134. The developer is not normally entitled to a separate set of costs unless (a) he has an interest requiring separate representation or (b) there was likely to be a separate issue on which he was entitled to be heard, that is, an issue not covered by Counsel for the Secretary of State. As to (a) being a developer with a valuable planning permission does not constitute an interest requiring separate representation. There remains point (b).

135. In this case two grounds of challenge were made to the decision letter. No allegations were made regarding the conduct of the Second Defendant.

136. Items 1(a) to (d) of the draft order cover a large part of the Second Defendant's skeleton. I do not accept that an order for costs is justified in relation to these matters. Essentially they cover ground which was dealt with in writing and/or orally by Counsel for the Secretary of State. They fall within the territory with which the First Defendant could have been expected to deal. In addition a good many matters would have been covered by the judge in his or her pre-reading for the hearing. The matters identified did not require separate representation.

137. I do not consider that costs can be justified in respect of the First of Mr. Tilley's witness statements. Very little of the material contained therein (including exhibit "RT 1") was necessary for the determination of the case or even relied upon in order to deal with the real issues raised by the challenge. It was rightly pointed out by Mr. Tilley in two short paragraphs that the Claimant had failed to identify what representations they would have made on the Veolia decision if they had had the opportunity to do so or the implications of that decision for Helioslough's appeal. That was an obvious omission. The Secretary of State could have been expected to identify that flaw in submissions, if the point had not previously been made in correspondence.

138. However, the Council then served a six page witness statement from Mr. Hargreaves and it was plainly appropriate for a second witness statement from Mr. Tilley to be served in response. I found it necessary to rely upon that statement in my judgment. The Second Defendant is entitled to the costs of preparing that second witness statement. Costs for the "presentation" of that statement are not justified. The document is clear and speaks for itself.

139. No order for costs in respect of the third witness statement is justifiable. The statement mainly contains submissions on material exhibited by Christine Symes or contained elsewhere in the bundles.

140. I will order the Claimant to pay the costs of the Second Defendant for the preparation of Mr. Tilley's second witness statement dated 16 January 2015, to be assessed if not agreed. Neither the protective costs order of Patterson J made on 3 November 2014 nor the consent order dated 30 January 2015 (agreed between the Claimant and First Defendant) apply to costs payable to the Second Defendant. In any event, I would not expect the costs I am ordering to approach anything like the balance of £21,731 identified in paragraph 6 of the Claimant's submissions dated 12 March 2015.

Permission to appeal

141. I refuse the Claimant's application for permission to appeal. The proposed appeal has no real prospect of success and there is no other compelling reason as to why the appeal should be heard.

142. In relation to Ground 1 paragraph 2(a) of the application does not identify any arguable error on the judgment let alone one with a real prospect of success. Paragraphs 2(b) to (d) of the application are misconceived. They focus on paragraphs 60 to 64 of the judgment. The short answers are:-

(i) Paragraph 59 clearly states that ground 1 had to be rejected in any event for the reasons already given before reaching paragraphs 60 to 64;

(ii) The judgement does not suggest that the ability of the Council to allege the legal error at an earlier point was a reason for rejecting the challenge were the Court to accept that that error had been committed;

(iii) Paragraphs 60 to 64 simply make the point that over the period from 2010 to 2014 the Council's behaviour suggests that it did not read the Inspector's report or the Secretary of State's "decisions" as having laid down a legal test. The Council's letter of 10 November 2011 did not make that point in relation to either the Inspector's report or the costs decision at all.

143. In relation to Ground 2:-

(i) Unlike the Colnbrook case, it has never been suggested that there was a "strategic" gap policy or issue. Instead, the issue in both the Veolia decision and the Heliosloughdecision concerned the application of Green Belt policy to the merger of settlements;

(ii) Paragraphs 4(a) and (b) simply seek to re-argue the merits and in particular they fail to address one of the key flaws in the Claimant's case (see e.g. paragraphs 113 and 117-119 of the judgment).

(iii) Paragraph 5 of the application is misconceived. Essentially the Council was successful in having the test in Baber applied. The alleged tension between Findlay and Bolton is of no consequence, because the judgment makes it plain that Ground 2 failed applying both tests in the alternative (see paragraphs 101 and 112).

