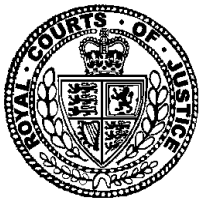

Neutral Citation Number: [2019] EWHC 1409 (Admin)

Case No: CO/2737/2017

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/05/2019

Before :

THE HON. MRS JUSTICE THORNTON

- -

Between :

R (oao Matthew Davison)	**Claimant**
- and -	
Elmbridge Borough Council	**Defendant**

- -
- -

Mr Andrew Parkinson (instructed by **Richard Buxton Solicitors**) for the **Claimant**
Mr Zack Simons (instructed by **Head of Legal Services Elmbridge Borough Council**) for the **Defendant**

- -

Judgment

The Hon. Mrs Justice Thornton :

Introduction

1. The Claimant seeks to quash the decision of Elmbridge Borough Council ("the Council"), dated 26 April 2017, to grant planning permission for a new football and athletic Stadium and associated development, located in the metropolitan Green Belt at Walton on Thames in Surrey. The development is now constructed and has been operational since 14 September 2017.

2. This is the second round of litigation in respect of the project. In January 2017 Mr Justice Supperstone quashed an earlier planning permission for the development ((R(Boot) v Elmbridge Borough Council [2017] EWHC 12 (Admin)), on grounds that the Council erred in its interpretation of paragraph 89 of the National Planning Policy Framework (NPPF) in finding that the sports facility was approved development despite it causing harm to the openness and purpose of the Green Belt.

3. There is one ground of challenge before this Court. The Claimant contends that the Council contravened the principle of consistency in decision-making in departing, without reasons, from its previous finding that the proposed development would have an adverse impact on the openness of the Green Belt to deciding that it would not have an adverse effect. The Council contends that it was not required to consider its previous planning judgment, because the decision in question had been quashed by the Court in R(Boot) v Elmbridge BC.

4. Accordingly, the issue for this Court is the application of the principle of consistency of decision making in planning law to a second round of decision making following the quashing of a previous decision.

Background Facts

5. The site in question is 14.2 ha. It is owned by the Council and is located within the metropolitan Green Belt. As well as being the site owner, the Council is the local planning authority.

6. The Claimant, Mr Davison, is the joint owner of the Weir Hotel and Restaurant which is located adjacent to the site.

7. On 5 March 2015, the Council applied for planning permission for a new football and athletics stadium with associated development. The development was considered likely to have significant effects on the environment and was therefore subject to the legal regime for assessing the environmental impacts of development (set out then in the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 (2011/1824) ("the EIA Regulations").

8. On 4 June 2015, the planning officer published his report on the application ("OR1").

9. The Council's Planning Committee resolved to grant planning permission on 14 December 2015. The planning permission was issued on 26 January 2016 ("Permission 1"). Pursuant to Regulation 24 of the EIA Regulations the Council published its reasons for deciding to grant permission.

10. On 8 March 2016 a local resident, Miss Amanda Boot applied to judicially review the 2016 permission.

11. On 14 October 2016, the Council submitted a further planning application to develop the site for a football and athletics stadium. It is common ground that the differences between the two schemes are minor.

12. On 11 January 2017 the planning officer published his report on the second planning application ("OR2").

13. On 16 January 2017, the High Court quashed Permission 1 (R(Boot) v Elmbridge Borough Council [2017] EWHC 12).

14. The day after, on 17 January 2017, the Council's planning committee met to determine the second planning application. Members were provided with an update report from the Planning Officer addressing the implications of the Court's judgment. The Committee resolved to grant permission. The planning permission was issued on 26 April 2017 ("Permission 2").

15. Proceedings were issued on behalf of the Claimant and permission to apply for judicial review was granted on 8 September 2017.

The 2015 Planning Officer's report (Permission 1) – 4 June 2015

16. The Planning Officer's report, dated 4 June 2015, outlines the proposal as comprising a new football and athletic Stadium with associated development. The proposed pavilion will be in the middle of the site and will be 56 m in length and 29 m in width with a height of 8.7 m. It will be 2 stories high. The pavilion will have raked seating on 2 sides and comprise 636 seats with half facing the athletics track and half facing the main football pitch.

17. The impact of the development on the surrounding Green Belt was considered at paragraphs 80 to 95 of the report. In particular, paragraphs 90 to 95 address the impact of the pavilion on the openness of the Green Belt as follows:

> *"90 the physical size of the proposed pavilion compared to the existing buildings means that it would have a greater impact on the openness of the greenbelt compared to the existing buildings. While it may be appropriate development an assessment must be made in terms of whether the proposal preserves the openness of the Belt. The proposed landscaping in the amended scheme involves the creation of a series of landforms around the perimeter of the site to enhance the character of the informal open space and will assist in screening activity within the site from certain viewpoints. Whilst there would be a larger area of formal enclosed sports facilities it is not considered that the impact on the openness of the Green Belt would be significant.*
>
> *91 the existing buildings … are of poor quality and are no longer considered to be fit for purpose. All are close to the northern boundary, approximately 33-50m from the River Thames…*

The buildings, including those removed, had a combined footprint of 785sqm, volume of 2100m³ an average height of approximately 2.7 m. The proposed pavilion has a gross external area, excluding seating, of 1674sqm and will be 56m in length and 29m in width with a height of 8.7m. However, it will be located within the centre of the site. In the amended scheme the landscape buffer has been increased in width to move the pitches and athletics ground further from the river.

