistency between the two decisions. He failed to grasp “the intellectual nettle of the disagreement” which is what was needed if he was to have proper regard to the previous decision (paragraphs 21 and 23).

33. As to the reliance by the Council and by Strife upon page 480 of the Gosport case, it is apparent from page 477 of the report that the Secretary of State did in fact give a number of reasons as to why he differed from the Inspector, either as to the extent of visual impact or the weight to be given to that impact. In the present case where the issues in the first inquiry were canvassed so extensively and detailed reasoning given in the first Inspector's report and the decision letter which followed it, the Secretary of State would have been ill-advised to issue a second decision letter in which he merely said that he disagreed with key aspects of the first decision.

Whether the Council was impeded in presenting its case at the second inquiry

34. On 8 October 2009 a pre-inquiry meeting was held in advance of the second inquiry in order to deal with procedural issues. Inspector Mead received written submissions from the Council and Helioslough on how the conclusions in the first Inspector's Report and the first decision letter should be treated. Subsequently, the Inspector issued his "notes" on the meeting for the benefit of participants in the inquiry. He did not issue any ruling on this subject. Instead, in paragraph 11 he referred to paragraph B29 of Circular 03/2009 as an example of circumstances in which costs *might* be awarded against a local planning authority (i.e. persisting in an objection previously rejected by the Secretary of State). In paragraph 12 the Inspector plainly and accurately stated:-

"The Council has the responsibility for the presentation of its own case and whether or not, in the circumstances, its evidence remains within the bounds of reasonableness."

35. For completeness, I note that paragraph 10 of the Council's skeleton claimed that because of the approach which the Inspector had indicated he would take to the earlier report and decision, the Council resolved to withdraw or amend certain of its reasons for refusal "whilst maintaining its position that this was not the appropriate approach to the fresh discretion" that was to be exercised (see also paragraph 11). In my judgment any implication that the Council's case had been prejudiced at the inquiry, whether as to scope or content, because of a stance taken by the Inspector was cogently refuted by Mr. Kingston QC in his oral submissions on behalf of Helioslough. The matter was dealt with entirely properly by the Inspector at IR 13.17 and 13.18. In any event, Mr. Reed confirmed that this aspect did not form any part of the Council's challenge and so I do not address the matter further.

The parties' submissions at the second inquiry on the first appeal decision

36. In order to see the Inspector's reasoning on the treatment of the previous report and decision in context, it is necessary to consider the positions adopted by the parties. Helioslough approached the second inquiry on the basis that the one matter upon which they had failed in the first appeal was the robustness of their alternative sites assessment to demonstrate that there were no other sites for an SRFI in the North West sector of the M25 area which would involve less harm to the Green Belt (Inspector Mead IR 7.1). The developer contended that the first decision letter was "of very considerable weight" and that absent a material change of circumstance, a conclusion of the previous Inspector would have to be accorded very significant weight (IR 7.8). It was submitted that although the Secretary of State was legally entitled to come to a different conclusion on aspects of the case or on the overall

balance, absent any material change of circumstance “there would be no rational reason for him to do so” (IR 7.10). Helioslough sought to argue that in view of the full nature of the first inquiry, any attempt to rely upon new or “better evidence” or a revisiting of an earlier judgment would be “unsustainable on the facts here” (IR 7.11).

37. The Council relied upon paragraphs 17 to 20 of the decision in the King’s Cross case (IR 8.6) and in summary submitted that (IR 8.7 to 8.10):-
- (i) A change of mind from the earlier decision would need to be based upon a “good reason”;
 - (ii) A “good reason” could be, but was not restricted to, a change of circumstances;
 - (iii) The decision-maker may have a “good reason” to reach a different decision simply because he takes a different view from the previous decision-maker or decides that the balance should be struck in a different way;
 - (iv) A new argument, piece of evidence or compelling presentation of evidence could amount to a “good reason”
 - (v) Thus, there was no principle which limited the Secretary of State to considering whether there had been a change of circumstance since the previous decision. Such an approach would involve an error of law.
38. It is important to note that on a correct understanding of the passages relied upon by the Council from the King’s Cross decision (recorded as part of the Council’s case in IR 8.6), and consistently with the Council’s submissions in this court, the Council’s stance at the inquiry was that the Secretary of State was entitled to approach the matter by considering whether there was a “good reason” to justify a change of mind, *treated as a matter of fact or judgment*. Given the reference by Sullivan J to “very good reason” in the passage expressly relied upon by the Council, the position should not be any different if the decision-maker were merely to add the adverb “very”. As an exercise of judgment, the expressions “good” and “very good” can simply refer to the weight considered to be appropriate to overcome the weight being given to conclusions in an earlier decision. Essentially, therefore, the issue is whether, on a fair reading of the Inspector’s report and the decision letter, the Secretary of State moved from that position to laying down a legal principle or test, albeit that no party at the inquiry suggested that he should do so.
39. Strife adopted substantially the same position as the Council before Inspector Mead (IR 9.3 to 9.9). They expressly accepted that there should be “the requisite good reason” to disagree with the view of the previous Inspector or Secretary of State but explained why such a reason should not be restricted to a material change in circumstances.

Discussion

40. Paragraphs 13.8 to 13.19 of Inspector Mead’s report appear in a section headed “legal submissions”. Contrary to a suggestion made by the Council, I do not think that the use of that phrase can be taken to mean that all of the text which follows, and in particular IR 13.15 and 13.16, should be treated as setting out principles of law or legal tests. This section of the report deals with submissions, as opposed to evidence, from the respective legal teams at the inquiry and referred, in part, to case law on the principle of consistency in decision-making. IR 13.10 summarised the Council’s submissions, from which it was plain, as I have already explained, that the phrase “good reason” was taken from the King’s Cross case, not as a legal test, but as a practical assessment of the weight to be attached to conclusions in the earlier report and decision and hence material to the reasoning which could support a different view being taken.
41. Given the Council’s reliance upon the King’s Cross decision, it was entirely permissible for the Inspector to point out that in fact Sullivan J had thought that “a very good reason” should be given for a change of mind in that case given its practical realities, and to adopt the same approach in the present case as a matter of judgment (IR 13.12 to 13.13). The Inspector expressly rejected Helioslough’s argument that, absent a material change in circumstance, there would be no rational reason for coming to a different conclusion from one reached previously. True enough the Inspector went on to say that the phrase “a very good planning reason” described “the appropriate test for a change of mind”. But he referred to this as his “opinion” as to how a reason for departing from an earlier conclusion would appropriately be described. The language of IR 13.13 is entirely consistent with the Inspector expressing his judgment on how these matters should be weighed.
42. That understanding of Inspector Mead’s report is reinforced by IR 13.14. There the Inspector referred once again to his “opinion” on this matter, basing himself upon the principle in the North Wiltshire case that a subsequent decision-maker can disagree with a critical aspect of a previous indistinguishable decision, provided that reasons are given. IR 13.13 and 14.14 are also inconsistent with the Council’s suggestion that the Inspector laid down some legal standard that had to be reached before being able to come to a different view.
43. In IR 13.15 the Inspector expressly referred back to IR 8.7 in which he had summarised the Council’s contention that a “good reason” could be based simply upon a change of view or different judgment. The Inspector thought that was “far too simplistic”. He was concerned that a different decision resulting from “a mere change of view or opinion” could “*appear* unsound” (my emphasis) unless “supported by an adequate chain of logic”. The Council criticised the Inspector’s reference to an “adequate chain of logic” as excluding a simple change of mind (Council’s skeleton paragraph 71). But the Council went on to state that a change of mind would suffice “*provided that he gives reasons for doing so*” (emphasis added). Given that this was a case in which the consistency principle was plainly engaged, in my judgment it is obvious that the Inspector was seeking to guard against the risk of a change of mind appearing to be arbitrary unless sufficiently explained so as to justify a different conclusion. The word “logic” simply referred to “reasoning”. Properly read, there is no significant difference between IR 13.15 and the position of the Council in paragraph 71 of its skeleton. The Inspector’s approach in IR 13.15 accorded with

Dunster. Certainly the paragraphs cannot be taken to have laid down a *legal* test or standard for departing from conclusions in the previous decision.

44. In oral argument the criticism of Inspector Mead's report ultimately centred on IR 13.16 which reads:-

"13.16 Therefore, following the findings in the *Kings Cross Railway Lands Group* case, whereas for reasons of consistency I accept that identical cases should be decided alike, I consider that neither I nor the Secretary of State are bound to follow either the conclusions of the previous Inspector or the decision provided that there are very good planning reasons, which are clearly explained, why such disagreement has occurred."

