Neutral Citation Number: [2024] EWHC 2723 (Admin)

Case No: AC-2024-LON-001438

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29 October 2024

Before :

MRS JUSTICE LANG DBE

- -

Between :

KEEP CHISWELL GREEN	**Claimant**
- and -	
(1) SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES **(2) CALA HOMES (CHILTERN) LIMITED** **(3) HEADLANDS WAY LIMITED** **(4) ST ALBANS CITY AND DISTRICT COUNCIL**	**Defendants**

- -
- -

Piers Riley-Smith (instructed by **Richard Buxton Solicitors**) for the **Claimant**
Zack Simons (instructed by the **Government Legal Department**) for the **First Defendant**
Lord Banner KC and **Matthew Henderson** (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **Second Defendant**
Paul Stinchcombe KC (instructed by **Harold Benjamin Solicitors**) for the **Third Defendant**
The **Fourth Defendant** did not appear and was not represented

Hearing date: 10 October 2024

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Approved Judgment

This judgment was handed down remotely at 10.30 am on 29 October 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE LANG DBE

Mrs Justice Lang :

1. The Claimant applies for statutory review, pursuant to section 288 Town and Country Planning Act 1990 ("TCPA 1990"), of the decisions of the Secretary of State for Levelling Up, Housing and Local Communities ("the First Defendant"), dated 22 March 2024, in which he accepted the recommendations of his Inspector, and allowed two conjoined appeals against the decisions of the Fourth Defendant ("the Council") to refuse planning permission for two residential developments, on adjacent sites within the Metropolitan Green Belt, in Chiswell Green, near St Albans, Hertfordshire.

2. The "Appeal A" scheme, promoted by CALA Homes (Chiltern) Limited, ("the Second Defendant"), is for up to 391 dwellings (and the provision of land for a new school) on a site to the south of Chiswell Green Lane ("Appeal A Site").

3. The "Appeal B" scheme, promoted by Headlands Way Limited ("the Third Defendant"), is for up to 330 discounted affordable homes for key workers on a site to the north of Chiswell Green Lane ("Appeal B Site").

4. The Claimant is a local community group of concerned residents who objected to the proposed schemes during the planning application process. They were granted Rule 6 status[1] at the Inquiry and treated as a main party. The Council has taken no part in the proceedings.

5. The issue in the claim is whether the Claimant is entitled to challenge the First Defendant's decisions, on the ground that he unlawfully failed to have regard to a material consideration, namely the Arup Green Belt Review ("the Arup Review"), which was published after the Inquiry closed but before the First Defendant's decision, in circumstances where none of the parties, in particular the Claimant, sought to rely upon the Arup Review or provide the First Defendant with a copy of it.

6. On 2 July 2024, Eyre J. granted permission on the papers.

Planning history

7. On 25 October 2022, the Council refused the Third Defendant's application for outline planning permission for "demolition of existing buildings and the construction of up to 330 discounted affordable homes for key workers, including military personnel, the creation of open space and the construction of new accesses and highway works including new foot and cycle path and works to junctions" (the Appeal B scheme).

8. On 6 December 2022, the Council refused the Second Defendant's application for outline planning permission for "demolition of existing structures and construction of up to 391 dwellings (Use Class C3); the provision of land for a new school, open space provision and associated landscaping, internal roads, parking, footpaths, cycleways, drainage, utilities and service infrastructure and new access arrangements" (the Appeal A scheme).

[1] Rule 6(6) of the Town and Country Planning (Inquiries Procedure) (England) Rules 2000 ("the Inquiries Procedure Rules 2000")

9. The reasons for refusal were that the proposed developments were inappropriate development in the Green Belt for which no "very special circumstances" existed, applying the National Planning Policy Framework ("the Framework") 2021 version, at paragraph 148. The equivalent provisions are now found in the December 2023 version, at paragraphs 152-153.

10. The Second and Third Defendants appealed to the First Defendant and a public inquiry was held by the Inspector (Mr Michael Boniface MSc MRTPI) between 17 April and 9 May 2023.

11. The appeals were recovered by the First Defendant for his own determination, following a direction made under section 79 and paragraph 3 of Schedule 6 TCPA 1990, on 1 June 2023.

The SKM Review and the Arup Review

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

13. The 1st Stage SKM Review analysed the Green Belt of Dacorum Borough Council, St Albans City and District Council, and Welwyn Hatfield Borough Council. It did this by breaking down the Green Belt into 'Strategic sub-areas' for analysis. The Appeal Sites both fell within sub-area 'SA-S8 - Enclosed land at Chiswell Green Lane at Chiswell Green (GB25)' which was described, at 8.2.9, as follows:

> "The strategic parcel significantly contributes towards 2 of the 5 Green Belt purposes whereby it safeguards the countryside and maintains the existing settlement pattern (providing gap between St Albans and Chiswell Green). It also makes a partial contribution towards preventing merging and preserving setting. However the sub-area identified on pasture land at Chiswell Green Lane displays urban fringe characteristics due to its proximity to the settlement edge and Butterfly World along Miriam Road to the west. This development bounds the outer extent of the pasture land and creates a physical barrier to the open countryside. The pasture land also displays greater levels of landscape enclosure due to localised planting along field boundaries. This creates potential to integrate development into the landscape with lower impact on views from the wider countryside and surroundings. At the strategic level, a reduction in the size of the parcel would not significantly compromise the overall role of the Green Belt or compromise the separation of settlements. Assessed in isolation the land makes a limited or no contribution towards all Green Belt purposes."

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

15. The 2nd Stage SKM Review analysed S8 at Section 10. At Section 11.2 it ranked all 8 sub-areas depending on their suitability for Green Belt release and future development. S8 was ranked top (at 11.2.4) with a finding that it was "the most suitable site" for development. Appeal A Site was found to be the least sensitive part of the sub-Area 8 (Inspector's Report paragraph 542 ("IR/542")). Appeal B Site was found to be more sensitive and it was not recommended for release from the Green Belt for housing (see IR/312 and IR/550).

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

17. The Arup Review was commissioned by the Council, as part of its preparations for the emerging Local Plan. It was presented to the Council's Planning Policy and Climate Committee on 23 June 2023, and it was published on 16 June 2023 as part of the advance Agenda for that meeting. The Arup Review superseded the 2nd Stage SKM Review, and this was confirmed by the Council on its website on 16 June 2023.