Extension of time

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

NORTH WILTSHIRE DISTRICT COUNCIL v. SECRETARY OF STATE FOR THE ENVIRONMENT AND CLOVER

COURT OF APPEAL (Purchas and Mann L.JJ. and Sir Michael Kerr): April 12, 1992

Town and country planning—Material considerations—Earlier appeal decision—Obligation to consider—Reasons—Appeal decision in 1982 concluded site was not within the physical limits of a village and permission for a house and garage should be refused—In 1989 a second application made—Council referred to earlier decision in submissions and supplied copy—Council did not rely on it—Inspector concluded site within physical limits and granted planning permission—Whether earlier appeal decision a material consideration—Whether inspector should have had regard to earlier decision—Whether failure to deal with earlier decision caused substantial prejudice to council

In September 1989, Mr. and Mrs. Clover applied for planning permission to build a house and garage on land within the walled garden of Notton Lodge, Notton, Wiltshire. Policy H14 of the West Wiltshire Structure Plan 1981 provided that in villages which lacked certain specified facilities, which included Notton, only very limited development within the physical limits of the village would normally be permitted. Policy H8 of the emerging North Wiltshire Local Plan provided that in villages which were not shown on the proposals map only very limited residential development within the physical limits of the village would normally be permitted. Notton was not on the map.

In 1980 or 1981, an earlier application to build a house and garage on a site within the walled gardens of Notton Lodge had been refused. The site was larger than, but included, the site of Mr. and Mrs. Clover's application. On an appeal against that refusal, the inspector had held that the appeal site lay outside the physical limits of Notton and that the development could not be regarded as infilling.

In October 1990, the North Wiltshire District Council refused the Clover's application. The reasons for refusal related to Policies H14 and H8, to the fact that the site was outside the physical limit of Notton, to the detriment to character and amenity, to injurious effects on the garden wall, and on highway grounds. There was no reference to the 1982 decision.

On appeal, the council did not rely upon the 1982 appeal decision as justifying their conclusion that the site lay outside the physical limits of Notton. The council did refer to the 1982 decision in its submission but only as part of the planning history of the site. The decision was also enclosed with their submission. A third party who made written submissions to the inspector also referred to the earlier decision. The inspector concluded that the garden and associated buildings formed one part of the village. The addition of a further house would not therefore conflict with the council's policies. He therefore allowed the appeal and granted permission. The inspector made no reference to the earlier decision.

On an application under section 245 of the Town and Country Planning Act 1971, Lionel Read, Q.C. sitting as a deputy judge held that the inspector had failed to give adequate reasons as he had not explained why he was not following the 1982 appeal decision. He quashed the decision of the inspector. The Secretary of State for the Environment appealed.

Held, dismissing the appeal,

(i) a previous appeal decision which is materially indistinguishable from the present case is a material consideration within the meaning of section 29 of the Town and Country Planning Act 1971 which an inspector should take into account in

determining whether or not to grant planning permission on an appeal. An inspector is free to depart from an earlier decision but before doing so he ought to have regard to the importance of ensuring consistent decisions and must give his reasons for departing from the earlier decision.

(ii) In the present case, the determination of the appeal against the refusal of planning permission on the Clovers' application necessarily required a decision as to whether the site was within the physical limits of Notton. That was a critical aspect of the decision in the earlier appeal which related to an identical proposal on the same, albeit larger, site. The earlier decision was therefore a material consideration. The inspector's decision did not indicate that he had taken the previous decision into account nor did the inspector explain why he had departed from that earlier decision;

(iii) the inspector had been made aware of the earlier decision and its materiality was apparent. The council had referred to the earlier decision in their submissions, enclosed it with their submission and it had been referred to in a letter from a third party. The fact that the council did not rely upon the earlier decision did not affect the fact that it was a material consideration which the inspector should have taken into consideration;

(iv) the failure by the inspector to deal with the earlier decision did substantially prejudice the interests of the council in that they were left in doubt as to whether the decision was one that the inspector was empowered to come to or was open to challenge.

Cases cited:

(1) *Cranleigh Aerials Ltd.* v. *Secretary of State for the Environment* [1991] N.P.C. 140.

(2) *Launchdeal Ltd.* v. *Secretary of State for the Environment* [1991] J.P.L. 1036.

(3) *Poyser and Mills Arbitration, Re* [1964] 2 Q.B. 467; [1963] 2 W.L.R. 115; [1965] 1 All E.R. 612.

(4) *Save Britain's Heritage* v. *Number 1 Poultry Ltd.* [1991] 1 W.L.R. 153; [1991] 2 All E.R. 10; (1991) 62 P. & C.R. 100, H.L.