45. The Council criticised the words "bound to follow". But I do not accept that when read properly in context those words indicate that the Inspector misdirected himself by imposing a legal test (or a fetter) or created any uncertainty so as to render his reasoning inadequate (in the sense explained by the House of Lords in South Buckinghamshire DC v Porter (No. 2) [2004] 1 WLR 1953). The phrase used by the Inspector should not be read as meaning "legally bound to follow". Instead, in my judgment it refers to the weight being attached to the conclusions in the 2008 Inspector's report and the 2008 decision letter following a very thorough examination and testing of the SRFI proposal. The Inspector decided that he should "follow the findings" in the King's Cross case. It would have been plain to the Inspector that Sullivan J did not use the words "a very good planning reason" in order to lay down a legal test. The "findings" in that case refer to the "practical realities" facing a local planning authority which had considered the same application in considerable depth a few months beforehand. Here, Inspector Mead was simply setting out his judgment as to the implications of the consistency principle for this case, in circumstances where it was plain that the Helioslough proposal had already been considered thoroughly at a lengthy public inquiry and in a detailed report.
46. For the same reasons I consider that IR 13.19 should be understood in the same way as 13.16 and indeed the preceding paragraphs of the report. IR 13.19 reads as follows:-

"13.19 Therefore, in my opinion, the Secretary of State may consider that, if there is a very good planning reason, he is able to differ from the conclusions or decision of his predecessor."

The same conclusion also applied to DL 22.

47. Nevertheless, the Council submitted that there were three examples which showed that the Inspector, and likewise the Secretary of State, had in fact applied "the very good planning reason" phrase as a legal test and thus improperly fettered their discretion. It was also submitted that these examples showed that they had failed to make their own assessment of the merits of the proposal. I should record that Mr. Reed very fairly accepted that the examples he gave were the best that the Council could put forward to support ground 1. It should also be noted that these examples related to individual components of the overall balancing exercise which the decision-maker had to undertake. It was not suggested, nor could it have been, that in the

second appeal either the Inspector or the Secretary of State failed to carry out that exercise for themselves (see IR 13.118 to 13.119 and DL 52 to 53).

48. The first example concerned the issue of whether the proposal would result in the merging of certain settlements. This had been considered in some detail in IR 16.10 and 16.11 of Inspector Phillipson's report and in DL 21 and 22 of the first decision letter. In these passages the concerns about merger had been rejected. The same subject was dealt with by Inspector Mead at IR 13.36 to 13.38 of his report. The Council submitted that these paragraphs showed that the process of reasoning in the determination of the second application was tainted by the adoption of the "very good planning reason" legal test. I disagree.
49. IR 13.36 begins by referring back to the conclusions in the first decision letter. Inspector Mead then identified the Council's reasons for taking a different view. In IR 13.37 Inspector Mead summarised conclusions reached previously by his colleagues, but in IR 13.38 to 13.39 plainly set out his own independent assessment. In the 2014 decision letter the Secretary of State agreed with that evaluation (DL 24). The merger concern was rejected in the decision letter determining the second appeal by a process of independent reasoning and certainly not by simply asking the question whether there was a very good reason to differ from the conclusions in the 2008 report and decision letter.
50. The Council also relied upon the Inspector's report on Helioslough's application for an award of costs against the Council. The report was produced on 19 May 2010. The Secretary of State's decision letter, in which he adopted the Inspector's conclusions, was dated 7 July 2010. At paragraph 200 of his report, Inspector Mead referred back to his main report in which he had agreed with the Council that "a very good planning reason" could constitute a sound basis on which to depart from conclusions of Inspector Phillipson or of the 2008 decision letter. The Inspector then stated that where the Council had put forward very good planning reasons for not supporting a previous conclusion, it could not be said that the Council had acted "unreasonably" so to justify an award of costs.
51. Here too it is plain that the Inspector was making a judgment as to the weight to be attached to the earlier decision. He was not referring to a legal test. First, he rejected Helioslough's contention that the Council's case in respect of Green Belt issues should have been confined to a consideration of the developer's new alternative site analysis. He agreed with the Council (IR 201) that it had relied upon a reason for refusal of permission which "involved a judgment on where the balance would lie in terms of harm in order to assess whether very special circumstances existed" and that the Council had adduced substantial evidence on that matter as well as alternative sites. But the Inspector concluded that the Council had nonetheless acted unreasonably because the evidence on harm to the Green Belt, including the merger of settlements issue, involved repetition of arguments thoroughly aired at the previous inquiry, nothing new of substance had been added and no "very good planning reasons" advanced "to *suggest*" that the Secretary of State should come to a different conclusion (IR 202). He added that it was difficult to avoid the conclusion that it had been unnecessary for the Council to revisit those subjects, absent any material change in circumstances, "in the light of the evidently thorough inspection of the site and surroundings by the first Inspector". It is therefore plain that Inspector Mead's conclusions on costs rested on his assessment of the considerable weight to be

attached to the first decision and the robustness of the Council's case for coming to a different view. None of his reasoning suggests that Inspector Mead applied a legal test rather than his judgment.

52. In any event, the costs decision letter issued in 2010 was never the subject of a legal challenge by the Council and cannot alter the fact that in his substantive report the Inspector demonstrated that his conclusions were based upon his own independent assessment (IR 13.38 and 13.39).
53. I should record that Mr. Reed regarded the merger example as the strongest of the three examples put forward by the Council. The second example concerned landscape and visual impact. In IR 2008 Inspector Phillipson had concluded that the overall effect of the proposal (including the country park areas) would be "moderately adverse", the effect of the development proposed to be located in Area 1 would be "significantly adverse" and plainly the planting proposed in Areas 3 to 8 would not offset the harm in area 1 (IR 16.22). In the 2008 decision letter (DL 22) the Secretary of State agreed with that assessment.
54. In 2010 Inspector Mead dealt with landscape and visual impact at IR 13.41 to 13.44. At the second inquiry the Council largely agreed with the conclusions reached in the 2008 report on this aspect (Inspector Mead IR 8.24, 13.41 and 13.42), but raised two additional impacts (effects of embankments and cuttings of the proposed railway line and impact on views from Shenley Ridge). The Council itself described those impacts as "moderate adverse" and unsurprisingly the Inspector, having agreed with that assessment, concluded that "this does not increase the severity of the impact as was concluded previously by the Secretary of State". The Inspector explicitly agreed (IR 13.42) with the Council's assessment of the railway cuttings and embankments and stated "this would not be inconsistent with the overall conclusions of the Secretary of State on the first appeal".
55. It is plain that here too the Inspector made his own independent assessment of the impacts of the scheme (IR 13.43 and 13.44). Having concluded that the overall effects would be "moderately adverse", he then said:-

"Therefore, I do not dissent from the previous conclusions of the Secretary of State. Neither it appears from submissions, does the Council, albeit it claims that the effects would be unacceptable."

The Inspector stated that the acceptability or otherwise of the impacts was a matter for the final planning balance. He returned to the subject at IR 13.107 and plainly said that he agreed with the conclusions in the 2008 decision letter "based on the evidence I heard at this inquiry".

56. The Council did not suggest that the Inspector misrepresented its case at the second inquiry. In these circumstances it is impossible to see how the second example could support ground 1. Equally it comes as no surprise to learn that the Council was ordered to pay Helioslough's costs in respect of the visual impact topic (IR 204 and 205 of the Costs Report). The Inspector indicated that the Council had not really attempted "to persuade the Secretary of State to change a conclusion previously reached". In his reply, Mr. Reed said that the Council would not rely upon the

landscape and visual impact example, if the merger example failed to support ground 1, which in my view it does. But I would go further. The second example is untenable.