18. The Arup Review stated at paragraph 3.5:

> "**3.5 Implications for Stage 2 GBR**
>
> The SKM Stage 1 GBR provides an analysis of the entirety of the St Albans Green Belt, which is judged to be in alignment with national policy and experience / best practice elsewhere. As a jointly commissioned study, it continues to be used by Dacorum and Welwyn Hatfield as part of their Local Plan evidence base. Its ongoing use in St Albans therefore provides continuity of approach on this strategic cross-boundary issue. The recommendations of the SKM Stage 1 GBR on the weakly performing areas therefore provide a good starting point for this Stage 2 review.
>
> However, as detailed above, significant concerns regarding the scope of the SKM Stage 2 GBR were raised by the Inspectors following initial hearing sessions on Green Belt matters. As such, the SKM Stage 2 GBR is entirely replaced by this newly commissioned Stage 2 GBR. As well as addressing the Inspectors' concerns re the spatial scope of the study, it also affords the opportunity to adopt an approach to the assessment for the Stage 2 GBR that is more aligned with neighbouring authorities and wider experience elsewhere.
>
> This Stage 2 GBR takes a more comprehensive and granular approach to identifying potential sub-areas to assess within the Green Belt. Not only does it re-consider the weakly performing strategic sub-areas and small-scale sub areas identified in the SKM Stage 1 GBR but also opportunities for potential release

> in the wider Green Belt. The exact process, including refinements to adjust for areas subject to major policy constraints and the application of a settlement buffer and to accord with NPPF policy on Green Belt boundaries, is detailed in section 4.2."

19. The Arup Review categorised the 183 sub-areas into one of four overall performances (according to how they performed against the Framework Green Belt purposes): Strong, Moderate, Weak, Does not meet. Then for each category it made recommendations as to whether:

    i) A sub-area should be 'recommended for further consideration in isolation' which meant if removed from the Green Belt, these areas are unlikely to result in harm to the wider Green Belt.

    ii) A sub-area should be 'recommended for further consideration in combination' - if removed from the Green Belt in combination, these areas are unlikely to result in harm to the wider Green Belt but one of the constituent sub-areas could not be removed in isolation without resulting in harm.

    iii) Not recommended for further consideration for removal from the Green Belt.

20. Appeal A Site was identified as SA-139 in the Arup Review and Appeal B Site was identified as SA-140.

21. The Arup Review found that SA-139 (Appeal A Site) "performs moderately against NPPF purposes but makes an important contribution to the wider Green Belt. Not recommended for further consideration". The detailed sub-area analysis in the Annex to the Arup Review included the following findings:

> "**Assessment of wider impact**
>
> At the more granular level, the sub-area performs similarly against purposes 1, and plays a lesser role against purposes 2, 3 and 4 compared to the strategic land parcel. As the sub-area is not located at the edge of a large built-up area, it does not contribute to checking unrestricted sprawl. Although the sub-area is quite large in scale, its location and comparatively smaller scale nature compared to the strategic land parcel mean that it plays a limited role in preventing neighbouring settlements from coalescing. Due to urbanising influences at the sub-area, the contribution it makes to protecting the openness of the countryside is diminished. As the sub-area does not abut an identified historic place or provide views to a historic place, it makes no contribution to preserving a historic context.
>
> The sub-area adjoins SA-136, SA-138 and SA-140 to the south, west and north respectively; as well as wider Green Belt to the west. The removal of the sub-area in isolation is likely to alter the performance of the surrounding Green Belt as it would

> represent a disproportionate spread of the built-up area, with regards to the scale of Chiswell Green. It would introduce urbanising influences, hence increasing the importance of surrounding Green Belt in preventing encroachment into the countryside. In addition, it would result in SA-136 effectively becoming enclosed by built development.
>
> In combination with SA-136, SA-138 and SA-140 the removal of the sub-area is likely to impact on the performance of the wider Green Belt as it would result in significant irregular spread of the built-up area, which would be disproportionate to the scale of the settlement.
>
> In combination with other sub-areas in the wider cluster in which the sub-area is located (SA-134, SA-135, SA-136, SA-137, SA-138, SA-140), the removal of the sub-area is likely to impact on the performance of the wider Green Belt, as it would constitute irregular and disproportionate sprawl of the built-up area; as well as substantially reducing the gap between Chiswell Green and Bricket Wood and eroding the strategic gap between St Albans and Watford. In addition, it would result in the creation of a 'island' of Green Belt to the west of Chiswell Green.
>
> **Summary**
>
> Overall, the sub-area plays an important role with respect to the strategic land parcel, and its release in isolation or in combination would harm the performance of the wider Green Belt."

22. The Arup Review found that SA-140 (Appeal B Site) "performs strongly against NPPF purposes and makes an important contribution to the wider Green Belt. Not recommended for further consideration". The detailed sub-area analysis in the Annex to the Arup Review included the following findings:

> "**Assessment of wider impact**
>
> At the more granular level, the sub-area performs similarly against purposes 1 and 3, and plays a lesser role against purposes 2 and 4 compared to the strategic land parcel. As the sub-area is not located at the edge of a large built-up area, it does not contribute to checking unrestricted sprawl. Due to the smaller scale nature of the sub-area, compared to the strategic land parcel, it makes a less significant contribution to preventing neighbouring settlements from coalescing. The sub-area maintains a strongly unspoilt rural character and makes an important contribution to safeguarding the countryside from encroachment. As the sub-area does not abut an identified historic place or provide views to a historic place, it makes no contribution to preserving a historic context.

> The sub-area adjoins SA-138 and SA-139 to the south; as well as wider Green Belt to the north and west. The removal of the sub-area in isolation is likely to alter the performance of the surrounding Green Belt as it would represent a disproportionate spread of the built-up area, with regards to the scale of Chiswell Green. It would introduce urbanising influences, hence increasing the importance of surrounding Green Belt in preventing encroachment into the countryside.
>
> In combination with SA-138 and SA-139 the removal of the sub-area is likely to impact on the performance of the wider Green Belt as it would result in significant irregular spread of the built-up area, which would be disproportionate to the scale of the settlement.
>
> In combination with other sub-areas in the wider cluster in which the sub-area is located (SA-134, SA-135, SA-136, SA-137, SA-138, SA-139), the removal of the sub-area is likely to impact on the performance of the wider Green Belt, as it would constitute irregular and disproportionate sprawl of the built-up area; as well as substantially reducing the gap between Chiswell Green and Bricket Wood and eroding the strategic gap between St Albans. and Watford. In addition, it would result in the creation of a 'island' of Green Belt to the west of Chiswell Green.
>
> **Summary**
>
> Overall, the sub-area plays an important role with respect to the strategic land parcel, and its release in isolation or in combination would harm the performance of the wider Green Belt."