…

94 The proposed pavilion is significantly smaller in scale than the outline permission has been granted under 2012/1185 and therefore it is considered that the proposal would have less impact on the openness of the Green Belt than the previous.

95 Taking Green Belt policy as a whole the proposals comprise development which is appropriate within the Green Belt. There will be limited adverse impact on landscape and visual amenity and openness of the Green Belt, however there will also be significant benefits in terms of facilitating the beneficial use of land within the Green Belt by providing significant opportunities for public access and outdoor sport and recreation by improving the damage land."

The EIA Statement of Reasons for granting permission ("Permission 1") – undated but early 2016

18. The statement of reasons required pursuant to the EIA regime provides as follows:

"The building comprise development which is appropriate within the Green Belt in line with para. 89 and 90 the NPPF…. The function of the pavilion will be ancillary and appropriate to the use of the site football and athletics. There will be a limited adverse impact on landscape and visual amenity and openness of the Green Belt, however there will also be significant benefits in terms of facilitating the beneficial use of land within the Green Belt by providing significant opportunities for public access and outdoor sport and recreation by improving damage land which supported by para. 81 of the NPPF.

…

It is concluded that the proposal represents appropriate development within the Green Belt the proposal is not considered to have a significant adverse impact on the openness of the Green Belt or the amenity of nearby properties."

The 2017 Planning Officer's report (Permission 2) – 12 January 2017

19. The report, dated 12 January 2017, compiled by the planning officer recommends the grant of planning permission. It acknowledges the ongoing judicial review challenge to the earlier planning permission.

20. Paragraphs 86 – 113 consider whether the proposed development would represent inappropriate development in the Green Belt under the NPPF. The following key paragraphs record the Officer's conclusions on the impact on green belt openness:

> *"105 The physical size of the proposed pavilion compared to the previous buildings mean that its size, height, bulk and mass is greater than the previous buildings. The buildings, including those removed had a combined footprint 785sqm, volume of 2100m³ and average height of approximately 2.7m. The proposed pavilion has a gross external area, excluding seating of 1674sqm and will be 56m in length and 29m in width with a height of 8.7m. The site of siting of the pavilion away from the river reduces the prominence of the main built development on the site. It would be located within the centre of the site whereas the previous buildings were near the north-western boundary visible from the road and the River Thames towpath. The purpose of the building is clearly ancillary to outdoor sport and therefore the building would be associated with the outdoor use. On balance, it is considered that the pavilion would preserve the openness of the Green Belt.*
>
> *106 The proposed landscaping involves the creation of a series of landforms around the perimeter of such a site to enhance the character of the informal open space will assist in screening activity within the site from certain viewpoints. The proposal would result in the replacement of a slightly undulating landscape with a flatter landscape which would have landscape bunds and additional planting along the north-western boundary. Whilst there would be a larger area of formal enclosed sports facilities, and would limit views across the site, it is considered that the landscaping would preserve the openness of the Green Belt.*
>
> *…*
>
> *108 The two main football pitches and the athletics track would be artificial surfaces and are considered to preserve the openness the Green Belt.*
>
> *109 In terms of any other external facilities, there would be an increase in the number and height of floodlit floodlight columns compared to the previous football club. However, due to their slender nature, it is considered that the floodlights would preserve the openness of the Green Belt. It is noted that the*

Walton Casuals site had 8 flood lights which were closer to the north west boundary from the proposed athletics floodlights.

110 The proposed car park and associated car parking access road lighting would also preserve the openness of the Green Belt.

111 On the basis of its scale and development footprint, whilst taking account of the previous development on the site in the context of neighbouring buildings, the proposed development is considered to preserve the openness of the Green Belt.

112 If members which take the view that the built development as part of the proposal are not appropriate facilities for outdoor sports and outdoor recreation, that it conflicts with any of the 5 purposes of including land within the greenbelt, it does not minimise the impact on the greenbelt under the policy DM 17 or it fails to preserve the openness of the greenbelt, then the proposal constitutes inappropriate development within the greenbelt."

The judgment in R(Boot) v Elmbridge Borough Council (Permission 1) – 16 January 2017

21. In his judgment quashing Permission 1, Mr Justice Supperstone held that the Council had erred in its interpretation of paragraph 89 of the NPPF by finding that the sports facility was appropriate development in the Green Belt despite also finding that it would have an adverse impact on the openness of the Green Belt:

"25. Mr Parkinson contends that the question of law raised by the Claimant's first ground of challenge is whether a new sports facility can be appropriate development even if it causes harm to the openness and purposes of the Green Belt.

26. He suggests this is because the Defendant found that the new stadium would cause harm to the openness and purposes of the Green Belt (see OR95 and 177, and the Statement of Reasons), but (despite this) found it was appropriate development and complied with paragraph 89 of the NPPF.