57. The third example concerned the issue of whether it had been appropriate for the developer to restrict the area of search for alternative sites to the North West sector of London and the M25. Inspector Mead concluded that it was appropriate for the reasons given in IR 13.84 to 13.88. Here again the complaint was that the second Inspector and the Secretary of State had improperly fettered their discretion by treating the 2008 decision as something which needed to be displaced by a very good planning reason. But Mr. Reed accepted that IR 13.84 to 13.88 themselves disclosed no error of law. In other words, this example depends upon the Court being prepared to accept (a) that IR 13.16 was erroneous as a matter of law and (b) that IR 13.84 to 13.88 had been tainted by IR 13.16. By definition therefore this so-called third example cannot provide any support for the error alleged to have been made in IR 13.16. In any event, the short answer is that IR 13.84 to 13.88 contain clear evidence of the Inspector reaching his own independent conclusions on the objections raised by the Council and others.
58. Moreover, there are a number of examples which show that the Inspector did not apply a legal test requiring a “very good planning reason”:-

“I have no reason to disagree” (IR 13.54)

“there has been no convincing evidence submitted to this inquiry to cause me to come to a different conclusion in relation to areas 3 to 8” (IR 13.105)

“there is no sound reason why I should depart from those views” (IR 13.106)

“I have no reason to disagree with that conclusion (IR 13.110).

59. Having carefully reviewed Inspector Mead’s report, the 2010 report and decision on costs and the 2014 decision letter, I am left in no doubt that the Inspector and the Secretary of State did not either misdirect themselves by imposing a legal test requiring a good or very good planning reason for disagreeing with the earlier decision to be shown or improperly fetter the scope of their discretion to reach independent judgments on the merits of the second application. The allegation is unfounded. Moreover, there is no basis for suggesting that the reasoning of the Secretary of State (or the Inspector) was inadequate in relation to this issue. The consequence of these conclusions is that ground 1 must be rejected.

The Council’s approach between 2010 and 2014 to the 2010 Inspector’s report

60. I would add that if there was any real reason to think that the Secretary of State (or Inspector Mead) had committed the error alleged, then it is most surprising that the point was not raised before the present challenge to the decision letter of 14 July 2014. The Council now argues that the alleged error also appeared in Inspector Mead’s report on Helioslough’s application for costs, which was published at the same time as the costs decision letter dated 7 July 2010. As Mr. Reed accepted, the

effect of that decision was to require the Council to pay Helioslough a substantial sum. It was open to the Council to challenge that decision by an application for judicial review. Indeed, it was clearly in the financial interests of the Council to do so if it thought that there had been a self-misdirection. The fact that no such challenge was brought indicates that neither the costs decision and report nor Inspector Mead's 2010 report on the public inquiry were then interpreted in the way which the Council now seeks to do.

61. Mr. Mead's report on the second inquiry was also published on 7 July 2010 along with the first decision letter on the second appeal. When Helioslough challenged that decision within the 6 week time limit under section 288 of the 1990 Act, it must have been clear to the Council that there was a risk of the decision being quashed and the second appeal having to be re-determined (as indeed subsequently turned out to be the case). As mentioned during argument, if the Council had read Inspector Mead's report and the 2010 decision letter as proceeding on an improper legal basis, it was then open to the Council to bring proceedings for judicial review so as to prevent any redetermination being flawed by the same error (see e.g. R v Secretary of State ex parte GLC [1985] J.P.L 868; R (Redditch BC) v First Secretary of State [2003] 2 P & CR 25). But even if I am wrong about that, once the 2010 decision was quashed by the High Court and the second appeal had to be redetermined, it is very surprising that the alleged error of law was not raised at that stage if Inspector Mead's report and the 2010 decision letter are to be read in the way now being suggested. Given the extent of the argument at the second inquiry on the approach to be taken to the 2008 decision, the misdirection now alleged by the Council should have been self-evident if that is the proper way in which to read the 2010 report (and the decision letter).
62. The same comment applies to subsequent stages of the redetermination process. On 14 December 2012 the Secretary of State announced that he would not re-open the inquiry into Helioslough's appeal or require it to be conjoined with the appeal into an interchange proposed at Colnbrook. On 20 December 2012 the Secretary of State issued a letter stating that he was minded to allow Helioslough's second appeal on the basis that he agreed with Inspector Mead's conclusions (see in particular his agreement with IR 13.8 to IR 13.19 in paragraph 19 of the letter). On 19 February 2014 and 1 April 2014 the Secretary of State invited comments and then "final comments" on the section 106 obligation submitted by Helioslough. At that stage it must have been obvious that the final decision letter was likely to be issued shortly.
63. At paragraphs 21 and 22 of its representations dated 12 October 2011 Helioslough had relied upon the approach taken by Inspector Mead. Paragraphs 10 and 11 of the Council's response dated 10 November 2011 did not raise any error of law. Similarly Strife, although represented throughout by Solicitors, did not raise the point (see letters of 14 October and 10 November 2011, 30 March 2012 and 4 March 2014).
64. At none of these key points in the redetermination of the second appeal did the Council raise the error now alleged under ground 1. The Council submitted that it acted in good faith throughout and "was not aware of any such error". Even on that basis, the implication is that throughout the period July 2010 to March 2014 the Council did not interpret Inspector Mead's response to the parties' submissions at the second inquiry as laying down some improper legal test as opposed to expressing his judgment on matters of weight.

65. For all these reasons I reject ground 1.

Ground 2

Points of agreement and disagreement

66. Whereas it was common ground that the Secretary of State's decision dated 1 October 2008, and the report of Inspector Phillipson preceding it, were "material considerations" which should be taken into account in the redetermination of Helioslough's second application, the parties were divided on whether the Secretary of State's decision dated 7 July 2014 on Veolia's appeal on the New Barnfield site was a material consideration at all.
67. The parties were also divided as to the legal basis upon which that issue should be decided. In summary, the Council and Strife submitted that the test in this case should be whether the Veolia decision was "sufficiently closely related" to the issues in Helioslough's appeal (R v Secretary of State for the Environment ex parte Baber [1996] J.P.L 1034, 1040), or whether it would have "tipped the balance" to some extent in the appeal, one way or another (R (Kides) v South Cambridgeshire D.C. [2003] 1 P. & C.R. 19, para 121). They submitted that that Kides test is substantially the same as the test stated in Bolton MBC v Secretary of State [1991] 61 P. & C.R. 343, 352), namely there is a real possibility that the factor might have resulted in a different decision if it had been taken into account.
68. The Secretary of State and Helioslough submitted that the correct test is given in Derbyshire Dales District Council v Secretary of State for Communities and Local Government [2010] J.P.L. 341 at paras 23 to 28, namely that it is necessary to show that the matter was one which the statute expressly or impliedly (because "obviously material") required to be taken into account "as a matter of legal obligation." It is insufficient that the consideration of a factor "might realistically" have led to a different result. The Secretary of State went further by submitting that the decision of the Court of Appeal in North Wiltshire District Council v Secretary of State (1993) 65 P. & C.R. 137, and by the same token the Baber case, did not lay down any principles for determining the materiality of other planning decisions, but were merely concerned with the adequacy of the reasoning given by the decision-makers in those cases.
69. It is common ground that in his 2014 decision on Helioslough's appeal the Secretary of State did not take into account the Veolia decision (see paragraph 12 of Christine Symes' witness statement) and thus did not make any assessment of whether that decision was "material". It is also agreed that in these circumstances it is the Court's task to determine that issue. Mr. Whale went on to accept that if the Court should decide that the Veolia decision was "obviously material", the Secretary of State's failure to do so would render the Helioslough decision liable to be quashed, without the Court needing to determine whether in addition the Secretary of State had acted unfairly by failing to give the Council and others an opportunity to make representations on any implications of the Veolia decision before determining Helioslough's appeal.
70. For his part, Mr. Reed accepted that the Council's contention that the Secretary of State had acted unfairly in that respect depended critically upon the Court reaching

the conclusion that the Veolia decision was material in this case. Thus, if the Court should decide that the Secretary of State had not been obliged to take the Veolia decision into account in the present case, he accepted that the allegation of procedural unfairness would fall away. He also accepted that the burden lies with the Council, as the Claimant, to persuade the Court that the Veolia decision was material. Mr. Stinchcombe Q.C. did not dissent from these concessions.