The Inquiry and the Inspector's Report

23. The Inquiry pre-dated the publication of the Arup Review as it closed on 9 May 2023. However, the Council stated, in its Closing Submissions to the Inquiry, at paragraph 11, that "a new Green Belt Review is to be published shortly". Also, the proof of evidence of Mr S. Connell, on behalf of the Council, referred to the Arup Review when describing the progress of the emerging Local Plan, stating that "the outputs of the new Green Belt Review and Site Selection work" were to be reported to the Local Plan Advisory Group in June 2023.

24. The IR, dated 24 October 2023, recorded (at IR/300) that "…a new Green Belt Review is due to be published shortly", in its summary of the Council's submissions, under the heading "Emerging Policy". Aside from that, it made no reference to the Arup Review.

25. In his Conclusions, the Inspector considered the SKM Review (referred to as the "GB Review") at IR/530 to 533:

> "530. In preparing for a new Local Plan, the Council commissioned a Green Belt Review (GB Review) comprising the Green Belt Review Purposes Assessment (November 2013) (GBR Purposes Assessment) and the Green Belt Review Sites & Boundaries Study (February 2014). The first is said to be an independent and comprehensive Green Belt review that seeks to advise on the role different areas play in fulfilling the fundamental aim of the Green Belt and its five purposes as defined within the Framework, ranking and scoring their performance. The second, reviews the eight strategic sub-areas found to contribute the least towards the five Green Belt purposes against which all Green Belt land in St Albans was assessed in the GBR Purposes Assessment. [46-57, 248, 307-314]
>
> 531. The GB Review looks at the district on a large and strategic scale, rather than on a site-by-site basis and is now some years old, such that some circumstances may have changed. It also makes assessments in the context of a potential release of land from the Green Belt through the plan making process, which is not the purpose of these appeals. For these reasons, its conclusions cannot be directly applied to the appeal proposals. However, the GB Review is clearly a material consideration relevant in considering Green Belt matters in the district, notwithstanding that the Local Plan they were intended to support has been withdrawn by the Council and attracts no weight in and of itself. I have had regard to the GB Review in reaching my own conclusions. This is notwithstanding the reservations expressed about the GB Review by the Inspectors examining the formerly emerging LP, which have no bearing on the issues in these appeals or on the purposes for which I have had regard to the GB Review. [55-57, 310-314]
>
> 532. Both appeals fall within strategic sub-area 'S8: Land at Chiswell Green'. It is a 'Tier 1' site, which includes sites that do not significantly contribute towards any of the five Green Belt purposes and are classified as exhibiting 'higher' suitability for at least two of the three categories relating to constraints, integration and landscape sensitivity. Out of the strategic sub-areas considered, it is ranked in first position, the most suitable area in the district. [59, 76]
>
> 533. The Council accepts that there will need to be a significant amount of development in the Green Belt if its housing requirement is to be met. That being the case, the relative suitability of sub-area S8 is an important consideration. [248, 307, 532]"

26. In considering Green Belt issues for Appeal A the Inspector found that there would be significant harm to Green Belt openness (IR/537). He found moderate harm to the aim of checking the unrestricted sprawl of built-up areas and safeguarding the countryside

from encroachment (IR/538, 540), and very limited harm to the aim of preventing towns merging into one another (IR/539). He concluded, at IR/542:

> "It is notable that the Council's GB Review found the part of sub-area S8, within which the appeal site falls, to be the least sensitive part of the sub-area. Nevertheless, the Appeal A scheme would result in definitional harm to the Green Belt, as well as harm to its openness and purposes. I attach substantial weight to this harm ….."

27. In considering Green Belt issues for Appeal B the Inspector found that the development would result in substantial harm to Green Belt openness (IR/545). He found significant harm to the aim of checking the unrestricted sprawl of built-up areas (IR/546) and safeguarding the countryside from encroachment (IR/5347). There was very limited harm to the second Green Belt purpose (IR/547). The Inspector concluded, at IR/550:

> "The GB Review draws a distinction between the east and west parts of sub-area S8, noting that the western area, within which Appeal B is located, is more sensitive. This accords with my own findings that the Green Belt impacts would be much greater from Appeal B. The development would result in definitional harm to the Green Belt, as well as harm to its openness and purposes. I attach substantial weight to this harm …."

28. In both Appeals, the Inspector attached substantial weight to the harm to the Green Belt. However, he considered that there would be very substantial benefits from the scheme in terms of housing provision, and other benefits. At IR/585 – 594, he described the "very substantial need for housing" in the district, especially affordable housing, which is "persistently going unmet". The Inspector concluded that overall, the harm by reason of inappropriateness, and any other harm was clearly outweighed by other considerations, so as to amount to the very special circumstances necessary to justify the development (IR/606-611). Therefore he recommended that both appeals be allowed and planning permission granted.

Post Inquiry correspondence

29. On 18 January 2024, the First Defendant wrote to the parties asking for views on the December 2023 version of the Framework and the 2022 Housing Delivery Test figures.

30. The Third Defendant's response, in the form of a statement by Mr B. Parker, Planning Consultant, dated January 2024, included the following reference to the Arup Review:

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

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

31. The Second Defendant responded to the Third Defendant's comments on the Arup Review, by a letter from its planning consultants, Stantec UK Limited, dated 16 February 2024, which stated:

> "……
>
> I have consciously steered away from providing new evidence. However, paragraph 12 of Mr Parker's Statement makes reference (for the first time) to a Green Belt Review published by Arup in June 2023 ('the Arup GBR') that was not presented nor discussed at the Public Inquiry.
>
> The Arup GBR was prepared as part of the Council's emerging evidence base in support of their draft Regulation 18 Local Plan. This evidence base and emerging plan carried no material weight in the determination of this appeal. We highlight the following points in particular:
>
> - It was the subject of consultation and the consultation responses included vigorous objections to it. The Council's response to the consultation has not yet been published.
>
> - It has not been relied upon by the Council in the context of the present appeal.
>
> - It is inconsistent with the Council's evidence in this appeal (including concessions made in cross-examination).
>
> - Is not referred to or relied upon in the Council's response letter dated 31st January 2024 which rightly invites the Secretary of State to ignore any new evidence outside the scope of DLUHC's request for comments on the implications of the revised NPPF and HDT results.
>
> In agreement with the Council, I therefore respectfully request that the DLUHC disregards the comments made by Mr Parker in paragraph 12 of his statement.
>
> If any reliance is to be placed upon those comments, the inquiry would need to be re-opened so that they could be the subject of

> cross-examination (which may also result in an application for costs). Reliance upon the Arup GBR without giving the Appellant the opportunity to cross-examine on it would be unlawful."