Mr Parkinson submits that the Defendant's interpretation of the policy is wrong. He contends that if a new sports facility causes harm to the openness of the Green Belt (even limited harm) it is not appropriate development for four main reasons:…

39. Mr Parkinson submits that West Lancashire establishes that if a proposal has an adverse impact on openness, the "inevitable conclusion" (see para 22 of the judgment) is that it does not comply with a policy that requires openness to be maintained. A decision maker does not have "any latitude" to find otherwise, based on the extent of the impact. In the present case the Defendant concluded that there was an adverse impact on

openness, but nevertheless granted permission without giving consideration to whether under paras 87 and 88 of the NPPF there were very special circumstances that would justify it.

40. I accept Mr Parkinson's submissions. In my judgment the Defendant erred in its interpretation of paragraph 89 of the NPPF."

22. The Judge made an order quashing the planning permission.

The Planning Officer's update report following the Court's judgment (Permission 2) – 17 January 2017

23. The officer's update to the planning committee on the Court's judgment stated as follows:

"The court found that the local planning authority had erred in law in advising the previous proposal had limited harm on the openness of the Green Belt but still preserved the openness of the greenbelt. The court concluded that it is not possible to have limited harm to the Green Belt reserve openness when para.89 of the NPPF is considered.

…

The report relating to the current application concludes that the proposal complies with para.89 of the NPPF…

The judgement is a material consideration to the current application. The decision is based on the detailed drafting of the officer report relating to consideration of the Green Belt. The current planning application requires consideration on its own merits and there are a number of changes to the scheme, as explained within the officer report. The officer report has given extended consideration to para.89 of the NPPF and the issue of preserving the openness the Green Belt."

The Minutes of the Planning Committee Meeting (Permission 2)

24. The Minutes provide as follows:

"Prior to the introduction of the application by the Planning Officer, the Chairman invited the Law Practice Manager to provide some guidance to the Committee on their role and to advise on the outcome of the Judicial Proceedings that had been delivered on 16 January 2017….

The Law Practice Manager advised that the role of Members of the Planning Committee that evening was to consider the planning merits of the Sports Hub application before them. The application was a new application and therefore should be considered on its own merits.

It was acknowledged that the scheme itself is very similar to one previously agreed by the Planning Committee, however, there were some minor variations to layout, lighting columns etc., and the Law Practice Manager advised that these matters have been addressed in the Planning Officer's report.

…

The Law Practice Manager advised that members were aware that the previous permission for the site had been quashed on 16 January 2017, following a Judicial Review. Members of the Committee, including those attending as temporary substitutes had been sent copies of the High Court decision and had also been provided with a short briefing note on the judgement in the context of the application before them that evening. The decision had been on a narrow point of policy interpretation and did not go into the merits of the application.

…

Judgement has been handed down on Monday 16 January 2017 and quashed the previous planning permission (2015/0949) relating to the Elmbridge Sports Hub, Waterside Drive. That application was the one under which works are been undertaken to date.

The Judge in the High Court found that the Local Planning Authority had erred in law in the test applied in the Officer's report, and stating the previous proposal had limited harm on the openness of the Green Belt but still preserved the openness of the Green Belt. The Court concluded that it was not possible to have limited harm to the Green Belt preserve openness, and therefore it was contrary to paragraph 89 of the National Planning Policy Framework (NPPF), so the test had not been properly applied.

…

Members were advised that the judgement was a material consideration to the current application. The committee should have regard to the planning application before them that evening, on its own merits, all of which was explained in the Officer's report on what the Officer had done in his report that evening was to give extended consideration to paragraph 89 of the NPPF and the issue of preserving openness of the Green Belt.

…

Members debated the application before them and concluded that, for the reasons set out in the Planning Officer's detailed report, as updated, the proposed development was in accordance

with the Development Plan when considered as a whole. The Committee were of the view that the proposed development was not inappropriate development in the Green Belt and that the proposal was compliant with NPPF policy in relation to the Green Belt."

The policy framework

25. Paragraphs 79 - 92 of the NPPF set out current national policy in relation to the protection of the Green Belt. The Government attaches great importance to Green Belts. The essential characteristics of greenbelt are their openness and permanence. The fundamental aim of greenbelt policies is to prevent urban sprawl by keeping land permanently open. Part of their purpose is to check the unrestricted sprawl of large built-up areas and to assist in safeguarding the countryside from encroachment (paragraphs 79-80).

26. The effect of paragraphs 87, 88 and 90 of the NPPF, when read together, is that all development in the Green Belt is inappropriate unless it is either development falling within one or more of the categories set out in paragraph 90 of the NPPF or is the construction of a new building or buildings that comes or potentially comes within one of the exceptions referred to in paragraph 89 (Fordent Holdings v Secretary of State for Communities and Local Government [2013] EWHC 2844 at para 19).

27. The exceptions in paragraph 89 include the exception relevant to the proposed development, namely:

"Provision of appropriate facilities for outdoor sport, outdoor recreation of the cemeteries as long as it preserves the openness of the greenbelt does not conflict with the purposes of including land within it."