The obligation to take into account material considerations

71. The starting point is section 70(2) of TCPA 1990 which requires the decision-maker to take into account not only the development plan (and in England any relevant “local finance considerations” as defined in subsection (4)) but also “any other material considerations”.
72. In section 70(2) “material” means “relevant”. It is for the courts to determine whether or not a consideration is relevant. But it is for the decision-maker to attribute to a relevant consideration such weight as he thinks fit and the courts will not interfere unless his judgment is irrational (Tesco Stores Ltd v Secretary of State [1995] 1 WLR 759, 764).
73. The general principle is that any consideration which relates to the use and development of land is capable of being a planning consideration, but “whether a particular consideration falling within that broad class is material in any given case will depend on the circumstances” (Stringer v Ministry of Housing and Local Government [1970] 1 WLR 1281, 1294). Plainly, the considerations taken into account in the Veolia decision were relevant planning matters in that decision, but the issue here is the relevance of those matters to the determination of the Helioslough appeal.
74. In the Derbyshire Dales case the High Court had to address the relevance of alternative sites for the location of a proposed development to the determination of a planning application for that proposal. In summary, Carnwath LJ (as he then was) referred to case law establishing the following propositions:-
 - (i) There is an important distinction between (1) cases where a possible alternative site is *potentially* relevant so that a decision-maker does not err in law if he has regard to it and (2) cases where an alternative is *necessarily* relevant so that he errs in law by failing to have regard to it (paragraph 17);
 - (ii) Following CREEDNZ [1981] 1 NZLR 172, 182; Re Findlay [1985] AC 318, 333-4; and R (National Association of Health Stores v Secretary of State for Health) [2005] EWCA Civ 154, in the second category of cases the issue depends upon *statutory construction* or upon whether it can be shown that the decision-maker acted *irrationally* by failing to take alternative sites into account. As to statutory construction, it is necessary to show that planning legislation either *expressly* requires alternative sites to be taken into account, or *impliedly* does so because that is “so obviously material” to a decision on a particular project that a failure to consider alternative sites directly *would not accord with the intention of the legislation* (paragraphs 25-28 and Lord Scarman in Re Findlay at [1985] AC 384);

- (iii) Planning legislation does not *expressly* require alternative sites to be taken into account (paragraph 36), but a legal obligation to consider alternatives may arise from the requirements of national or local policy (paragraph 37).
- (iv) Otherwise the matter is one for the planning judgment of the decision-maker on the facts of the case (paragraphs 28 and 36). In assessing whether it was irrational for the decision-maker not to have regard to alternative sites, a relevant factor is whether alternatives have been identified and were before the decision-maker (paragraphs 21, 22 and 35) That factor was treated as having “crucial” importance in the circumstances of Secretary of State v Edwards (1995) 68 P. & C.R. 60, in contrast to Derbyshire Dales where no alternatives had been identified and it was simply the *possibility* of there being alternatives which was said to be material (paragraph 22).

As Carnwath LJ noted, a similar analysis is to be found in Wade: Administrative Law (11th Edition) at pp. 324-325.

- 75. In point (ii) above the implied statutory obligation to take into account an “obviously material” factor reflects the basic principle in Padfield v Minister of Agriculture, Fisheries and Food [1968] AC 997 that a statutory power or discretion is required to be exercised so as to promote the policy or objectives of the legislation (see also R v Tower Hamlets LBC ex parte Chetnik Ltd [1988] AC 859, 888 and R (Cala Homes (South) Limited) v Secretary of State for Communities and Local Government [2011] JPL 1458, para. 15).
- 76. In Derbyshire Dales Carnwath LJ pointed out (paragraph 24) that the decision in Bolton MBC had been concerned primarily with the rejection of the appellant’s argument in that case that a failure to have regard to a non-mandatory consideration could *only* invalidate a decision if the failure to do so could be treated as *irrational* (see (1991) 61 P. & C.R. at pp 349-351). As Carnwath LJ also stated (paragraph 28), a decision may also be invalidated if the decision-maker ignores a consideration which the operative legislation required him to take into account either expressly or, because it was “obviously material”, impliedly.
- 77. Having rejected the appellant’s submission in Bolton, the Court of Appeal went on to hold that the “relative importance” of a material consideration is “a very major aspect” of the question whether the decision-maker was obliged to take it into account (page 352). The Court of Appeal expressly endorsed the distinction drawn in the CREEDNZ case between matters which legislation requires a decision-maker to take into account and other matters where the “obligation to take into account is to be implied from the nature of the decision and of the matter in question” (pages 352 – 3). It is for the Court to decide whether there was a legal requirement to take into account matters in that second category. Thus far, the approach taken by the Court of Appeal in Bolton is not significantly different from the analysis of Carnwath LJ in Derbyshire Dales.
- 78. The apparent difference is said to be that in Bolton the Court of Appeal went on to lay down a relatively low threshold for determining whether a consideration was something that, by implication, the decision-maker was required to take into account, i.e. whether in the opinion of the Court it might realistically have led to a different result, as compared with whether the consideration was “obviously material”.

79. In fact Glidewell LJ stated (p. 353) that a Court should decide that a decision-maker errs in failing to take account a potentially relevant consideration where either:-
- (i) the matter was *fundamental to the decision*; or
 - (ii) “it is *clear* that there is a real possibility that the consideration of the matter would have made a difference to the decision” (emphasis added).

He continued:-

“...if the judge is *uncertain* whether the matter could have had this effect or was of such importance in the decision-making process, then he does not have before him the material necessary for him to conclude that the decision was invalid” (emphasis added).”

80. The words I have emphasised above in the judgement of Glidewell LJ indicate that any difference between the tests given in the Bolton case and in Findlay for assessing the *importance* of a consideration is not substantial. In any event, a test given in an authority for determining whether a consideration was sufficiently important that there was an *implicit* legal obligation to take it into account, should not be divorced from the context in which the case was decided.
81. For example, the Bolton case was concerned with whether the decision-maker was obliged to take into account a landowner’s late objection to a compulsory purchase order, which had been made necessary because of a change in Government policy undermining the landowner’s earlier agreement with the acquiring authority and the withdrawal of its initial objection. The context in which the Court of Appeal formulated its “test” of materiality was a statutory code intended to provide a procedure for examining the justification for a proposed expropriation of private land and objections thereto.
82. By contrast, when dealing with the relevance of alternatives to an applicant’s proposal, the principle is that there is no *general* requirement for alternative sites or schemes to be considered (see e.g. R (Jones) v North Warwickshire B.C., [2001] P.L.C.R. 31). The object is to see whether or not a proposal is acceptable on its own merits. In that context, therefore, much of the case law focuses on why it should be relevant to require the consideration of alternatives. This may be because of a legal or policy requirement or because of the particular, if not special, circumstances of the case.
83. Similarly, the passage relied upon by the Council and by Strife in paragraph 121 of Kides on the materiality of a consideration was expressly stated by Parker LJ to apply “in this context”. That case was essentially concerned with a procedural issue, namely the circumstances in which a local planning authority, having resolved to grant planning permission but delegated the actual grant of permission to an officer, might itself have to reconsider the matter if subsequently a material change of circumstance (such as a change of policy) should occur before the permission is actually granted.

84. In particular, because the obligation in section 70(2) to take into account “other material considerations” *is imposed on the planning authority itself*, and not upon an officer (paragraph 125), unless acting within the scope of an authority delegated to him, the Court explained the circumstances in which an officer, “erring on the side of caution”, could proceed to issue a grant of permission without needing to refer the matter back to the authority. He should be satisfied that (a) the authority is aware of the new factor; (b) that it has considered it with the application in mind; and (c) that on a reconsideration the authority *would* reach (not *might* reach) the same decision (paragraph 126). I would understand (c) to arise where (a) and (b) do not. It was only in that context therefore, that the Court of Appeal held in paragraph 121 that a consideration is “material” if it is a factor which, when taken into account by the decision-maker, would tip the balance to some extent, one way or another. Parker LJ went on to say: “In other words, it must be a factor which has some weight in the decision-making process, although plainly it may not be determinative”.
85. But the Court of Appeal was only concerned with the circumstances in which the merits of an application already considered by a planning authority might have to be revisited by the authority itself, as the body charged with the obligation under section 70(2) to take into account material considerations, because of a new factor which that authority had not already taken into account. That new factor might not be something which the authority is legally *obliged* to take into account; it might only be a factor which the authority would be legally *entitled* to take into account (paragraph 74(1) above). Where the new matter falls into the second category, then unless it is referred back by the planning officer, the authority will be unable to choose whether to take it into account. The discretion to decide whether to take into account a “non-obligatory” consideration is vested in the authority, unless properly delegated to an officer. That explains the Court of Appeal’s cautious approach and the threshold it set for requiring an officer to refer an application back to the decision-maker.
86. The reliance by the Claimant and Strife upon Kides is misconceived. That decision has nothing to do with the basis upon which it should be determined whether a consideration was one which the authority was obliged to take into account, as opposed to one which it was entitled to take into account. It is plain that the decision in Kides was not intended to detract from basic principles on “materiality” laid down in cases such as Findlay and CREEDNZ. Nor could it be suggested that Kides altered the principles laid down in the case law on whether a decision-maker is obliged to take into account alternative sites, or for that matter previous planning decisions.
87. Accordingly, when determining whether a consideration is material, tests such as “obviously material” (Findlay) or “whether the matter was fundamental to the decision or it is clear that there was a real possibility of it making a difference to the decision” (Bolton) cannot be considered in the abstract. Regard must be had to the context. In the present case we are dealing with the basis for determining whether there was an obligation to take into account a previous planning decision.