32. In February 2024, Mr Parker made further representations on behalf of the Third Defendant in which he made the following observations about the Arup Review:

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

33. On 31 January 2024 and 12 February 2024, the Council responded to the issues raised by the First Defendant. It did not ask the First Defendant to consider the Arup Review. It did not respond substantively to the comments about the Arup Review by the Second and Third Defendants and invited the First Defendant to disregard their submissions as they went beyond the remit of the First Defendant's letter and the case put forward by the Appellants at the Inquiry.

34. On 12 February 2024, the Claimant sent detailed submissions to the First Defendant but did not respond to the comments about the Arup Review by the Second and Third Defendants, complaining that they were outside the remit of the First Defendant's letter.

35. The Claimant was aware of the Arup Review from the Council's Closing Submissions. It also made representations on the Arup Review to the Council in September 2023, as part of its response to the public consultation on the draft Local Plan.

The First Defendant's decision

36. The First Defendant's Decision Letter ("DL"), dated 22 March 2024, agreed with the Inspector's recommendation to allow the appeals and grant planning permission in Appeal A and B.

37. The DL made no express reference to the Arup Review or the correspondence concerning it. However, at DL/9 the First Defendant stated:

> "A list of other representations which have been received since the inquiry is also at Annex A. The Secretary of State is satisfied that the issues raised do not affect his decision, and no other new issues were raised in this correspondence to warrant further investigation or necessitate additional referrals back to

parties. Copies of these letters may be obtained on request to the email address at the foot of the first page of this letter."

38. At DL/17 - 20, the First Defendant set out his conclusions on the Green Belt and the SKM Review as follows:

"Green Belt

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

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

19. Appeal B: For the reasons given at IR543 the Secretary of State agrees that Appeal site B is largely open and undeveloped, and that the 330 dwellings sought would have a considerable and permanent impact on openness in both a spatial and visual sense. The Secretary of State agrees with the Inspector for the reasons given in IR544 that the development would result in substantial harm to Green Belt openness. For the reasons given at IR546-548 the Secretary of State agrees with the Inspector that there would be significant harm to the purpose of checking unrestricted sprawl, very limited harm to preventing neighbouring towns merging into one another, and significant harm to safeguarding the countryside from encroachment. Like the Inspector at IR550, the Secretary of State concludes that the development would result in definitional harm to the Green Belt, as well as harm to its openness and purposes, and he attaches substantial weight to this harm.

20. Both Appeals: The Secretary of State has gone on to apply national Green Belt policy. Paragraphs 152-153 (formerly 147-

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

39. At DL/42, the First Defendant concluded that the harm to the Green Belt by reason of inappropriateness, and the other harms identified, were clearly outweighed by other considerations, and therefore very special circumstances existed to justify permitting the development.

Statutory and policy framework

40. Section 70(2) TCPA 1990 provides:

> "In dealing with an application for planning permission … the authority shall have regard to –
>
> (a) the provisions of the development plan, so far as material to the application,
>
> ……
>
> (c) any other material considerations."

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

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

42. The development plan includes the Saved Policies of the Council's District Local Plan Review (1994) ("LP") and the St Stephen Neighbourhood Plan (2019-2036). The relevant LP policies were listed at IR/19-20. The Inspector and the First Defendant concluded that the most important policies for determining the application were deemed out of date, as the Council did not have a five-year housing land supply. However, the Metropolitan Green Belt Policy (LP Policy 1) was not considered to be out of date due to its consistency with the Framework.

43. The Inquiries Procedure Rules 2000 provide, at rule 17:

> "17.— Procedure after inquiry
>
> (1) After the close of an inquiry, the inspector shall make a report in writing to the Secretary of State which shall include

his conclusions and his recommendations or his reasons for not making any recommendations.

…

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

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

> (a) differs from the inspector on any matter of fact mentioned in, or appearing to him to be material to, a conclusion reached by the inspector; or
>
> (b) takes into consideration any new evidence or new matter of fact (not being a matter of government policy),

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

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

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

> (a) the Secretary of State shall send to the persons entitled to appear at the inquiry who appeared at it a written statement of the matters with respect to which further evidence is invited; and
>
> (b) paragraphs (3) to (8) of rule 10 shall apply as if the references to an inquiry were references to a re-opened inquiry."

44. In the Framework, Green Belt policy is set out at Chapter 13. It provides materially as follows:

> "**13. Protecting Green Belt land**
>
> 142. The Government attaches great importance to Green Belts. The fundamental aim of Green Belt policy is to prevent urban sprawl by keeping land permanently open; the essential characteristics of Green Belts are their openness and their permanence.
>
> 143. Green Belt serves five purposes:
>
> a) to check the unrestricted sprawl of large built-up areas;
>
> b) to prevent neighbouring towns merging into one another;
>
> c) to assist in safeguarding the countryside from encroachment;
>
> d) to preserve the setting and special character of historic towns; and
>
> e) to assist in urban regeneration, by encouraging the recycling of derelict and other urban land.
>
> ……
>
> **Proposals affecting the Green Belt**
>
> 152. Inappropriate development is, by definition, harmful to the Green Belt and should not be approved except in very special circumstances.
>
> 153. 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 resulting from the proposal, is clearly outweighed by other considerations."

Grounds of challenge

Ground 1

Claimant's submissions

45. In dealing with the appeals, the First Defendant was required by section 70(2)(c) TCPA 1990 to have regard to material considerations. The Claimant submitted that the First Defendant unlawfully failed to have regard to a material consideration, namely the Arup Review, which was published in June 2023, after the Inquiry had closed (on 9 May 2023), and after the First Defendant recovered the appeals (on 1 June 2023), but before the First Defendant's decision was made (on 22 March 2024).