(5) *Top Deck Holdings* v. *Secretary of State for the Environment* [1991] J.P.L. 961.

(6) *Wells* v. *Secretary of State for the Environment* [1992] 1 P.L.R. 51.

(7) *Westminster City Council* v. *Great Portland Estates plc* [1985] A.C. 661; [1984] 3 W.L.R. 1035; [1984] 3 All E.R. 744; (1984) 49 P. & C.R. 34.

Appeal by the first respondent the Secretary of State for the Environment, and second respondents, Mr. and Mrs. Keith Simon Clover, against a decision of Lionel Read, Q.C. sitting as a deputy judge of the High Court on February 26, 1991, whereby he allowed an application by the applicant, North Wiltshire District Council under section 245 of the Town and Country Planning Act 1971 and quashed a decision of an inspector appointed by the first respondent allowing an appeal by the second respondents against the decision of the applicant dated October 30, 1990, refusing planning permission for a dwelling-house and garage within the walled garden of Notton Lodge, Notton, Wiltshire. The facts are set out in the judgment of Mann L.J.

Stephen Richards for the appellant.
T. D. Straker for the respondents.

MANN L.J. This is an appeal by the Secretary of State for the environment against a decision of Mr. Lionel Read, Q.C. when sitting as a deputy judge of the High Court on February 26, 1991. By his decision the learned

deputy judge allowed an application by the North Wiltshire District Council under section 245 of the Town and Country Planning Act 1971 and quashed a decision of an inspector appointed by the Secretary of State dated June 5, 1990. By his decision the inspector had allowed an appeal by Mr. and Mrs. Keith Clover against a decision of the district council dated October 30, 1989, whereby they had refused planning permission for the erection of a dwelling-house with garage on 0.11 ha. of land within the walled garden of Notton Lodge, Notton, Wiltshire. Although parties to the proceedings, Mr. and Mrs. Clover have played no part in them in either the court below or this court.

The district council's notice of motion dated June 13, 1990, raised a number of grounds of challenge but it was on only one ground that they succeeded before the learned deputy judge. It was a ground to the effect that the inspector had failed to give any reason for reaching a decision which was inconsistent with an earlier appeal decision. The Secretary of State appeals on the grounds that there was in the circumstances of the case no need for the inspector to have given any reason why he had reached a conclusion different from that reached earlier, and that if there was, then any deficiency in reasons had not caused substantial prejudice to the district council.

Notton is within an area which is covered by the approved West Wiltshire Structure Plan 1981, the adopted Chippenham Local Plan 1987 and the emerging North Wiltshire Local Plan. Policies in the structure plan and in the emerging local plan were relevant to Mr. & Mrs. Clover's application for permission. Policy H14 of the structure plan provided that in villages which lack certain specified facilities (as does Notton) "only very limited development within the physical limits of the village will normally be permitted." Policy H8 of the emerging local plan provides that in villages not shown on the proposals map (as Notton is not) "only very limited residential development within the physical limits of the village will normally be permitted." Both of the policies state that development within the physical limits of a village is acceptable only where it would be in scale and harmony with the character of the settlement and without adverse effect on the local environment. Policy H6 of the adopted local plan is more restrictive than the policies of both the structure plan and the emerging local plan, but for reasons which are now unchallenged, the inspector who determined Mr. and Mrs. Clover's appeal, attached great importance to policy H14 and H8.

In 1980 or 1981 a Mrs. J. M. Holliday submitted an application to the district council for planning permission for the erection of a dwelling-house with garage on a site within the walled garden of Notton Lodge which was larger than, but included, the site of Mr. and Mrs. Clover's proposal. The application was refused. Mrs. Holliday appealed to the Secretary of state who appointed an inspector, Mr. W. S. C. Redpath R.I.B.A., to determine the appeal. He held an inquiry into the appeal and dismissed it on February 4, 1982. This is the earlier appeal decision to which I have referred and it has the departmental reference T/APP/5408/A/81/09959/62.

Mr. Redpath identified the main issue before him as being whether the proposed development could be regarded as "infilling within the physical limits of an existing settlement and, if not, whether or not there is adequate justification for permitting the development as an exception to the normal requirements of the . . . structure plan" (decision letter para. 2). After an

analysis of the fabric and character of Notton, he concluded "that the appeal site lies outside the physical limits of Notton and that . . . the proposed development cannot be regarded as infilling." Mr. Redpath then considered whether there was any adequate justification for exceptional treatment and found no adequate argument favouring a proposal "which would consolidate existing sporadic development and erode the open rural character of the locality contrary to the policies of the . . . Structure Plan" (the same, para. 6). He accordingly dismissed the appeal.