The law on whether a previous planning decision must be taken into account

88. I turn to the Secretary of State’s submission that the sole test for determining whether a decision-maker is obliged to take into account a previous planning decision is whether the earlier decision is “obviously material” and that North Wiltshire and Baber do not add any more specific tests.

89. North Wiltshire was concerned with a planning appeal in which an Inspector had granted planning permission for a dwelling on the basis that the site lay within the physical limits of the village. He did not deal with an earlier appeal decision to which he had been referred, in which a similar proposal had been refused on the grounds that the same site lay outside the physical limits of the village. The Court of Appeal pointed out that the second Inspector's decision had necessarily required a determination as to whether the site lay within the physical limits of the village and that had also been a critical aspect of the first decision. The second Inspector gave no indication that he had taken the earlier decision into account; if he had, he must be taken to have disagreed with it and yet had given no reasons for doing so (p. 146).
90. The general principles were laid down in the judgment of Mann LJ p. 145:-

“In this case the asserted material consideration is a previous appeal decision. It was not disputed in argument that a previous appeal decision is capable of being a material consideration. The proposition is in my judgment indisputable. 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. I do not suggest and it would be wrong to do so, that like cases must be decided alike. An inspector must always exercise his own judgment. He is therefore free upon consideration to disagree with the judgment of another but before doing so he ought to have regard to the importance of consistency and to give his reasons for departure from the previous decision.

To state that like cases should be decided alike presupposes that the earlier case is alike and is not distinguishable in some relevant respect. If it is distinguishable then it usually will lack materiality by reference to consistency although it may be material in some other way. Where it 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 a disagreement then the inspector must weigh the previous decision and give his reasons for departure from it. These can on occasion be short, for example in the case of disagreement on aesthetics. On other occasions they may have to be elaborate.”

91. The North Wiltshire case established the importance in development management of consistency between indistinguishable planning decisions. However, the circumstances in which a previous decision may be relevant cover a broad spectrum
92. In some instances the earlier decision may relate to the same development proposal on the same site (as here the Secretary of State's decision of 1 October 2008 on the first Helioslough application) or the same type of development on the same site (as in North Wiltshire; Dunster Properties Limited v First Secretary of State [2007] 2 P & CR 26; and R (Mid-Counties Co-Operative Limited) v Forest of Dean D.C. [2013] J.P.L. 1551). In some cases a previous decision may relate to a similar type of development in the same terrace or road, where similar planning issues or policies apply (e.g. Butterworth v Secretary of State for Communities and Local Government [2015] EWHC 108 (Admin)). In other situations a previous decision may relate to a completely different proposal on a different site but the *interpretation* of a planning policy is relevant to a subsequent determination (e.g. the "spatial objectives" for Sandbach considered in R (Fox Strategic Land and Property Ltd) v Secretary of State [2013] 1 P. & C.R. 6). Alternatively, a previous decision may be material because of the way in which a particular policy relevant to a later decision was *applied* in circumstances of sufficient similarity to the case under consideration.
93. The rationale which links these examples is the importance of consistency for decision-making in "like cases". But this is not an absolute principle. A subsequent decision-maker may disagree with an earlier decision which is material and drawn to his attention, provided that he gives reasons for so doing and has regard to the importance of consistency.
94. "Likeness" or similarity will depend upon the circumstances. Where an earlier decision interpreted a policy relevant to a subsequent decision, the issue in point is objective in nature (see e.g. Tesco Stores Ltd v Dundee City Council [2012] PTSR 983). In other cases "likeness", or whether an earlier decision is "distinguishable in some relevant respect" (Mann LJ in North Wiltshire at page 115), may depend not only upon identifying matters in an earlier decision of potential relevance, but also the exercise of judgment (whether by the decision-maker or by a reviewing Court) on the nature or degree of similarity. For these reasons I do not accept that the sole test suggested by the Secretary of State, namely whether a consideration is "obviously material", enables the Court, without more, to determine in all cases whether there was an implicit obligation to take into account an earlier planning decision.
95. In North Wiltshire Mann LJ suggested a practical test, namely if a subsequent case is decided in a particular way does that *necessarily* involve agreeing or disagreeing with some critical aspect of an earlier decision. That was said to be a *sufficient* test in the North Wiltshire case because there the Court held (p. 146) that *of necessity* the second decision-maker must have been disagreeing with a critical aspect of the first decision. Of course, in that case the two decisions related to the same type of development on the same site.
96. However, the test suggested in North Wiltshire will not necessarily be sufficient for all cases. That is confirmed by the decision of the Court of Appeal in Baber ([1996] J.P.L 1034). Residents of a hamlet successfully challenged the grant on appeal of a planning permission for an equestrian centre in the Green Belt accessed by a very narrow track. The Court of Appeal held that the Inspector, in deciding that the effect

upon residential amenity of the use of the track was acceptable, ought to have considered an earlier appeal decision in which another Inspector had rejected a proposal for a race horse training establishment on a different site on the grounds of the adverse effect on residential amenity from traffic using a different lane but with similar characteristics nearby.

97. Glidewell LJ held (p. 1040) that the appropriate test was whether the earlier decision drawn to the second Inspector's attention was "sufficiently closely related" to the issues in the subsequent appeal that he should have had regard to it. Applying that test, Glidewell LJ concluded that although the two proposed developments were not identical, the lanes affected were of about the same width and adjacent to properties in the same hamlet, and the issues raised were so similar that the earlier decision ought to have been taken into account and dealt with in the second decision.
98. Similarly, Morritt LJ held that the practical test suggested in North Wiltshire, namely whether the second Inspector necessarily disagreed with some critical aspect of the first decision, was too high for the circumstances in Baber. Instead, a "sufficient" test for Baber was whether the earlier decision was "sufficiently related" to the decision needing to be made in the second appeal (p. 1041).
99. It is plain from the above analysis that the Secretary of State's submission that North Wiltshire and Baber were simply concerned with adequacy of reasoning is untenable.
100. Here, the decision on the Veolia appeal which the Council contends ought to have been taken into account, was for a different type of development (waste management) on a different site and in another part of the Green Belt, albeit only 4 miles or so from the Helioslough site. Mr. Reed accepted that his client would have wanted to rely upon the decision, not because of any interpretation of policy relevant to the Helioslough decision, but because of the way in which Green Belt policy was *applied* to the circumstances of that case. The argument depends upon similarities between the two cases as claimed by the Council, but plainly they must be assessed together with any relevant dissimilarities.
101. In view of the nature of the Council's argument, I consider that the "obviously material" test should be applied in this case by following the approach taken in Baber, namely whether those aspects of the Veolia decision relied upon by the Council were sufficiently closely related to Helioslough's appeal proposal as to oblige the Secretary of State to deal with them in his decision on the latter. However, for the reasons set out below I do not think that the test in Bolton would produce a different outcome.

The findings in the Veolia decision

102. In the Veolia decision the Secretary of State refused an application for planning permission for a Recycling and Energy Recovery Facility ("RERF") at New Barnfield, Hatfield, Hertfordshire. In their conclusions on the RERF, both the Inspector and the Secretary of State identified the harm arising from the proposal and then went on to consider the very special circumstances said clearly to outweigh that harm. They concluded that the objections to the proposal were just as strong as the points telling in its favour and so in the final balancing exercise they decided that the applicant had not demonstrated very special circumstances which clearly outweighed harm.