Submissions on behalf of the Claimant

28. On behalf of the Claimant, Mr Parkinson submits that the Council made two inconsistent planning judgments in relatively short succession as to the impact of the proposed development on the openness of the Green Belt, in circumstances where none of the surrounding circumstances or policy framework had changed. The Council granted Permission 1 on the basis of a planning judgment that the proposal would have an adverse impact on greenbelt openness. It granted Permission 2 on the basis of no such impact. The difference in view was not referred to, or explained, in Permission 2. This is a stark example of inconsistency in planning decision making. The principle of consistency applies despite the fact that Permission 1 was quashed. The reasoning in the EIA Statement and the Officer's report remain in existence. Moreover, the judgment of Supperstone J leaves untouched the Council's planning judgment about Green belt openness which was capable in law of being a material consideration when deciding Permission 2. There is no general rule that a previously quashed decision must be taken into account. The question is fact and circumstance specific. However, the circumstances of this case made it unreasonable for the Council not to have considered its previous assessment. The development was the same, as was the Planning Officer. None of the surrounding circumstances or policy had changed. The difference in judgment was stark and unexplained. The site is sensitive. The proposed development

is EIA development in the Green Belt. The judgment in R(Boot) made it clear that the Court had not interfered with the Council's previous planning judgment.

Submissions on behalf of the Defendant

29. On behalf of Elmbridge Borough Council, Mr Simons accepted that the principle of consistency applied to local authority decision making. The EIA statement of reasons and the officer's report for Permission 1, which detail the previous planning judgment continue to exist in law and were capable of being a material consideration in the decision making for Permission 2. However, Permission 1 had been quashed and the weight to be given to the underlying reasoning was a matter of weight for the Council. The Council were entitled to give it no weight given the decision had been quashed by the Court. A decision of some kind is still necessary for the consistency principle to apply. It was rational and sensible for the Council not to start examining the reasoning for its earlier decision. The application was a fresh decision which was considered by the Committee on its own merits. The Planning Officer's report on Permission 2 considered the impact on the green belt at greater length than the report on Permission 1. The reasoning for Permission 2 was sound and had not been challenged save in respect of the consistency principle. Councillors would face practical difficulties trying to identify which parts of Permission 1 remained and which had been quashed.

Analysis

The legal framework

30. In determining any application for planning permission, planning authorities must have regard to 'the provisions of the development plan so far as material to the application and to 'other material considerations' (section 70(2) and 70(1) of the Town and Country Planning Act 1990). The "determination must be made in accordance with the development plan unless material considerations indicate otherwise" (section 38(6) of the Planning and Compulsory Purchase Act 2004).

31. It is for the courts to determine whether or not a consideration is relevant such that it becomes a material consideration. But it is for the decision-maker to attribute to a relevant consideration such weight as s/he thinks fit and the courts will not interfere unless the judgment is irrational (Tesco Stores Ltd v Secretary of State [1995] 2 All ER 636).

32. 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 [1971] 1 All ER 65,68 LGR 788, [1970] 1 WLR 1281, 1294).

The principle of consistency

33. When an administrative discretion is vested in a public authority that falls to be exercised on a potentially indefinite number of occasions, the law requires steps be taken to achieve reasonable consistency and avoid arbitrariness in its exercise (R(Lumba) v Secretary of State for the Home Department [2012] 1 AC 245 (at [26] & [34]).

34. Consistency in decision making is a well established principle in planning law. The classic statement of the principle is set out by the Court of Appeal in North Wiltshire District Council v Secretary of State for the Environment and Clover (1993) 65 P&CR 137:

> *"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 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."*

35. In Dunster Properties Ltd v the First Secretary of State & Anr [2007] EWCA Civ 236, Lord Justice Lloyd explained the rationale for the principle:

> *"**[22]** It seems to me that a factor which is relevant to the duty to give reasons in planning decisions is the point which emerges more clearly in cases such as Flannery than in the planning cases, that the requirement to give reasons concentrates the mind and if fulfilled is likely to lead to a more soundly based decision (see Henry LJ in Flannery at p 381)…*
>
> ***[23]** …it seems to me that by declining to comment, other than to refer to his own reasons already expressed, Mr Mead appears*

> *not to have faced up to his duty to have regard to the previous decision so far as it related to the point of principle as a material consideration. Omission to deal with the conflicting decision, as in the* North Wiltshire *case, might have been sufficient in itself. But Mr Mead's last sentence in para 8 suggests that he has not grasped the intellectual nettle of the disagreement, which is what is needed if he is to have had proper regard to the previous decision. Either he did not have a proper regard to it, in which case he has failed to fulfil the duty to do so, or he has done so but has not explained his reasons, in which case he has not discharged the obligation to give his reasons."*

36. A recent example of the application of the principle is the decision by the Court of Appeal in DLA Delivery Ltd v Baroness Cumberledge of Newark [2018] EWCA Civ 1305 (Lindblom LJ).

37. The cases of North Wiltshire, Dunster and Baroness Cumberledge were cases of inconsistency between decisions by planning inspectors. Mr Simons accepted however that the principle is capable of applying to local authority decision making. This was a sensible concession. In R(Thompson) and Oxford City Council [2014] EWCA Civ 94, Lloyd Jones LJ considered that the principles stated in Dunster are of general application and not limited to planning cases. The principle flows from the function of reasons as a safeguard of sound decision making. The case of R(Havard) v South Kesteven DC [2006] EWHC 1373 is an example of the application of the principle to decision making by a local planning authority decision making. In Baroness Cumberledge of Newick v Secretary of State, John Howell QC, sitting as a Deputy High Court Judge, considered that the public interest in securing reasonable consistency in the exercise of administrative discretions which may make it unreasonable for a decision maker not to take other decisions into account applies to all planning authorities. His analysis was approved by Lindblom LJ in the Court of Appeal.