Mr. and Mrs. Clover made their application on September 1, 1989. It was refused on October 30, 1989. The reasons for refusal were those which had been recommended by the district council's planning officer in his report upon the application. They related to policies H14 and H8, to the site being outside the physical limits of Notton, to detriment to character and amenity, to injurious effects on the garden wall (which is a listed building) and to a highway objection by the Wiltshire County Council. There was no reference to the 1982 decision either in the refusal notice or in the planning officer's report but he did refer to a representation by the Lacock Parish Council which indicated "they are unaware of any *change* in the structure plan which would make this a viable application." The emphasis is mine. It is at least possible that the parish council had in mind the absence of change since the decision of 1982. This was certainly in the mind of Mrs. P. A. Hawkins, a local resident, who wrote to the district council on October 31, 1989, expressing her objection to the proposal and stating her belief that the "area should remain as open countryside." She concluded "a similar application was refused in 1981/1982 (Refer T/APP/ 54508/A/81/09959/62). The reasons for refusal have not changed since that date."

On November 21, 1989, Mr. and Mrs. Clover's agents lodged an appeal to the Secretary of State on grounds which in effect traversed the reasons for refusal. The appeal was one of a class of appeals which has been transferred for determination to inspectors appointed by the Secretary of State (see Town and Country Planning (Determination of Appeals by appointed persons) (Prescribed Classes) Regulations 1981). Mr. and Mrs. Clover and the district council each had a right to a hearing by an inspector (Act of 1971 Sched. 9, para. 2(2)(*b*), now Town and Country Planning Act 1990, sched. 6, para. 2(4)). But each of them waived that right in favour of the very widely used written representations procedure.

The written representations procedure is regulated by the Town and Country Planning (Appeals) (Written Representations Procedure) Regulations 1987. Under that procedure (i) the notice of appeal and any documents are treated as the appellant's representations; (ii) the planning authority are required to submit an appeals questionnaire together with any documents referred to in it, and (iii) the planning authority may elect to treat the completed questionnaire and its documents as their representation but, where they do not do so, they may submit representations on which the appellant is entitled to make further representations (see regulations 6 and 7). The district council submitted a completed questionnaire together with the documents referred to in it which included the letters from the parish council and Mrs. Hawkins as being "relevant correspondence concerning the application." The council did not rest on the questionnaire but, on January 22, 1990, submitted what were described as "Concluding Submissions and Comment." On March 26, Mr. Steven

Smallman, who is a chartered surveyor and town planner, submitted further representations for the appellants. These contained Mr. and Mrs. Clover's substantive case. The district council commented on those further representations in a letter dated April 3, 1990.

The representations by both parties were very largely concerned with whether the proposed development accorded with policies H14 and H8. An important issue to be decided in that regard was whether the appeal site was (as the appellants' surveyor and planner asserted) or was not (as the district council asserted), within the "physical limits" of Notton. I would have expected the district council to rely in support of their view upon the decision of Mr. Redpath. Surprisingly they did not do so although in their "Concluding Submissions and Comment" under the heading "Planning History," there is the entry "DWELLING-HOUSE WITH GARAGE AND VEHICULAR ACCESS DISMISSED AT APPEAL 4 FEBRUARY 1982 (COPY LETTER ENCLOSED)." The decision letter was enclosed but nowhere is there any mention of its contents. Mr. Smallman in his submissions (para. 5.1) did refer to the 1982 decision but only to remark that it was taken in the light of the Chippenham Local Plan. The district council made no comment on this remark in their letter of April 3.

The inspector appointed to determine the appeal was Mr. Denis McCoy A.R.I.B.A., F.R.T.P.I. His decision letter of June 5, 1990 was addressed to Mr. and Mrs. Clover's agents and contained the following passages:

(i) . . . I have considered the written representations made by you and by the council . . . I have also considered those representations made directly to the council which have been forwarded to me. [Para. 1].

(ii) After referring to policies H14 and H8:
From my inspection of the site and its surroundings, and from the representations made, I am of the opinion that the main issue in this case is whether or not, taking account of those policies, the proposed house would amount to intrusive development harming either the rural amenity of the local scene or the setting of Notton Lodge which with its former outbuilding and boundary walls is a listed building. [Para. 3].