103. In Veolia's application the Inspector found that there was a strong case for the development on waste management grounds (IR 1076). For example, it would have enabled all of the local authority collected waste in Hertfordshire, and other waste, to be diverted from landfill sites, and avoided the transportation of that waste outside the County. There were no satisfactory alternatives for dealing with the amount of waste which the RERF would handle. Smaller schemes on a range of sites were judged to be unsatisfactory because of considerable delay (in the order of 10 years) in achieving delivery, the export of waste to landfill sites outside the County would have to continue in the meantime, and there were doubts as to whether such alternatives would be visually less intrusive.
104. The Veolia Inspector found (inter alia) that the proposed RERF would cause serious harm to the openness of the Green Belt, serious harm to the character and appearance of the area, harm to the amenity of users of public footpaths, and significant harm to heritage assets, including the ensemble at Hatfield House and Hatfield Park (IR 1059 to 1061, 1062 and 1074). The effects of the proposal on the Green Belt were dealt with at IR 727 to 742. The Inspector found that the volume of the RERF would be about 20 times the volume of the existing development on the site, which mainly comprised single storey buildings (IR 728). Accordingly, the RERF fell to be treated as "inappropriate development" requiring to be justified by very special circumstances (IR 733). He also found that the site occupied a prominent location (IR 729) and that the proposed development would contribute significantly to the sprawl of a large built up area and the encroachment of development into the countryside (IR 730).
105. In his decision letter of 7 July 2014 on Veolia's application the Secretary of State agreed with the Inspector's conclusion on harm and how the planning balance should be struck (see e.g. paragraphs 19 to 25 and 50 to 55).

The findings in the Helioslough decision

106. In the Helioslough decision letter issued on 14 July 2014, the Secretary of State agreed (DL 24) with Inspector Mead's assessment of harm to the Green Belt (IR 13.35 to 13.40). The SRFI would have a substantial impact on the openness of the Green Belt which could not be mitigated, there would be a significant encroachment into the open countryside, contribution to urban sprawl and some harm to the setting of St. Albans. On the other hand, the proposal would not lead to the merging of neighbouring towns. It was also found that the overall effect on the landscape would be moderately adverse (DL 25 and IR 13.41 to 13.44) and there would be harm to ecological interests (DL 25 and IR 13.46).
107. On the benefits of the proposal, the Inspector and the Secretary of State decided that national and regional policies supported the need to provide SRFIs to serve London and the South East as part of a national network (IR 13.29 to 13.34 and DL 31). The existence of that need was not disputed and "very considerable weight" was attached to it (IR 13.111 and DL 44). The broad sector North West of London was the appropriate area within which to search for sites (IR 13.112 and DL 45). There were no more appropriate locations for the SRFI which would cause less harm to the Green Belt (IR 13.114 and DL 45 and 53). In addition, the proposal would provide for a country park and a bypass as well as improvements to footpaths (IR 13.119 and DL 44 and 53). It was concluded that these matters clearly outweighed the harm identified (DL 53).

The Claimant's submissions

108. In paragraph 5 of his first witness statement Richard Tilley, a planning consultant acting for Helioslough, pointed out that the Council had not explained what it would have said going beyond its earlier representations if it had been in a position to rely upon the Veolia decision. In paragraph 6 he denied that the Veolia decision had any implications for the acceptability of the SRFI. The Veolia decision simply demonstrated what was considered to be unacceptable on the specific facts of that case.
109. In his first witness statement Richard Hargreaves, the Council's planning witness at the public inquiry into the SRFI proposal, responded to Mr. Tilley. In paragraph 3 he relied upon the following similarities between the schemes:-
- (i) both involved major public infrastructure schemes the need for which was accepted;
 - (ii) both were located entirely within the Green Belt, indeed "the same Green Belt area", and were located only 4 miles apart;
 - (iii) both involved substantial encroachment into the countryside and substantial impacts on the openness of the Green Belt and significant harm to the Green Belt;
110. Mr. Reed did not suggest that these similarities were sufficient to bring the consistency principle into play in the decision of the SRFI proposal. In my judgment he was plainly right not to do so. Mr. Hargreaves's points are too generalised, or involve too high a level of abstraction, to give rise to any obligation on the part of the Secretary of State to take into account and compare his decision on Veolia's RERF with his assessment of Helioslough's SRFI. Even if it were to be accepted for the sake of argument that the two sites lie in the same "Green Belt area" (whatever precisely that may mean), the mere fact that both proposals involved, for example, substantial impacts on the openness of the Green Belt would not have been sufficient here to oblige the Secretary of State to take into account the Veolia decision in Helioslough's appeal. First, "substantial impacts" may not involve similarity as to type or degree of impact. Second, even if it were to be assumed that there was a sufficient similarity in respect of harm, the Veolia application was not rejected simply because of that harm, but because in the final balancing exercise the very special circumstances identified were judged to be insufficient to "clearly outweigh" that harm. In other words, that harm did not constitute a freestanding reason for refusal but formed part of the overall balancing exercise which involved weighing specific findings on harm against the specific need arguments in Veolia's case.
111. Consequently, Mr. Reed's submissions on why the consistency principle was engaged in this case, relied upon paragraph 4 of Mr. Hargreaves' first witness statement in which he set out seven more specific matters which the Council say they would have wished to advance. It is these matters which Mr. Reed argues involved sufficient similarity between the two proposals, or a sufficiently close relationship, as to oblige the Secretary of State to have regard to the Veolia decision from the point of view of consistency. In summary, those seven matters were:-

- (i) The scale of SRFI and the area it occupies is substantially larger than the RERF. The area of the SRFI is about 12 times greater than that of the RERF and has a commensurately greater impact on openness. If the smaller scheme had a sufficient impact on openness to warrant a refusal, then the larger scheme should also have been refused “in terms of this *one criteria*” (emphasis added). It is also suggested that this one factor could by *itself* have made a difference to the outcome of the Helioslough appeal;
- (ii) The same point is made in relation to the overall volume of the SRFI. The volume of the RERF was said to be greater than the volume of the existing development on the New Barnfield site. The SRFI would be located on a site with very little existing development and would have a volume of 6,269,920 cu. m. compared to the 585,000 cu. m. of the RERF;
- (iii) Likewise both proposals involved significant encroachment into the countryside and contributed to urban sprawl, but it is said that the sprawl of the RERF is substantially less than that of the SRFI because of the differences in the scale of the two developments and so the same consequences follow as in (i) and (ii) above;
- (iv) In the Veolia case it was found that the RERF would occupy a prominent location (IR 729) and that there would be serious harm to the character and appearance of the landscape of the area (IR 777 and IR 1060). The SRFI is similarly located (i.e. gentle ridge and local area of high ground) and if the same approach had been taken in the SRFI decision as in the RERF decision, the Secretary of State would have decided that the impact across the whole site was greater than “moderate adverse”;
- (v) In the Veolia decision it was said that the scale of the development would be detrimental to the visual perception of the remaining gap between Hatfield and Welham Green and that would be harmful to one of the purposes of the Green Belt, namely to prevent neighbouring settlements merging into one another (DL 21). In the Helioslough decision it was concluded that the proposal would not lead to the merging of neighbouring towns, namely St. Albans merging with Radlett or Park Street and Frogmore merging with Napsbury or London Colney (DL 24 and IR 13.36 to 13.36). However, Mr. Hargreaves says that the gap between settlements to the east and west of the SRFI would be reduced to only 25%, which would be a much greater reduction than in the Veolia proposal and therefore the conclusion in the RERF decision on merger should also have been reached on the SRFI decision;
- (vi) In the Veolia application the Secretary of State concluded that although the on-site landscaping proposed, including ground modelling and planting, would partially soften the appearance of the RERF and provide some mitigation by year 15, “it could not be wholly effective in view of the scale and prominent siting of the structure” (DL 24 and IR 777). In the Helioslough decision, the Secretary of State agreed (DL 25) with the conclusions of Inspector Mead (IR 13.41 to 13.44), which were similar to those of Inspector Phillipson (IR 16.14 to 16.22) and the first decision letter (DL 24 to 27). In other words, the mitigation works proposed in areas 3 to 8 would do practically nothing to ameliorate the impact of the built development (located in areas 1 and 2). The

improvement in Areas 3 to 8 would not offset harm to the landscape caused by development on Area 1 and the overall impact on the entire site would be moderately adverse. Mr. Hargreaves asserts that the mitigation proposed for the SRFI would be much less effective than that proposed for the RERF and, given the larger scale and volume of the SRFI, “the Secretary of State could have reached a different view on this point had he considered the different approach adopted to the same sort of harm in the New Barnfield RERF decision”;

- (vii) In the Veolia case there was a “strong waste management case” and no better performing alternative sites and yet the proposal was refused permission, whereas in the SRFI case the need case was accepted as clearly outweighing the harm identified.