46. The Arup Review was an "obviously material" consideration, applying the principles set out in *R (Friends of the Earth Ltd) v Heathrow Airport Ltd* [2020] UKSC 52, as it superseded Part 2 of the SKM Green Belt Review ("the SKM Review"), which both the Inspector and the First Defendant treated as a material consideration on which they placed importance. It was also realistically capable of causing the First Defendant to reach a different decision and the First Defendant knew of the Arup Review and could have obtained it. The principles established in *R (Kides) v South Cambridgeshire DC* [2002] EWCA Civ 1370 and *R (Hayle Town Council) v Cornwall CC* [2023] EWHC 389 (Admin), and followed in the context of Inspectors' decisions in *Wainhomes (South West) Holdings Ltd v Secretary of State for Communities and Local Government* [2013] EWHC 597 (Admin) and *Wiltshire Council v Secretary of State for Communities and Local Government* [2015] EWHC 1261 (Admin), were applicable to the circumstances of this case.

47. Further or alternatively, the First Defendant failed to take reasonable steps to acquaint himself with the relevant information to enable him to determine the appeal, in breach of the duty of sufficient inquiry: *Secretary of State for Education and Science v Tameside MBC* [1977] AC 1014, per Lord Diplock at 1065B. The Council informed the Inspector that the Arup Review would be available shortly, in June 2023, and the Second and Third Defendants objected to its inclusion in the appeals in their representations to the First Defendant in January and February 2024. The First Defendant acted irrationally in not obtaining a copy of the Arup Review, considering it, and asking the parties for their views on it.

48. Contrary to the Defendants' submissions, the Claimant was not barred from relying upon the Arup Review because they did not seek to rely upon it before the First Defendant made his decision, particularly since they were unrepresented.

49. If the Arup Review was held to be a mandatory material consideration, or if the First Defendant failed to discharge the duty of sufficient inquiry, the Court cannot be satisfied that, applying *Simplex GE (Holdings) Ltd v Secretary of State for the Environment* [2017] PTSR 1041, the outcome in the appeals would necessarily have been the same even if the error of law had not occurred because the Arup Review reached different conclusions to the SKM Review.

Defendants' submissions

50. It is convenient to consider the Defendants' submissions together because of the overlap between them.

51. The Defendants submitted, as a preliminary issue, that the Claimant was not entitled to advance a submission based on new material and argument that was never placed before the First Defendant. There were no exceptional circumstances to justify a departure from the standard approach. See *West v First Secretary of State* [2005] EWHC 729 (Admin) at [42-43]; *Dyason v Secretary of State for the Environment* [1998] 2 PLR 54, at [62E]; and *Mead Realisations Limited v Secretary of State for Levelling Up, Housing and Communities* [2024] EWHC 279 (Admin), at [182].

52. Alternatively, if the Claimant was permitted to proceed with the claim, the First Defendant was not obliged to take the Arup Review into account in the determination of the appeals. Applying the principles set out in *Friends of the Earth Ltd* [2020] UKSC 52, [2021] PTSR 190, per Lord Hodge and Lord Sales at [116] – [121], the Arup Review was not a mandatory material consideration, being something that the decision-maker was either required by legislation and/or policy to take into account, or was "so obviously material" as to require consideration.

53. The First Defendant acted rationally, in the exercise of his discretion, in not taking the Arup Review into account in circumstances where it was not relied upon by the Claimant, or the Council (by whom it was commissioned), or even supplied to the First Defendant.

54. Furthermore, the purpose of the Green Belt reviews was to assess the contribution of different areas towards Green Belt purposes, for the purpose of plan-making. They did not address the main issue identified by the Inspector and the First Defendant, namely, whether the harm by reason of inappropriateness, and any other harm, was clearly outweighed by other considerations, so as to amount to the very special circumstances necessary to justify development (IR/525(e), DL/16). Therefore the Inspector found that the conclusions in the SKM Review could not be "directly applied to the appeal proposals" (IR/531; accepted at DL/17). Whilst the Inspector had regard to the SKM Review, he made his own assessment of the suitability of the appeal sites for the proposed development, and came to his own judgment, at IR/527 – 612. As a result, the First Defendant had the benefit of a detailed report from the Inspector who had considered the Green Belt issues following a site inspection, oral evidence, written evidence and submissions. This case-specific consideration removed any need to consider the higher-level and more generalised analysis in the Arup Review.

55. In regard to the *Tameside* duty, as set out in *R (Balajigari) v Secretary of State for the Home Department* [2019] 1 WLR 4647, per Underhill LJ at [70], the First Defendant was rationally entitled to decide the appeals without making further inquiries into the Arup Review. The Arup Review was part of the emerging plan process, it had not been tested by independent examination or approved by Examining Inspectors, and it was not relied upon by the Council or the Claimant in resisting the appeal. The

Council and the Claimant did not take issue with the Second and Third Defendants' objection to its inclusion in the appeal.

56. Under rule 17(4) of the Inquiries Procedure Rules 2000, the First Defendant could disregard any representations or evidence or other document after the close of the inquiry. If he decided to take new material into consideration, he had to give persons entitled to appear at the inquiry an opportunity to make written representations or to ask for the re-opening of the Inquiry. At DL/9, the First Defendant decided that the representations made *inter alia* in respect of the Arup Review in the post-inquiry correspondence did not warrant further investigation or necessitate additional referrals back to the parties.

57. Alternatively, if the Arup Review was a mandatory material consideration, relief should be refused because, applying the *Simplex* test, the outcome in both appeals would necessarily have been the same even if the error of law had not occurred for the following reasons.

58. The Inspector found that the concerns about methodology in the 2nd Stage SKM Review raised by the Examining Inspectors had no bearing on these appeals (IR/531). The finding in the 2nd Stage SKM Review that Appeal A Site was the least sensitive part of sub-Area 8 was not a factor listed by the First Defendant as weighing in favour of Appeal A (DL/38-38). Appeal B Site was not recommended for release from the Green Belt in either the 2nd Stage SKM Review or the Arup Review.

59. The Council had not approved or adopted the findings in the Arup Review, and the Council's Work Programme indicated that both it, and the draft policies it would inform, would not be considered until the end of September 2024. At the Planning Policy and Climate Committee on 26 June 2023, officers had advised that the Council that the Arup GBR's recommendations were "not determinative", meaning that in September 2024 all of its recommendations might be rejected. The 2nd Stage SKM Review was found to be flawed by the Examining Inspector, which demonstrated why any Green Belt review can be afforded only limited weight until it has been adopted following independent examination.