(iii) . . . I am drawn to the conclusion that it would be unrealistic not to regard the former garden, the group of associated historic buildings and the more recent dwelling of somewhat suburban design immediately to the south as one part of a village to whose character fields penetrating its core are of great importance. Accordingly, though undoubtedly not infill in the usual sense of that word, it is my opinion that the addition of a further dwelling within this group need not in principle conflict with the council's policies. I am in no doubt that the proposal cannot be regarded as the sort of sporadic or haphazard development in open countryside which those policies very properly aim to prevent. [Para. 4].

The inspector went on to conclude that there would be no injurious impact on the listed buildings. He therefore allowed the appeal and granted planning permission subject to conditions. Mr. McCoy's assessment of the physical limits of Notton and of the impact of a development on the appeal site are each manifestly different from the assessment of Mr. Redpath in 1982 but Mr. McCoy made no reference to the earlier decision.

The learned deputy judge held that the inspector had failed to comply with requirement to give reasons for his decision and on this ground quashed the decision. He said:

> . . . I do not think it is enough for him to reach and express a conclusion which is different from that of his predecessor on essentially the same, if not identical, facts without any overt or necessary recognition that he has addressed that previous decision and without some comprehensible explanation of why he disagrees with it.
> The reality of the matter is that the council are left with two diametrically opposite decisions on appeal without any explanation of which they should, in reason and in justice to other applicants for planning permission, follow. I do not agree that in the face of the 1982 decision, on apparently identical facts, it was enough for the inspector in the appeal under challenge to give reasons for his decision without in any way addressing the reasons of his predecessor. That does not adequately deal with the substantial issue raised by the council in the form of a decision directly in point which supports their content.

Mr. Stephen Richards who appeared for the Secretary of State, drew our attention to the contrast between the phrase "substantial issue raised by the council" in this passage and the judge's earlier remarks that the 1982 decision was "not the subject of any comment by the council in its representations and appears in those representations only as an item of planning history." The district council's application to quash was made under section 245 of the Act of 1971 (now section 288 of the Act of 1990). The application was, so far as is now material, on the ground that a "relevant requirement" had not been complied with in relation to the decision. On such an application the High Court "if satisfied . . . that the interests of the applicant have been substantially prejudiced by a failure to comply with [a relevant requirement] in relation to [the decision] may quash [it]" (section 245(5) of the Act of 1971, now section 288(5) of the Act of 1990). The ground of the council's application is one available in regard to determinations by inspectors (Act of 1971, Sched. 9, para. 2(3), now Sched. 16, para. 2(6) of the Act of 1990).

It was the common assumption of counsel in the court below and in this court, that there is a "relevant requirement" which requires the inspector to give reasons for his decision on an appeal which is disposed of on the basis of written representations. The requirement was not, however, identified. The term "relevant requirement" is defined to mean any applicable requirement of the 1971 (now 1990) Act or of the Tribunals and Inquiries Act 1971 or of any order, regulation or rule made under either of those Acts (section 245(7) of the Act of 1971, now section 288(9) of the Act of 1990). Although there are rules which require the giving of reasons for a decision on an appeal after a local inquiry (Town and Country Planning (Inquiries Procedure) Rules 1988, rule 17(1), and Town and Country Planning (Determination by Inspectors) (Inquiries Procedure) Rules 1988, rule 18(1)). There is no such rule in relation to a decision on an appeal disposed of on the basis of written representations. In such cases the requirement to give reasons is derived from section 12(1) of the Act of 1971. That subsection provides so far as material:

> where . . . any minister notifies any decision . . . taken by him in a

> case in which a person concerned could have required the holding . . . of a statutory enquiry,
>
> it shall be the duty of the tribunal or minister to furnish a statement, either written or oral, of the reasons for the decision if requested, on or before giving the notification of the decision, to state the reasons.

Paragraph 7(1) of Schedule 9 to the Act of 1971 (now paragraph 8(1) of Schedule 6 to the Act of 1990) provided that section 12(1) was to apply to hearings before appointed persons and was to apply as if it referred to determinations by appointed persons. I have already said that the parties waived their right to a hearing. I doubt whether there was any express request for reasons, but reasons have in practice invariably been given on the written representations procedure and in that circumstance I regard a request as implicit in the acceptance of that procedure.