Discussion

112. In my judgment the Council’s argument is flawed. On the material before the Court it is impossible to reach the conclusion that, as a matter of law, matters in the Veolia decision upon which the Council relies were sufficiently closely related to the issues in the Helioslough appeal, so that they were “obviously material” to the latter and the Secretary of State was under an obligation to take them into account. Alternatively, applying the test in Bolton, the Council has not shown that the matters in the Veolia decision upon which it relies were either fundamental to Helioslough’s appeal or that it is clear that there is a real possibility that these matters would have made a difference to the Helioslough decision if they had been taken into account.
113. Points (i) to (iii) essentially involve the same line of argument, namely if the impact of the smaller Veolia scheme had been sufficient to warrant a refusal because of its effect on the openness of the Green Belt and its contribution to urban sprawl, the same approach should have resulted in the dismissal of Helioslough’s appeal. But in my judgment the argument is misconceived because it ignores the basis upon which the Veolia application was refused by the Secretary of State. In that case the Secretary of State accepted that there was a strong need argument. So the application was not rejected simply because of harm to the Green Belt and other planning interests but because that harm was not outweighed, let alone clearly outweighed, by the need for the development and other benefits. According to the Secretary of State’s reasoning in the Veolia decision upon which the Council seeks to rely, the disbenefits of the proposal should not be considered in isolation from its benefits. The two are intrinsically linked because of the requirement to carry out the balancing exercise. The same applies to the Helioslough decision, as can be seen, for example, in paragraph 13.44 of the report of Inspector Mead where he stated that the acceptability or otherwise of the landscape harm he had identified could not be judged until the final balancing of harm and other considerations was evaluated. The Council has not suggested that that approach involved any legal error. Plainly it does not.
114. As I have already mentioned, the Council does not rely upon the Veolia decision for the interpretation of policy, but rather for the way in which policy, in particular Green Belt policy, was applied. Mr. Hargreaves’ witness statement asserts that the approach taken to that policy in the Helioslough decision differed from that taken in the Veolia decision. I do not accept that. Essentially the approach was the same. In each case, the need for the development proposed and the availability or otherwise of

alternatives, together with any benefits, were evaluated and then weighed against the extent to which that development would cause harm to the Green Belt and other harm. The differences between the two cases concerns the *weight* given to each of these various factors.

115. In my judgment the weighing of these factors in the overall balance in the Veolia decision was *case and site specific* and the same is true for the Helioslough decision. Take for example the questions of need and alternative sites. In Veolia the need related to the disposal of waste arising within the County and the avoidance of the use of landfill for the disposal of that waste. The proposal was supported to some extent by local planning policy, in particular policy at the County level. By contrast the SRFI was a proposal supported by national and regional policy for infrastructure forming part of the national rail and road network. Indeed, Mr. Hargreaves accepted that there was a national need for the SRFI (para. 4(7) of first witness statement). Thus, it was possible for the need in the Helioslough case, to which the Secretary of State gave “very considerable weight”, to outweigh more readily the overall harm of the SRFI, to which he attached “substantial weight” (DL 41 and 44), even if be assumed *for the sake of argument* that the harm in the Helioslough case was greater than that in the Veolia case.
116. In paragraph 9 of his second witness statement Mr. Hargreaves contends that the need in the two cases is comparable by pointing out that the RERF at New Barnfield would, in diverting waste from landfill, contribute towards a national obligation in the EU Landfill Directive to meet targets for 2020. But Mr. Reed accepted that that contribution is limited to waste arising within one county, Hertfordshire. By contrast, the proposed SRFI would form part of a national transport network enabling goods to be distributed to or from the London and South East regions. The purposes and significance of the two developments are plainly different. There is no justification for assuming that the weight to be given to the need for each of the schemes is the same or even comparable.
117. The two developments also have different requirements as to the amount of land needed. The overall area of the New Barnfield site was 12.62 ha (para. 15 of the Inspector’s Report). The site selection criteria for the SRFI included a minimum site area of 40 ha (Inspector Mead IR 13.89). Self-evidently, development of an SRFI on a larger scale on a larger site may well have a greater impact on the openness of the Green Belt, but that simply flows from the requirements or needs of the development if it is to go ahead. It follows ineluctably that (i) the harmful effects of the SRFI cannot be divorced from the requirements of that development, (ii) these issues are bound up with the need for the development, and (iii) it is pointless to make a comparison between the harmful effects of the RERF and of the SRFI in isolation from the requirements of, and need for, the development. The Council’s argument does not address this. Once these additional factors are taken into account, it is obvious that the two proposed developments and their effects cannot meaningfully be compared in the way the Council seeks to do.
118. Indeed, Mr. Hargreaves “let the cat out of the bag” when he made it clear that the Council contends that point (i), scale of development, should be considered in isolation (see paragraph 4 of his first witness statement). The same goes for his points (ii) and (iii). For the reasons I have set out, that approach is untenable.

119. The same flaw applies to the Council's points (iv) to (vii). In addition, points (iv) and (vi), namely the effect of the prominence of the two sites on the landscape assessment and mitigation measures, have been contradicted by Mr. Tilley in paragraphs 3 and 4 of his second witness statement. I acknowledge that in paragraphs 3 to 7 of his second witness statement Mr. Hargreaves takes issue with Mr. Tilley, but it is not possible in proceedings for judicial review or statutory review to resolve issues of this kind. In such circumstances the general principle is that the Court will proceed on the basis of the factual and/or opinion evidence stated by those defending the decision under challenge (see e.g. R v Camden LBC ex parte Cran (1996) 94 LGR 8, 12).
120. Furthermore, the Council's contention in point (iv) is muddled. It is suggested that if the Veolia decision had been taken into account in the determination of Helioslough's appeal, the Secretary of State would have concluded that the landscape harm across the whole of the appeal site would be greater than "moderately adverse". But that ignores the fact that, as Mr. Reed accepted, it was the Council's case before the Secretary of State that the overall effect of the SRFI proposal would indeed be "moderately adverse" (see Inspector Mead's report – IR 8.25 to 8.28 and 13.41 to 13.42 and 13.44). Accordingly this point is entirely hollow.
121. There remains point (v), the issue of whether the development would lead to the merging of neighbouring towns. But from a plan shown to the Court during the hearing, it can be seen that in the two cases before him the Secretary of State was dealing with entirely different gaps between different settlements in different parts of the Green Belt. From the material before the Court, I am quite unable to say that either the characteristics of those gaps, or the effects of the respective developments on those gaps, would be in any way similar or comparable. Of even greater importance is the reasoning of Inspector Mead at IR 13.37 to 13.38, from which it is plain that he made his own assessment of the effect of the SRFI development and the new railway line on the gaps and the separation remaining between settlements. This type of assessment was site-specific in each instance and there was no legal obligation upon the Secretary of State to have in mind another site-specific assessment made in the Veolia decision as to the effect of the proposal in that case upon an entirely different gap. I distinguish Baber in which both of the appeal decisions concerned a single factor, namely the effect of traffic generated by developments with certain similarities upon the residential amenity of properties in the same small hamlet, and not as part of an exercise balancing need against harm.
122. For these reasons, I have reached the firm conclusion that the circumstances of the Veolia case were not sufficiently similar or related to the issues in the Helioslough case that the Secretary of State was obliged to take into account the Veolia decision when determining Helioslough's appeal. The two decisions are plainly distinguishable.
123. I note that in paragraph 9 of the Council's Statement of Facts and Grounds reliance was placed upon Veolia's challenge to an alleged failure by the Secretary of State in that case to take the Helioslough decision into account and an unexplained inconsistency of approach. However, as appears from paragraph 45 of my judgment at [2015] EWHC 91 (Admin), Veolia did not attempt at the hearing to demonstrate any relevant similarities and the ground fell away. So this point can add nothing to the merits of the Council's challenge here.

Fairness

124. The Council also complains that the Secretary of State acted unfairly by failing to give them an opportunity to make representations on the Veolia decision. Alternatively, the Council traced the process followed by the Secretary of State in the redetermination of Helioslough's second appeal following the quashing by the High Court [2011] EWHC 2054 (Admin) of the decision dated 7 July 2010. They submitted that they had gained a legitimate expectation of being consulted upon, and being able to make representations upon, any new matter which the Council considered to be material to the redetermination (see e.g. paragraph 3(c) of the Secretary of State's letter dated 15 September 2011). The Council submitted that the Veolia decision fell within the scope of that expectation.
125. The Council accepted that, in place of "the fair crack of the whip" approach in Fairmont Investment Ltd v Secretary of State [1976] 1WLR 1255, 1266 the relevant test is whether there has been procedural unfairness which materially prejudiced the claimant. (Hopkins v Secretary of State for Communities and Local Government [2014] PTSR 1145, paragraphs 49 and 62-3). That reflects the statement by Lord Denning MR. in George v Secretary of State (1979) 77 LGR 689, 695
- "there is no such thing as a technical breach of material justice...you should not find a breach of natural justice unless there has been substantial prejudice to the applicant as a result of the mistake or error which has been made."
126. For that reason, Mr. Reed was correct to accept that if the Veolia decision was not a material consideration in the determination of Helioslough's appeal, as I have decided, then the Council's challenge based on unfairness and legitimate expectation falls away. I agree and therefore will not address issues such as whether the Secretary of State was obliged to allow the Council (and others) an opportunity to make representations on the Veolia decision, or whether the Council had a sufficient opportunity between obtaining the Veolia decision by its own efforts and the issuing of the Helioslough decision on 14 July 2014 in which to ask for the determination of the latter to be deferred pending representations on any implications of the Veolia decision.