38. The case law on consistency in decision-making must be seen in the broader context of the jurisprudence on challenges to the decision maker's reasons. The case of JJ Gallagher Ltd v Secretary of State [2002] EWHC 1812 suggests that the more stark the inconsistency, the more it behoves an explanation:

> *"58….. In my judgment the need for an express explanation of an apparent inconsistency between the decision under consideration and an earlier decision will depend on the circumstances. If the explanation for the inconsistency is obvious, a formal statement of it will be unnecessary. Where the inconsistency is stark and fundamental, as it seems to me it is in the present case, it will in my judgment usually be insufficient to leave it to the reader to infer the explanation for the inconsistent decisions. The reason for this is that unless the decision-maker deals expressly with the earlier decision and gives reasons that are directed at explaining the apparent inconsistency, there is likely to be a doubt as to whether he has truly taken the earlier decision into account."* (George Bartlett QC sitting as a deputy High Court Judge)

Application of the principle

39. The consistency principle is given practical effect in planning decision making via the test of material considerations. There is no rigid rule that a decision maker must always treat a previous decision as a material consideration. Where the complaint is a failure to consider a previous decision, any such failure will make the decision unlawful if no reasonable decision maker would have failed to take it into account in the circumstances of the decision making. There is no exhaustive list of the matters in respect of which a previous decision may be relevant. That must inevitably depend on the circumstances. Whether a decision with which the decision-maker has not been supplied is one that no reasonable decision-maker would have failed to take into account will likewise depend on the circumstances. These may include whether the decision-maker was or ought to have been aware that such a decision may exist, the significance that any such decision might have in relation to the decision to be made and what steps may have been required to ascertain whether or not it did exist and to obtain it. (See John Howell QC in Baroness Cumberledge of Newick v Secretary of State [2017] EWHC 2057 approved by Lindblom LJ in the Court of Appeal in DLA Delivery Ltd v Baroness Cumberledge of Newark [2018] EWCA Civ 1305).

Application of the consistency principle in the context of a previously quashed decision

40. The application of the consistency principle to decision making following the quashing of a previous decision was the core legal dispute between the parties.

41. It was common ground that a quashed decision is incapable of having any legal effect on the rights or duties of the parties to the proceedings (Hoffman La Roche v Secretary of State for Trade and Industry [1975] AC 295):

> *"It would however be inconsistent with the doctrine of ultra vires as it has been developed in English law as a means of controlling abuse of power …if the judgment of a Court…that a statutory instrument was ultra vires were to have any lesser consequence in law than to render the instrument incapable of ever having had any legal effect upon the rights or duties of the parties to the proceedings."* (Lord Diplock)

42. It was also common ground that where the Court quashes a planning permission, the decision maker must start the decision making again, with a clean sheet, having regard to the development plan and other material considerations, including material considerations which have emerged since the matter was originally considered (Kingswood District Council v Secretary of State for the Environment (1989) 57 P&CR 153 (Graham Eyre QC sitting as a Deputy High Court Judge)).

43. Mr Parkinson submitted that the principle of consistency in decision making still applies where a previous decision has been quashed and the previous decision may be a material consideration. This was particularly so in a case like the present where the EIA statement of reasons and the Officer's Planning report remain in existence, despite the permission itself having been quashed.

44. In support of his contention that a quashed decision may be a material consideration in the fresh round of decision making, he relied on R (Fox Strategic Land and Property

Ltd) v Secretary of State [2012] EWCA Civ 1198; Land and Development Ltd v First Secretary of State [2003] EWHC 2200; Vallis v Secretary of State [2012] EWHC 578 (Admin) and St Albans City and District Council v SS [2015] EWHC 655. Each case concerned two inconsistent decisions by inspector(s) where the first decision in time had been quashed save that, in the case of Fox where the first decision in time was under legal challenge at the time of the second decision.

45. In support of his contention that a quashed decision cannot be a material consideration Mr Simons relied on the first instance decisions of Arun District Council v Secretary of State [2013] EWHC 190, in which the Court (HHJ Seys-Llewellyn QC sitting as a Deputy High Court Judge) held that as a matter of law the first inspector's conclusion could not be a material consideration, following the principle in Hoffman La Roche that a quashed decision is of no legal effect. Mr Simons also relied on R (West Lancashire Borough Council) v Secretary of State [2017] EWHC 3451 which followed Arun.

46. Mr Simons contended that the principle of consistency did not arise where there was no previous decision in existence because it had been quashed. He relied in this respect on a passage in a judgment by Lindblom J (as he then was) in Benjamin Butterworth v Secretary of State [2015] EWHC (Admin) 108 at [40] in which the Judge commented that: "I should also add that I think Mr Westmoreland Smith's reliance on the decision in *Arun* is misplaced. As the judge in that case acknowledged, the circumstances there – an appeal decision quashed by the court and the appeal re-determined with a different result – are not analogous to cases in which the decision-maker is obliged to consider the principle of consistency (see paras 17 to 22 of the judgment)". Mr Simons used the passage to distinguish between 'previous quashed decisions' from 'previous, not quashed decisions'. The consistency principle applies to the latter but not the former. In this context Mr Simons submitted that this Court would be extending existing caselaw if the Court were to hold it necessary for a decision maker to consider a previously quashed decision.