60. In September 2023, during a consultation on the emerging local plan, the Claimant objected to the Arup Review, complaining in its formal submission that "the Green Belt Review and site selection documents were presented to the committee on 26th June 2023 (published on 16th June), which did not give councillors, interested parties and the public sufficient time for proper scrutiny of the selected sites before the councillors were put under considerable pressure at 10th July meeting to approve the launch of the Regulation 18 public consultation."

61. The Arup Review was considered in another appeal[2] concerning a site at Ragged Hall Lane, Chiswell Green, in which the Claimant appeared as an Interested Party. In a Decision Letter dated 3 May 2024, the Inspector found that the Arup Review should be given limited weight. He stated:

> "15. It was agreed at the hearing that the Green Belt studies I have before me, commissioned by the Council at various stages for plan preparation should be given weight in connection with

[2] APP/B1930/W/23/3331451

> their purpose. As such, whilst they are tools for the preparation of the plan, they are of limited direct relevance to the appeal proposal, given the scale of the land parcels they address. Further, KCG sought to suggest that the most recent, 2023, studies should themselves be given limited weight as they had yet to be reviewed, amended if necessary and then approved by the Council for plan making."

62. The Claimant subsequently wrote to the Inspector, on 8 May 2024, indicating that it was not its view that the Arup Review might be found to be unsound nor that it should only be given limited weight, and querying the basis of paragraph 15 of the Decision Letter. However, it accepted that the Arup Review had yet to be reviewed, amended if necessary, and then approved by the Council for plan making.

63. The Arup Review was part of the evidence base for the emerging local plan, not a report in the appeals. It could not and did not consider the impact of the proposed development or whether Green Belt harms were outweighed by the benefits of housing.

64. The Inspector provided a detailed report with a case-specific analysis, following a full Inquiry. The First Defendant found harm to the Green Belt at both sites to which he attributed substantial weight (DL/18-19). Nonetheless he found that the benefits of the proposed development clearly outweighed that harm and "very special circumstances" were established, applying the Framework. The Claimant had not demonstrated that the Arup Review would have displaced the Inspector's analysis or made any difference to the First Defendant's conclusions.

Conclusions

Preliminary issue – whether the Claimant is permitted to advance an argument in the High Court based on new material and argument that was not placed before the Inspector or the First Defendant

65. The general rule is that it is incumbent on the parties to a planning appeal to place before the decision maker the material on which they rely: *West v First Secretary of State* [2005] EWHC 729 (Admin), per Richards J., at [42]. A party to a planning appeal must be expected to tell the decision maker all he wishes to tell them: *West* at [43]. In general, the determination of a planning appeal does not require the decision maker to go beyond proper consideration of the material put forward by the parties: *West* at [44].

66. In *Mead Realisations Limited v Secretary of State for Levelling Up, Housing and Communities* [2024] EWHC 279 (Admin), Holgate J. identified this as an important principle, given the strong public interest in the finality of planning appeals. He said, at [178] – [182]:

> "178. I can see that if Redrow had submitted to the Inspector that there was a substantial need for housing which could not be met entirely on sequentially preferable sites (and even more so in the next 5 years), so that additional sites with a similar or

worse flood risk would need to be developed, that would be a significant factor to be addressed in the overall planning balance. It could reduce the weight to be given to the failure to satisfy the sequential test. Here the Inspector gave that failure "very substantial weight" (DL 100). It would have been arguable that the flood risk implications of satisfying the unmet need for housing land was an "obviously material consideration", such that it was irrational for the Inspector not to have taken it into account (*R (Friends of the Earth Limited) v Secretary of State for Transport* [2021] PTSR 190 at [116] to [120]). Alternatively, it could have been said that there was a failure to comply with the duty to give reasons in relation to a "principal important controversial issue" between the parties.

179. The problem faced by Redrow is that, as Mr. Simons accepted, this argument was not put before the Inspector. Redrow did not consider it to be material, let alone obviously material. It was not raised as a substantial issue between the parties. The Inspector cannot be criticised for acting irrationally, or for failing to give reasons, in relation to an argument of this kind which the claimant did not see fit to rely upon at any stage in its appeal. Ground 3 must therefore be rejected for this reason alone.

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

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

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

67. It is clear from *Mead*, at [178] and [179], that these principles are to be applied even where the new material is significant, could have been an "obviously material consideration" for which reasons were required and could have affected the outcome. The Court is applying a preliminary procedural bar, not making a determination on the merits of the new material. For this reason, the Claimant is mistaken in submitting that the *West/Mead* principles are not applicable, and the approach in the *Kides* line of cases is to be preferred.

68. In this case, the Claimant was aware, before the Inquiry closed on 9 May 2023, from evidence and submissions made by the Council, that the Arup Review was due to be published shortly, in June 2023. The Council did not seek to rely on the Arup Review in these appeals. It was duly published on 16 June 2023 and considered by the Council's Planning Policy and Climate Committee on 26 June 2023. In September 2023, the Claimant made critical comments about the Council's handling of the Arup Review in a formal consultation response.

69. Although the Claimant could have asked the Inspector to consider the Arup Review, as new material published after the close of the Inquiry, and to seek representations on it from the parties, it failed to do so. The IR, dated 24 October 2023, was produced by the Inspector without having seen the Arup Review. The Inspector clearly proceeded on the basis that none of the parties had sought to rely upon or refer to the Arup Review as relevant to the issues in the appeals. He merely recorded (at IR/300) that "…a new Green Belt Review is due to be published shortly", in his summary of the Council's submissions, under the heading "Emerging Policy". In my view, the Inspector was entitled to take this approach; indeed the Claimant did not submit otherwise.

70. I refer to my summary of the post-Inquiry correspondence at [29] – [34] above. In response to a letter from the First Defendant, on 18 January 2024, asking for the parties' views on the updated Framework and Housing Delivery Test figures, the Second and Third Defendants referred to the Arup Review. The Second Defendant objected to any consideration of the Arup Review by the First Defendant as it was not presented nor discussed at the Inquiry; it was not relied upon by the Council in the appeals and was inconsistent with the Council's case; it was prepared as part of the evidence base in support of the emerging local plan, and there were vigorous objections to it in the consultation.

71. The Council, which was the primary party resisting the appeals against its decisions and had commissioned the Arup Review as part of its evidence base for the emerging local plan, did not ask the First Defendant to consider the Arup Review. In its letters

of 31 January and 12 February 2024, it did not respond substantively to the comments about the Arup Review by the Second and Third Defendants and invited the First Defendant to disregard their submissions as they went beyond the remit of the First Defendant's letter and the case put forward by the Appellants at the Inquiry.