The effect in this case of the quashing of the Veolia decision

127. Likewise, I will not decide the argument raised by the Secretary of State and by Helioslough that the effect of the High Court's quashing order on 22 January 2015 in Veolia's challenge was to render the Veolia decision of no legal effect from the outset for any purpose and thus prevent the Council from pursuing Ground 2 (applying Boddington v British Transport Police [1999] 2 AC 143, 155C). If it had been necessary for me to decide the point, I doubt whether I would have accepted it on the argument I heard.
128. First, the Boddington principle is not absolute (see e.g. R (Shoemith) v Ofsted [2011] PTSR 1459). Second, there is authority to the effect that when a planning decision by the Secretary of State or an Inspector is quashed, it does not follow that reliance cannot be placed upon any part of that decision at all. For example, it may be possible to have regard to parts of the decision which are not tainted or affected by the

legal grounds upon which the quashing was based (see e.g. Vallis v Secretary of State for Communities and Local Government [2012] EWHC 578 (Admin) paragraphs 14 and 27). Third, the decisions of the High Court and the Court of Appeal in Fox Strategic Land and Property Ltd v Secretary of State [2013] 1 P&CR 6 proceeded on the basis that when the decision in Fox's case was re-determined as a result of a quashing order, that part of the decision in the Richborough appeal relating to the spatial vision for Sandbach would be taken into account, notwithstanding that the Richborough decision had already been quashed on other grounds. Mr. Whale accepted this, but merely added that the Boddington point had not been argued in Fox. That response suggested that the Secretary of State has not thought through the implications for other cases of the "knock out blow" he seeks to deliver in the present case, and therefore the matter should await full argument and citation of relevant authorities in a case where a decision on the issue is necessary. Fourth, the Secretary of State should reconsider his argument in the light of regulation 19 of the Town and County Planning Act (Inquiries Procedure) (England) Rules 2000 (SI 2000 No 1624) and parallel rules for decisions by Inspectors. These rules proceed on the basis that when an appeal has to be redetermined following a quashing, there is no legal principle requiring the whole decision to be treated as if it had never existed, so as to make it necessary for all of the merits of the appeal to be redetermined.

Conclusion

129. For the above reasons, grounds 1 and 2 fail and the claim must be dismissed.

Addendum

130. The parties agree that the Court should order that the application be dismissed and the Claimant should pay the First Defendant's costs in the sum of £13,269.00.

131. However, there are issues as to whether:-

- (i) The Claimant should pay the costs sought by the Second Defendant;
- (ii) The Claimant should have permission to appeal;
- (iii) If the answer to (ii) is no, whether time under CPR 52.4(2) for filing a notice of appeal should be extended to 13 April 2015.

I am grateful for the written submissions which I have carefully considered.

Costs

132. The Second Defendant asks that the Claimant be ordered to pay its costs reasonably incurred in preparing a skeleton argument and preparing and presenting evidence to complete the factual background given by the Claimant and the First Defendant in the specific respects set out in the draft order submitted.

133. The main principles governing the award of a second set of costs are set out in the decision of the House of Lords in Bolton MDC v Secretary of State [1995] 1WLR 1176. The First Defendant is entitled to the whole of his costs in any event.

134. The developer is not normally entitled to a separate set of costs unless (a) he has an interest requiring separate representation or (b) there was likely to be a separate issue on which he was entitled to be heard, that is, an issue not covered by Counsel for the Secretary of State. As to (a) being a developer with a valuable planning permission does not constitute an interest requiring separate representation. There remains point (b).
135. In this case two grounds of challenge were made to the decision letter. No allegations were made regarding the conduct of the Second Defendant.
136. Items 1(a) to (d) of the draft order cover a large part of the Second Defendant's skeleton. I do not accept that an order for costs is justified in relation to these matters. Essentially they cover ground which was dealt with in writing and/or orally by Counsel for the Secretary of State. They fall within the territory with which the First Defendant could have been expected to deal. In addition a good many matters would have been covered by the judge in his or her pre-reading for the hearing. The matters identified did not require separate representation.
137. I do not consider that costs can be justified in respect of the First of Mr. Tilley's witness statements. Very little of the material contained therein (including exhibit "RT 1") was necessary for the determination of the case or even relied upon in order to deal with the real issues raised by the challenge. It was rightly pointed out by Mr. Tilley in two short paragraphs that the Claimant had failed to identify what representations they would have made on the Veolia decision if they had had the opportunity to do so or the implications of that decision for Helioslough's appeal. That was an obvious omission. The Secretary of State could have been expected to identify that flaw in submissions, if the point had not previously been made in correspondence.
138. However, the Council then served a six page witness statement from Mr. Hargreaves and it was plainly appropriate for a second witness statement from Mr. Tilley to be served in response. I found it necessary to rely upon that statement in my judgment. The Second Defendant is entitled to the costs of preparing that second witness statement. Costs for the "presentation" of that statement are not justified. The document is clear and speaks for itself.
139. No order for costs in respect of the third witness statement is justifiable. The statement mainly contains submissions on material exhibited by Christine Symes or contained elsewhere in the bundles.
140. I will order the Claimant to pay the costs of the Second Defendant for the preparation of Mr. Tilley's second witness statement dated 16 January 2015, to be assessed if not agreed. Neither the protective costs order of Patterson J made on 3 November 2014 nor the consent order dated 30 January 2015 (agreed between the Claimant and First Defendant) apply to costs payable to the Second Defendant. In any event, I would not expect the costs I am ordering to approach anything like the balance of £21,731 identified in paragraph 6 of the Claimant's submissions dated 12 March 2015.

Permission to appeal

141. I refuse the Claimant's application for permission to appeal. The proposed appeal has no real prospect of success and there is no other compelling reason as to why the appeal should be heard.
142. In relation to Ground 1 paragraph 2(a) of the application does not identify any arguable error on the judgment let alone one with a real prospect of success. Paragraphs 2(b) to (d) of the application are misconceived. They focus on paragraphs 60 to 64 of the judgment. The short answers are:-
- (i) Paragraph 59 clearly states that ground 1 had to be rejected in any event for the reasons already given before reaching paragraphs 60 to 64;
 - (ii) The judgement does not suggest that the ability of the Council to allege the legal error at an earlier point was a reason for rejecting the challenge were the Court to accept that that error had been committed;
 - (iii) Paragraphs 60 to 64 simply make the point that over the period from 2010 to 2014 the Council's behaviour suggests that it did not read the Inspector's report or the Secretary of State's "decisions" as having laid down a legal test. The Council's letter of 10 November 2011 did not make that point in relation to either the Inspector's report or the costs decision at all.
143. In relation to Ground 2:-
- (i) Unlike the Colnbrook case, it has never been suggested that there was a "strategic" gap policy or issue. Instead, the issue in both the Veolia decision and the Helioslough decision concerned the application of Green Belt policy to the merger of settlements;
 - (ii) Paragraphs 4(a) and (b) simply seek to re-argue the merits and in particular they fail to address one of the key flaws in the Claimant's case (see e.g. paragraphs 113 and 117-119 of the judgment).
 - (iii) Paragraph 5 of the application is misconceived. Essentially the Council was successful in having the test in Baber applied. The alleged tension between Findlay and Bolton is of no consequence, because the judgment makes it plain that Ground 2 failed applying both tests in the alternative (see paragraphs 101 and 112).

Extension of time

144. Notwithstanding the objections of the Second Defendant, I consider that it would be reasonable to extend time for the service of the notice of appeal under CPR 52.4(1) from 7 April to 13 April 2015 to take into account Easter and for the reasons set out in the Claimant's application.