Discussion

47. Starting from principle, before I turn to the caselaw, I find it difficult to accept Mr Simons' argument that the consistency principle applies only to a decision and not to its underlying reasoning. I do not see how the two can be as hermetically sealed as Mr Simons suggests. The cases of North Wilts and Dunster emphasise that the rationale for the principle is to 'concentrate the mind of the decision maker'; to 'force him/her to grasp the intellectual nettle' and to uphold 'public confidence in the planning system'. In (R(Thompson) and Oxford City Council [2014] EWCA Civ 94, Lloyd Jones LJ considered that the principle flows from the 'function of reasons as a safeguard of sound decision making'. Given the content and breadth of the rationale, I am of the view that the consistency principle is of broad application. It seems to me to be artificial to distinguish between the formal decision and its underlying reasoning in the way that Mr Simons seeks to do.

48. I accept, as was common ground, the principle established in Hoffman la Roche, that a quashed decision is incapable of having any legal effect on the rights and duties of the parties. However, that case, about patented drugs, does not address the nature of the subsequent decision making in the particular context of planning law, which is the focus of the present case. In this regard, it was also common ground that where the Court quashes a planning permission, the decision maker must start the decision making

afresh, with a clean sheet, having regard to the development plan and other material considerations (Kingswood District Council v Secretary of State for the Environment (1989) 57 P&CR 153). In this context, I accept that the Council is entitled to change its mind in its fresh decision making, subject to the constraints of consistency explored below.

49. It seems to me that the argument advanced by Mr Simons before this Court was essentially the same as that advanced on behalf of the Secretary of State in R(Fox Strategic Land and Property Ltd) v Secretary of State [2012] EWCA Civ 1198. The case concerned an Inspector's decision ('the Fox decision') in which the Inspector gave no weight to his previous and inconsistent decision in relation to a nearby site (the Richborough decision). The Richborough decision was under legal challenge but the challenge had not yet been determined at the time of the Fox decision:

> *"**15]** On behalf of the Secretary of State Mr Warren submits that it was open to the Secretary of State to afford the* Richborough *decision no weight. It has throughout been accepted to be a material consideration when making the* Fox *decision. However, it was not a precedent in a legal sense, and whether to attach weight to it and, if so, the weight to be attached, was a decision for the decision-maker…*
>
> ***[16]** Moreover, submits Mr Warren, the Secretary of State was bound to consider that the challenge in the Richborough decision might succeed, as in the event it did succeed by consent. While it had not been conceded at the time of the* Fox *decision the Secretary of State was entitled to take the prospect of it being quashed into account in deciding to attach no weight to it. The Richborough appeal decision was sub judice at the point of decision, he submits, though accepting that the technical term may not be entirely apt. It would not have been appropriate to apply that decision prior to a final determination of the challenge to its legality.*
>
> *…"*

50. Pill LJ rejected the Secretary of State's argument:

> *"**[19]** I do not accept that proposition. Further analysis was required by the Secretary of State of the situation that had arisen before making his decision in the Fox appeal.*
>
> *…*
>
> ***[32]** …. In my judgment it was not open to the Secretary of State to put aside the Richborough decision when making the* Fox *decision. He could not put it aside on the ground that there was a High Court challenge, the challenge being made on quite different grounds.*

[33] *Mr Warren argues that, whatever the grounds, if the decision is quashed it is quashed, but that in my judgment is to take too simplistic a view of the situation. One has to look forward…..*

[34] *There should have been an analysis of the relevance of the Richborough decision to the Fox decision and a consideration of what the implications of favourable findings in Richborough were for the Fox appeal. If the Secretary of State was minded to depart from the spatial findings in Richborough, at least an explanation was required of why he proposed to do so. Rather than provide that, he simply relied on the existence of the High Court challenge which, upon analysis, does not begin to deal with the key question of inconsistency and also does not provide a justification for failing to address the question of inconsistency.*

[35] *In my judgment the judge was correct to reach the conclusion he did on this issue. It was unlawful to ignore the implications of the Richborough decision when making the Fox decision. The inconsistencies against which the North Wiltshire principles guard were present in this case and have led to an unlawful decision by the Secretary of State which I too would quash."*

51. Similarly, in Vallis v Secretary of State [2012] EWHC 578 (Admin) Mr Justice Coulson considered the position to be as follows:

"26 On analysis, therefore, it seems to me that the relevant principles are these:

a) The second inspector must consider carefully the reasons put forward by the first inspector.

b) The second inspector is not bound by the views of the first; he or she must exercise his own judgment.

c) If the second inspector reaches a different conclusion then, for consistency/public confidence reasons, he or she must explain why. Those reasons must satisfy the usual South Bucks test (see paragraph 23(c) above).