72. On 12 February 2024, the Claimant sent detailed submissions to the First Defendant, but it did not refer to the Arup Review, or seek to rely upon it. It merely stated, at paragraph 3, that the Second and Third Defendants had commented on matters outside the remit of the First Defendant's request, and it's lack of response should not be taken to imply agreement.

73. No party provided the First Defendant with a copy of the Arup Review or requested that he should obtain one.

74. The Claimant only sought to rely upon the Arup Review after the First Defendant's DL was issued on 22 March 2024, in which the First Defendant stated, at DL/9, that the issues raised by the parties in the post-Inquiry correspondence did not affect his decision and did not warrant further investigation or necessitate additional referrals back to parties. The Claimant's claim form, relying for the first time upon a failure to take into account the Arup Review, as grounds for a statutory review, was then issued on 29 April 2024.

75. The only explanation that has been provided by the Claimant for its failure to mention any reliance upon the Arup Review with the Inspector or the First Defendant at an earlier stage, before the final decision had been made, is that it was not represented by a legal or planning professional and it was unaware that it could raise new material, because of the Inspector's cautions against doing so. I find this explanation to be inadequate. The Claimant is an experienced campaigner. The professional quality of its letters and submissions indicate that its officers are highly educated, intelligent people who understand the issues, and are not diffident. Indeed, they express their views with vigour. I have no doubt that they had sufficient confidence and skill to ask the Inspector and/or the First Defendant to consider and seek representations on the Arup Review, if they considered it would further their goal of protecting the Green Belt in Chiswell Green.

76. In my view, the Claimant would have been able to obtain professional advice on the possibility of reliance on the Arup Review, if they wished to do so. The Claimant instructed a planning consultant to resist the applications for planning permission (Mr J. Griffiths MA DipTP FRTPI), who submitted detailed representations. Mr Griffiths did not appear at the Inquiry because he was not available at the relevant time. There was no evidence to show that the Claimant could not have raised funds to cover the costs of a substitute planning consultant. Instead it chose to instruct a transport consultant at a cost of £17,400, and represented itself at the Inquiry. The Claimant is also represented by experienced planning solicitors in its High Court challenge.

77. As a matter of general principle, unrepresented parties are bound by the same rules of practice and procedure in public law proceedings as represented parties. In *R (Hysaj) v Secretary of State for the Home Department* [2014] EWCA Civ 1633, Moore-Bick LJ held, at [44]:

> "The problems facing ordinary litigants are substantial and have been exacerbated by reductions in legal aid. Nonetheless, if proceedings are not to become a free-for-all, the court must insist on litigants of all kinds following the rules. In my view, therefore, being a litigant in person with no previous experience of legal proceedings is not a good reason for failing to comply with the rules".

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

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

i) The Inquiry would have to be re-opened.

ii) The Inspector would have to receive further evidence, and, as the Second Defendant indicated in its letter of 16 February 2024, there would have to be an opportunity for cross-examination. Further submissions would have to be made.

iii) The Inspector would have to make new findings and evaluations, on the basis that the Arup Review had superseded the 2nd Stage SKM Review, and strike the overall planning balance, in a revised IR.

iv) The First Defendant would have to re-make his decision, on the basis of the revised IR, and the Inspector's recommendations, and issue a revised DL.

v) Alternatively, the parties may contend that a fresh appeal process with a new Inspector is required, in the interests of fairness.

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

81. For these reasons, Ground 1 does not succeed. However, for the sake of completeness, I now go on to consider the other grounds.

The test in *R (Kides) v South Cambridgeshire DC*

82. In *Kides* the Court of Appeal held that the duty on a local planning authority to have regard to all material considerations, in section 70(2) TCPA 1990, meant that where a new material consideration arose after a Planning Committee had resolved to grant

planning permission, but before the decision notice was issued, the planning officer was required to refer the application back to the Planning Committee for re-consideration, provided certain elements were met.

83. This principle was applied in the context of Inspectors' decisions in *Wainhomes (South West) Holdings Ltd v Secretary of State for Communities and Local Government* [2013] EWHC 597 (Admin) and *Wiltshire Council v Secretary of State for Communities and Local Government* [2015] EWHC 1261 (Admin), where a material consideration arose after the hearing of an appeal but before a decision was made.

84. The elements in the *Kides* test were further refined in *R (Hardcastle) v Buckinghamshire County Council* [2022] EWHC 2905 (Admin) and *Hayle*, per Lane J. at [37] – [48]. It was common ground before me that the elements are now as follows:

i) The material consideration is so "obviously material" that it must be taken into account, applying the principles in the judgment of the Supreme Court in *Friends of the Earth Ltd*; and

ii) The existence of the material consideration was either known or could reasonably have been discovered or anticipated by the decision-maker.

85. In *Friends of the Earth Ltd*, Lord Hodge and Lord Sales set out the relevant principles as follows:

> "116. ….. A useful summation of the law was given by Simon Brown LJ in *R v Somerset County Council, Ex p Fewings* [1995] 1 WLR 1037, 1049, in which he identified three categories of consideration, as follows:
>
> > "… [T]he judge speaks of a 'decision-maker who fails to take account of all and only those considerations material to his task'. It is important to bear in mind, however, … that there are in fact three categories of consideration. First, those clearly (whether expressly or impliedly) identified by the statute as considerations to which regard must be had. Second, those clearly identified by the statute as considerations to which regard must not be had. Third, those to which the decision-maker may have regard if in his judgment and discretion he thinks it right to do so. There is, in short, a margin of appreciation within which the decision-maker may decide just what considerations should play a part in his reasoning process."
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> 117. The three categories of consideration were identified by Cooke J in the *New Zealand Court of Appeal in CREEDNZ Inc v Governor General* [1981] NZLR 172, 183:

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

Cooke J further explained at p 183 in relation to the third category of consideration that, notwithstanding the silence of the statute, "there will be some matters so obviously material to a decision on a particular project that anything short of direct consideration of them by [the public authority] … would not be in accordance with the intention of the Act."