The duty to give reasons imposed by section 12 of the Act of 1971 was considered by Megaw J. (as he then was) in *In re Poyser and Mills Arbitration*.[1] He said:

> . . . Parliament provided that reasons shall be given, and in my view that must be read as meaning that proper, adequate reasons must be given. The reasons that are set out must be reasons which will not only be intelligible, but which deal with the substantial points that have been raised.

This statement was approved by the House of Lords in *Westminster City Council* v. *Great Portland Estates plc* and Lord Bridge of Harwich used the three criteria of propriety, intelligibility and adequacy as the basis of his analysis in *Save Britain's Heritage* v. *Number 1 Poultry Ltd.* at page 166H. The district council do not have any complaint about the propriety and intelligibility of the reasons given by the inspector for his determination; the complaint is as to their adequacy. The method of dealing with such a complaint has been laid down by Lord Bridge in *Save Britain's Heritage* in a speech with which the other members of the House agreed and which was delivered two days after the decision of the learned judge in the present case. Lord Bridge said[2]:

> Whatever may be the position in any other legislative context, under the planning legislation, when it comes to deciding in any particular case whether the reasons given are deficient, the question is not to be answered in *vacuo*. The alleged deficiency will only afford a ground for quashing the decision if the court is satisfied that the interests of the applicant have been substantially prejudiced by it. This reinforces the view I have already expressed that the adequacy reasons is not to be judged by reference to some abstract standard. There are in truth not two separate questions: (1) were the reasons adequate? (2) if not, were the interests of the applicant substantially prejudiced thereby? The single indivisible question, in my opinion, which the court must ask itself whenever a planning decision is challenged on the ground of a failure to give reasons is whether the interests of the applicant have been substantially prejudiced by the deficiency of the reasons given. Here again, I disclaim any intention to put a gloss on the statutory pro-

[1] [1964] 2 Q.B. 467.
[2] [1991] 1 W.L.R. 153 at p. 167; (1991) 62 P. & C.R. 105 at p. 119.

> visions by attempting to define or delimit the circumstances in which deficiency of reasons will be capable of causing substantial prejudice, but I should expect that normally such prejudice will arise from one of three causes. First, there will be substantial prejudice to a developer whose application for permission has been refused or to an opponent of development when permission has been granted where the reasons for the decision are so inadequately or obscurely expressed as to raise a substantial doubt whether the decision was taken within the powers of the Act. Secondly, a developer whose application for permission is refused may be substantially prejudiced where the planning considerations on which the decision is based are not explained sufficiently clearly to enable him reasonably to assess the prospects of succeeding in an application for some alternative form of development. Thirdly, an opponent of development, whether the local planning authority or some unofficial body like Save, may be substantially prejudiced by a decision to grant permission, in which the planning considerations on which the decision is based, particularly if they relate to planning policy, are not explained sufficiently clearly to indicate what, if any, impact they may have in relation to the decision of future application.

Later he said[3]:

> . . . If it was necessary to the decision to resolve an issue of law and the reasons do not disclose how the issue was resolved, that will suffice. If the decision depended on a disputed issue of fact and the reasons do not show how that issue was decided, that may suffice. But in the absence of any such defined issue of law or fact left unresolved and when the decision was essentially an exercise of discretion, I think that it is for the applicant to satisfy the court that the lacuna in the stated reasons is such as to raise a substantial doubt as to whether the decision was based on relevant grounds and was otherwise free from any flaw in the decision-making process which would afford a ground for quashing the decision.

Mr. Richards relied upon these passages and submitted that the relevance of the 1982 decision was not a substantial issue on the representation, that there was accordingly no need for the inspector to have dealt with it and that in any event the district council were not prejudiced by any deficiency in the reasons for the determination. He pointed out that neither the notice of motion nor the affidavit in support asserted prejudice but he accepted that prejudice could be demonstrated by argument (see *Wells* v. *Secretary of State*, at p. 56). I agree that it can, although it is always desirable that the formal documents should indicate the prejudice alleged.

Mr. Timothy Straker who appeared for the district council submitted that the 1982 decision was a "material consideration" which had been "placed before" the inspector, that the inspector had failed to mention it and therefore the council were left in a state of uncertainty both as to whether it had been taken into account and as to whether or not they should treat applications in respect of other lands, for example, the fields north of Notton Lodge, as being for development within the physical limits of Notton.

[3] *Ibid.* at pp. 168, 120.