27. Ms Busch argued that, whilst these principles may not themselves be objectionable, she did not accept that they could apply to a case like this, where the first inspector's decision letter has been agreed to be unlawful. That is a reasonable point, but only to the extent that it relates to a matter connected with the unlawfulness of the first decision. In other words, if the first inspector decided a particular issue in such a way that his or her decision on that point was unlawful, the second inspector would be justified in dealing with that issue entirely afresh, without

> *making any reference to the previous unlawful decision on that issue. If, on the other hand, the first inspector provided clear and cogent reasons for a conclusion on a specific issue, which explanation was nothing whatsoever to do with the subsequent unlawfulness of the decision, then the principles that I have outlined above must apply. In other words, the mere fact that the first inspector's decision was quashed as being unlawful should not, without more, render the whole decision irrelevant to the second inspector.'*

52. As a decision of the Court of Appeal, Fox Strategic is binding on this Court unless it can be distinguished. Mr Simons sought to do so on the basis it concerned a decision under challenge which had not yet been quashed. I do not accept his distinction. In his judgment Pill LJ 'looked forward' to consider the implications of the first decision being quashed. Mr Simons suggested 'the looking forward' was a fact specific assessment. I do not accept that this detracts from Pill LJ's assessment that it is too simplistic to simply rely on a decision having been quashed. Further analysis of the decision is required.

53. The case of Arun District Council relied on by Mr Simons was a decision by His Honour Judge Seys-Llewellyn QC, sitting as a deputy High Court Judge. The judge rejected the argument that the first inspector's decision was a material consideration in light of the principle expressed in Hoffman La Roche that the decision on appeal had been quashed in its entirety. The Judge emphasised the potential confusion and complexity for Inspectors on remitted appeals if as a preliminary step they have to consider which part or parts of a quashed decision might or might not be capable of being revived as a material consideration in its own right.

54. In R(West Lancashire Borough Council) v Secretary of State [2017] EWHC 3451, the Court followed Arun and the Judge (HHJ Pelling QC) considered that the first instance case law was in a state of some confusion:

> *"The approach adopted in Vallis is inconsistent with that which had been adopted in Kingswood, which was not cited and with Arun which does not appear to have been cited either Similarly, Fox v Secretary of State [2013] 1 P & CR 6 does not provide a definitive answer because the authorities on which the judge had taken a different view in Arun were not cited to the court and because the decision relied upon in Fox was under challenge but had not been quashed. Thus, this is an area of planning law which has been left in some confusion because of the conflicting approaches by first instance judges in many cases where those first instance judges had not had the or any of the relevant authorities cited to them"*

55. I am not convinced there is any inconsistency in the case law. It seems to me that the approach of the Court in the cases of Fox, Vallis, and Land and Development, relied on by Mr Parkinson, is no more than the application of the test for material considerations. All the decisions proceed on the assumption that the Hoffman La Roche and Kingswood principles apply. The first decision is of no legal effect and the second decision maker must start afresh and make a de novo decision. The question for the

Court in each case is whether the previously quashed decision was a material consideration for the purposes of the second decision. This is a fact specific assessment. Unsurprisingly, the fact specific assessment varies. Viewed in this light, the case of West Lancashire is particular to its facts, a case in which the Interested Party developer attempted to rely upon a quashed decision in another appeal with different parties and different land to demonstrate that any error in the decision making before the Court would not have made a difference to the outcome. The Court in Arun and West Lancashire were persuaded of the complexity in discerning which elements of the quashed decision remained unaffected by the quashing. This is a factor to considered in the fact specific assessment as the Court in Fox Strategic and Vallis recognised. There may be times when the complexity entitles the decision maker to put aside the previous decision making, provided this is explained. In Arun, the Judge was influenced by the fact that the second Inspector's reasoning was comprehensive enough to make the reasons for the change in view apparent. Nonetheless; to the extent that Arun and West Lancashire are inconsistent with the Court of Appeal's decision in Fox Strategic, the latter is binding on this Court and makes clear that it is unlawful for the subsequent decision maker to ignore the implications of a previously quashed decision, without further analysis.

Applicable principles

56. Accordingly, from the cases above, I draw the following principles which seem to me to be relevant to the present case:

i) The principle of consistency is not limited to the formal decision but extends to the reasoning underlying the decision (North Wilts v Secretary of State; Dunster; Baroness Cumberledge; Fox Stategic and Vallis).

ii) Of itself, a decision quashed by the Courts is incapable of having any legal effect on the rights and duties of the parties. In the planning context, the subsequent decision maker is not bound by the quashed decision and starts afresh taking into account the development plan and other material considerations (Hoffman La Roche; and Kingswood).

iii) However, the previously quashed decision is capable in law of being a material consideration. Whether, and to what extent, the decision maker is required to take the previously quashed decision into account is a matter for the judgment of the decision maker reviewable on public law grounds. A failure to take into account a previously quashed decision will be unlawful if no reasonable authority could have failed to take it into account (DLA Delivery Ltd v Baroness Cumberledge of Newark)

iv) The decision maker may need to analyse the basis on which the previous decision was quashed and take into account the parts of the decision unaffected by the quashing (Fox and Vallis). Difficulties with identifying what has been quashed and what has been left could be a reason not to take the previous decision into account (as with the cases of Arun and West Lancashire).

v) The greater the apparent inconsistency between the decisions the more the need for an explanation of the position (JJ Gallagher).

Application of the law to the facts

57. Applying the principles set out above to the facts of the present case:

58. The two planning applications for the sport stadium relate to the same site and the same development. They were identical in all material respects. The policy framework was the same.