118. These passages were approved as a correct statement of principle by the House of Lords in *In re Findlay* [1985] AC 318, 333-334. See also *R (Hurst) v London Northern District Coroner* [2007] UKHL 13; [2007] 2 AC 189, paras 55-59 (Lord Brown of Eaton-under Heywood, with whom a majority of the Appellate Committee agreed); *R (Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 60; [2009] 1 AC 756, para 40 (Lord Bingham of Cornhill, with whom a majority of the Appellate Committee agreed); and *R (Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire County Council* [2020] UKSC 3; [2020] PTSR 221, paras 29-32 (Lord Carnwath, with whom the other members of the court agreed). In the Hurst case, Lord Brown pointed out that it is usually lawful for a decision-maker to have regard to unincorporated treaty obligations in the exercise of a discretion (para 55), but that it is not unlawful to omit to do so (para 56).

119. As the Court of Appeal correctly held in *Baroness Cumberlege of Newick v Secretary of State for Communities and Local Government* [2018] EWCA Civ 1305; [2018] PTSR 2063, paras 20-26, in line with these other authorities, the test whether a consideration falling within the third category is "so obviously material" that it must be taken into account is the familiar Wednesbury irrationality test (*Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410-411 per Lord Diplock).

120. It is possible to subdivide the third category of consideration into two types of case. First, a decision-maker may not advert at all to a particular consideration falling within that category. In such a case, unless the consideration is obviously material according to the *Wednesbury* irrationality test, the decision is not affected by any unlawfulness. Lord

> Bingham deals with such a case in *Corner House Research* at para 40. There is no obligation on a decision-maker to work through every consideration which might conceivably be regarded as potentially relevant to the decision they have to take and positively decide to discount it in the exercise of their discretion.
>
> 121. Secondly, a decision-maker may in fact turn their mind to a particular consideration falling within the third category, but decide to give the consideration no weight. As we explain below, this is what happened in the present case. The question again is whether the decision-maker acts rationally in doing so. Lord Brown deals with a case of this sort in *Hurst* (see para 59). This shades into a cognate principle of public law, that in normal circumstances the weight to be given to a particular consideration is a matter for the decision-maker, and this includes that a decision-maker might (subject to the test of rationality) lawfully decide to give a consideration no weight: see, in the planning context, *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759 (HL), 780 (Lord Hoffmann)."

86. The Arup Review was in the third category of consideration. Applying the principles set out in *Friends of the Earth Ltd*, I consider that the First Defendant acted rationally, in the exercise of his discretion, in not taking the Arup Review into account, for the following reasons.

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

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

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

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

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

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

The *Tameside* duty of sufficient inquiry

93. The *Tameside* duty of sufficient inquiry was helpfully described in *R (Balajigari) v Secretary of State for the Home Department* [2019] 1 WLR 4647, per Underhill LJ at [70]:

> "70. The general principles on the Tameside duty were summarised by Haddon-Cave J in *R (Plantagenet Alliance Ltd) v Secretary of State for Justice* [2014] EWHC 1662 (Admin) at paras. 99-100. In that passage, having referred to the speech of Lord Diplock in *Tameside*, Haddon-Cave J summarised the relevant principles which are to be derived from authorities since Tameside itself as follows. First, the obligation on the decision-maker is only to take such steps to inform himself as are reasonable. Secondly, subject to a Wednesbury challenge, it is for the public body and not the court to decide upon the manner and intensity of enquiry to be undertaken: see *R (Khatun) v Newham LBC* [2004] EWCA Civ 55, [2005] QB 37, at para. 35 (Laws LJ). Thirdly, the court should not intervene merely because it considers that further enquiries would have been sensible or desirable. It should intervene only if no reasonable authority could have been satisfied on the basis of the enquiries made that it possessed the information necessary for its decision. Fourthly, the court should establish what material was before the authority and should only strike down a decision not to make further enquiries if no reasonable authority possessed of that material could suppose that the enquiries they had made were sufficient. Fifthly, the principle that the decision-maker must call his own attention to considerations relevant to his decision, a duty which in practice may require him to consult outside bodies with a particular knowledge or involvement in the case, does not spring from a duty of procedural fairness to the applicant but rather from the

> Secretary of State's duty so to inform himself as to arrive at a rational conclusion. Sixthly, the wider the discretion conferred on the Secretary of State, the more important it must be that he has all the relevant material to enable him properly to exercise it."

94. Under rule 17(4) of the Inquiries Procedure Rules 2000, the First Defendant could disregard any representations or evidence or other document after the close of the inquiry (subject of course to the requirement to act lawfully). At DL/9, the First Defendant decided that the representations made *inter alia* in respect of the Arup Review in the post-inquiry correspondence did not warrant further investigation or necessitate additional referrals back to the parties.

95. In my view, the First Defendant's decision to decide the appeals without making further inquiries into the Arup Review was a rational one which he was entitled to make. The Arup Review was not relied upon by the Council or the Claimant in resisting the appeal, and together with the Second Defendant, they asked the First Defendant to disregard the references made to it, in the post-inquiry correspondence.

96. As stated above, the First Defendant had the benefit of a detailed report from the Inspector who had considered the Green Belt issues in depth, including the SKM Review. The Arup Review was part of the evidence base for the emerging local plan, not a report in the appeals, and it did not address the main issue identified by the Inspector and the First Defendant.

97. For these reasons, Ground 1 does not succeed.

Ground 2

98. The Claimant submitted, in the alternative, that if the First Defendant did take the Arup Review into account, he failed to provide any reasons why he preferred the superseded 10 year old SKM Review which the Arup Review contradicted in material ways.

99. The First Defendant's response was that he did not treat the Arup Review as a material consideration in the determination of the appeals, so Ground 2 did not arise. The Second and Third Defendants also submitted that there was no requirement to give reasons as the Arup Review and its relationship with the SKM Review was not a principal controversial issue, applying the principles set out by Lord Brown in *South Bucks v Porter (No. 2)* [2004] 1 WLR 1953, at [36]. No party had put the Arup Review in evidence or contended that it should be preferred to the 2nd Stage SKM Review. So the question of preferring one review over the other did not arise in the appeals. I accept these submissions.

100. Furthermore, I consider that the First Defendant's approach to the post-Inquiry representations concerning the Arup Review was sufficiently clear from DL/9, where he concluded that they did not affect his decision and did not warrant further investigation. This approach accorded with the Claimant's own post-Inquiry representations, and those of the Council and the Second Defendant. Therefore, the

Claimant could not possibly meet the requirement to show prejudice as a result of any inadequacy in the reasons.

101. For these reasons, Ground 2 does not succeed.

Final conclusion

102. The application for statutory review is dismissed.