When making his determination an inspector is obliged to have regard to those matters which are specified in what was section 29(1) of the Act of 1971 and is now section 70(2) of the Act of 1990 (Act of 1971 section 36(5) and Schedule 9, paragraph 2(1)(*a*), now Act of 1990 section 79(4) and Schedule 6, paragraph 2(1)(a)). Those matters include "other material considerations." If an inspector fails to have regard to what in the circumstances of the case is a material consideration which has been "placed before him" (and for the moment I adopt Mr. Straker's phrase), then his determination is exposed to challenge on the ground that it is not within the powers of the Act. Where an inspector's reasons do not indicate whether he has had regard to a material consideration which was placed before him then there must usually be (in Lord Bridge's words) "substantial doubt whether the decision taken was within the powers of the Act." Accordingly the interests of an applicant will in that circumstance have been substantially prejudiced by the deficiency of reasons, for he is left in doubt as to empowerment and his ability to challenge on that ground.

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.

The materiality of previous appeal decisions has not hitherto been discussed in this court but we were referred to some decisions at first instance. The most recent is *Launchdeal Ltd.* v. *Secretary of State* where at pages 1041 to 1042 Mr. Roy Vandermeer, Q.C. sitting as a deputy judge of the High Court, referred to the earlier authorities. I have read the judgments at first instance and, with one possible exception, I find what is said in them consonant with what I have said. The exception is a dictum by Mr. Vandermeer to the effect that he had reservations about where an inspector need

refer to "every decision with which he had disagreed."[4] If Mr. Vandermeer had in mind cases where an inspector in deciding in a particular way necessarily disagrees with some critical aspect of a previous decision, then there is no occasion for the reservation and I disagree with it. However, I suspect that all that the learned deputy judge had in mind was that an inspector is under no obligation to manifest his disagreement with other decisions which are distinguishable. That indeed would be a gratuitous and pointless exercise.

In the present case the 1982 decision plainly fulfils the capacity of a previous appeal decision to be a material consideration in regard to the appeal of 1990. The determination of the latter appeal necessarily required a decision as to whether the site was within the physical limits of Notton and that was a critical aspect of the decision in the previous case which related to an identical proposal on the same albeit slightly larger site. The inspector's decision in 1990 gives no indication that he had taken the 1982 decision into account let alone of why he disagreed with it.

The decision of 1982 had been placed before the inspector in the sense that it was referred to in the district council's planning history, enclosed with their submissions and referred to in Mrs. Hawkins' letter which had been forwarded to him and which he said he had considered. Mr. Richards submitted that such placement did not impose any obligation upon the inspector to deal with the decision. The district council, he said, were content to make their case by arguing the merits afresh without reference to consistency and it was that argument on merit alone that the inspector had to address. Mr. Richards relied on the decision of the court in *Cranleigh Aerials Ltd.* v. *The Secretary of State* (unreported) as showing that an inspector is under no obligation to explore issues which have not been raised before him. Similarly, an inspector is under no obligation to devise conditions which might make a development acceptable if none have been suggested before him (see *Top Deck Holdings Ltd.* v. *The Secretary of State*). However, I do not find these cases helpful. I am not concerned with the treatment of issues which were not raised. I am concerned (and only concerned) with the disregard of a consideration of which the materiality was apparent and of which the inspector was made aware by a party to the appeal. The inspector's duty is by statute to have regard to such consideration and his failure to do so exposes his decision to challenge on the ground that it is not within the powers of the Act. The fact that the party did not rely upon the consideration does not affect the need to perform the duty. Accordingly, the deficiency in the inspector's reasons, that is to say the absence of any treatment of the 1982 decision, is in my judgment one which substantially prejudiced the interests of the district council in that they were left in doubt as to empowerment and to their ability to challenge on that ground.

I should add that I was not attracted by Mr. Straker's second argument that the deficiency of reasons gave rise to prejudice because of the consequent uncertainty as to how the district council should treat applications in respect of other land. This argument (which attracted the learned deputy judge) encounters the difficulty, in my judgment, that even if reasons had been given there would have remained two different value judgments for the later could not have overruled the earlier. The district council would

[4] [1991] J.P.L. 1036 at p. 1041.

have been left with a question of judgment upon which there were two available but differing opinions.

I would dismiss this appeal.

SIR MICHAEL KERR. I agree.

PURCHAS L.J. I also agree.

Appeal dismissed, with costs.