59. The Council is awarding planning permission to itself in circumstances where its earlier decision making has been criticised by the Courts. Contrary to the submission of Mr Simons, it seems to me that the rationale for the consistency principle outlined in North Wilts, namely the need to secure public confidence in the planning system, is heightened in the present circumstances.

60. In deciding to grant Permission 1 in 2016, the Planning Committee decided that the proposed development would have a (limited) adverse impact on the openness of the Green Belt. This is set out in the EIA Statement of Reasons and the OR 2016, both of which remain in existence despite the permission itself having been quashed.

61. The day after Permission 1 was quashed the Committee made a fresh determination on a new planning application and came to a different decision, namely that there would be no adverse impact on the openness of the Green Belt.

62. The impact of the development on the openness of the Green Belt was a key planning judgment in the decision making. Under the policy framework, an adverse impact on openness makes the development inappropriate unless it satisfies the stringent exceptions in the 'very special circumstances' test.

63. The judgment in R(Boot) v Elmbridge County Council makes clear that Council's planning judgment on openness was unaffected by the Court's decision to quash Permission 1. This is entirely unsurprising, given the well established principle that planning judgments are for the planning authority not the Courts. There is therefore, it seems to me, no practical difficulty in ascertaining the implications of the Court's decision and I reject Mr Simons' submissions to the contrary.

64. The site and the promised development are sensitive. The development proposed was considered likely to have significant effects on the environment. It is to be located in the Green Belt.

65. Mr Simons submitted that the Council was entitled to give its previous decision no weight because it considered matters afresh the second time round and the analysis in OR2 is more comprehensive than in OR1. I have compared the most relevant paragraphs in both reports (paragraphs 90-91 in OR 1 and 105-106 in OR2).

66. I accept Mr Simons' submission that OR2 provides a more comprehensive assessment of Green Belt issues than OR1 does and that the Planning Committee considered the second application afresh and on its own merits. I also bear in mind that the adverse impact in OR1 was considered to be limited and the judgment in OR2 was reached 'on balance'. I do not therefore accept that the inconsistency was as stark as Mr Parkinson sought to portray. Looked at closely, the difference between OR1 and OR2 appears to be that in OR2 the officer gives greater weight to the benefits of moving the building

away from the river to the centre of the site and on the beneficial effect of the landscaping. The minutes of the planning meeting indicate that the Planning Committee followed the Planning Officer's reasoning. I accept that the Council is entitled to come to a different view in its second round of decision making and that weight is a matter for the planning authority and not for this Court.

67. Nonetheless, I have come to the view that it was incumbent on the Officer and the Planning Committee to address the change in position on openness between the two reports. The applications were identical in all material respects and related to the same site. Public confidence in the Council's decision making was important given the earlier judicial criticism and given the Council was awarding permission to itself. It was both unsurprising and clear from the judgment in Boot that Court's criticism of Permission 1 did not extend to the issue of Green Belt openness. The EIA Statement of Reasons and OR1 which contain the apparently inconsistent decision on openness remains in existence. In the absence of any explanation it is simply not possible to know whether the Planning Officer and especially the Planning Committee were even aware they had changed their position, let alone whether they had grasped the intellectual nettle of the difference in view. Nor was the explanation for the apparent inconsistency so obvious that a formal statement about it was unnecessary. The Court has been left to attempt to infer the reasons for the difference in view by a close scrutiny of both reports.

68. Accordingly, in this case I am of the view the Planning Committee unlawfully failed to take into account its previous decision that the proposal would have an adverse impact on Green Belt openness, when determining the second application for planning permission.

Relief

69. The effect of my conclusion is that the Council's failure to take account of its previous decision was unlawful. Even so, I have a discretion not to quash the decision. I am required to consider whether the decision would necessarily have been the same had the flaws in the decision not occurred (Simplex GE Holdings v Secretary of State (1989) 57 P&CR. Further, Section 31 of the Senior Courts Act 1981 provides that the Court must refuse to grant relief on an application for judicial review, if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred. In effect, the court must still be satisfied on the balance of probabilities that it is highly likely that the permission would have been granted had the unlawful conduct found not occurred. The question is not whether it is highly likely that the judge hearing the case would have taken the same decision. The court is not required to treat itself as the decision maker and must act on the evidence it has or on reasonable inferences from it.

70. Mr Simons submits that the scheme and the site were already well known to Committee members. The officer's report on the second proposal was comprehensive. All that would have been required to avoid the present litigation was a sentence saying that the previous report had reached a different judgment and explaining why a different view had been taken.

71. In the absence of any explanation of the inconsistency, it is simply not possible to tell whether the Committee was even aware of its previous apparently inconsistent planning judgment or what view they would have taken of matters had they been aware. It may

be that they would have followed the Officer's view of matters, which the Court has attempted to infer from a close reading of both reports. Equally, however, they may not have done and it is not for the Court to speculate. A judgment about openness on Green Belt is a planning judgment that Parliament has entrusted to the Committee, and not to the Court.

Conclusion

72. For the reasons given above, the local planning authority acted unlawfully in failing to take into account its previous decision that the development could have an adverse impact on Green Belt openness, when determining the second planning application Pursuant to the exercise of the Court's direction, the decision is quashed.