*350 Gateshead Metropolitan Borough Council v Secretary of State for the Environment and Northumbrian Water Group Plc

Positive/Neutral Judicial Consideration

Court
Court of Appeal (Civil Division)

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12 May 1994

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Court of Appeal

(Glidewell , Hoffman and Hobhouse L.JJ.):

May 12, 1994

Town and country planning—Overlap with pollution control—Incinerator—Planning appeal—Structure plan policy required acceptable environmental impact—Concern over impact on air quality—Whether adequate controls under the Environmental Protection Act 1990 —Whether Secretary of State gave adequate reasons for rejecting Inspector's recommendation to refuse permission

The local planning authority, Gateshead M.B.C. (“Gateshead”) had refused Northumbrian Water Group plc (“NWG”) planning permission for a clinical waste incinerator in a semi-rural location. NWG appealed to the Secretary of State for the Environment. The inspector appointed by the Secretary of State held a public inquiry, and recommended in his report that permission should be refused. Although the inspector was satisfied that an appropriate plant could be built to meet the various standards, the impact on air quality and agriculture in this location was insufficiently defined. Public disquiet regarding fears as to environmental pollution could not be sufficiently allayed to make the development acceptable. The Secretary of State rejected the inspector's recommendation, and granted planning permission. He was satisfied that the available controls under the Environmental Protection Act 1990 (the “E.P.A.”) for this proposal were such that there would be no unacceptable environmental impact on adjacent land, as required by structure plan policy. This was a key point in its favour. As a “prescribed process”, separate authorisation to carry on the incineration would be required under Part 1 of E.P.A. from Her Majesty's Inspectorate of Pollution (“H.M.I.P.”).

The High Court refused Gateshead's application to quash the Secretary of State's decision. Gateshead appealed, arguing that he had not given adequate reasons why he differed from the inspector and that he was wrong to say that the E.P.A. controls were adequate to deal with the risks to human health. In so doing he had misunderstood the powers of H.M.I.P., contravened the precautionary principle and/or reached an irrational conclusion.

Held, dismissing the appeal, that the Secretary of State's reasoning was proper, adequate and intelligible for rejecting the inspector's recommendation. Clearly the control regimes under the Town and Country Planning Act and the E.P.A. overlap. Just as the environmental impact of emissions from a proposed plant is a material consideration in the planning decision, so is the existence of a stringent regime under the E.P.A. for preventing or mitigating that impact. This was not a case in which it was apparent that a refusal of authorisation under the E.P.A. would probably be the only proper decision for H.M.I.P. to make. The Secretary of State was therefore justified in concluding that the areas of concern which led the Inspector to recommend refusal were matters which could properly be decided by H.M.I.P., and that their powers were adequate to deal with those concerns. He was also justified in concluding that the plant met, or could meet, the structure plan criteria. He had not erred in law, nor had he reached a decision which was irrational or in any way outside his statutory powers.

Case referred to:

(1) *Westminster City Council v. Great Portland Estates [1985] A.C. 661; [1984] 3 W.L.R. 1035; (1984) 128 S.J. 784; [1984] 3 All E.R. 744; (1984) 49 P. & C.R. 34; [1985] J.P.L. 108; (1984) 81 L.S.Gaz. 3501, H.L.* ****351***

Legislation construed:

Town and Country Planning Act 1990, ss.54A, 72(2) and 79(4) ; Environment Protection Act 1990, ss.2(1), 6 and 7 . The Government White Paper "This Common Inheritance, Britain's Environmental Strategy" (1990, Cm. 1200) and the draft Planning Policy Guidance Note on Planning and Pollution Control (now P.P.G. 23) were also referred to. The relevant provisions are set out in the judgment of Glidewell L.J.

Appeal by Gateshead M.B.C. against the decision of Jeremy Sullivan Q.C., sitting as a Deputy High Court Judge, on September 29, 1993, refusing their application under section 288 of the Town and Country Planning Act 1990 , reported at *[1994] 67 P. & C.R. 179* . Gateshead M.B.C. had challenged the decision of the Secretary of State for the Environment to grant outline planning permission on appeal to Northumbrian Water Group plc ("NWG") for a clinical waste incinerator at Follingsby Lane, Wardley, Gateshead. The inspector, sitting with an assessor, had held a public inquiry into the appeal proposals on a number of days between April 9 and May 1, 1991. He produced a report to the Secretary of State on August 3, 1992, recommending refusal. The Secretary of State disagreed with the recommendation and granted permission, by a decision letter dated May 24, 1993. Although NWG had also made an application under Part I of the Environmental Protection Act 1990 to H.M.I.P., no determination had been made at the time of the inquiry. The facts are set out in the judgment of Glidewell L.J.

Representation

David Mole Q.C. and Thomas Hill for the appellants.
Stephen Richards and Richard Drabble for the first respondent.
William Hicks and Russell Harris for the second respondent.

Glidewell L.J.

This appeal relates to an activity which, in general terms, is subject to planning control under the Town and Country Planning Act , and to control as a prescribed process under Part I of the Environmental Protection Act 1990 . The main issue in the appeal is, what is the proper approach for the Secretary of State for the Environment to adopt where these two statutory regimes apply and, to an extent, overlap?

The Northumbrian Water Group plc ("NWG") wish to construct and operate an incinerator for the disposal of clinical waste on a site some nine acres in extent, comprising about half of the area of the disused Felling Sewage Treatment Works at Wardley in the Metropolitan Borough of Gateshead. Under the Town and Country Planning Act planning permission is necessary for the construction of the incinerator and for the commencement of its use thereafter. The proposed incineration is a prescribed process within section 2 of the Environmental Protection Act 1990 and Schedule 1 of the Environmental Protection (Prescribed Processes etc.) Regulations 1991 as amended. An authorisation to carry on the process of incineration is therefore required by section 6 of the Environmental Protection Act . In this case, the enforcing authority which is responsible for granting such an authorisation is H.M. Inspectorate of Pollution ("H.M.I.P.").

Two applications were made to Gateshead, the Local Planning Authority, for planning permission for the construction of the incinerator. This appeal is only concerned with the second, which was an outline application submitted on October 26, 1991. The application was refused by Gateshead ****352*** by a notice dated February 4, 1991, for six reasons which I summarise as

follows. The proposal is contrary to the provisions of the approved Development Plan, both the Local Plan and the County Structure Plan; the use of land for waste disposal purposes conflicts with the allocation of neighbouring land for industrial and/or warehousing purposes and could prejudice the development of that land; since there was no national or regional planning framework which identified the volume of clinical waste which was likely to arise, the proposal was premature; the Applicants have failed to supply sufficient information that the plant could be operated without causing a nuisance to the locality; the Applicants have failed to demonstrate that the overall effects on the environment, particularly in relation to health risk, have been fully investigated and taken account of. Then there was finally a ground relating to the reclamation and development of the site stating that no proposals have been submitted demonstrating how contamination arising from its previous use could be treated. That point does not arise in this appeal.

NWG appealed against the refusal to the Secretary of State. An enquiry into the appeal was heard by an Inspector of the Department of the Environment, Mr C. A. Jennings BSc CEng, with the assistance of Dr Waring, a Chemical Assessor, between April 9 and May 1, 1991. The inspector and the assessor reported to the Secretary of State on August 3, 1992. The inspector recommended that permission be refused. The Secretary of State by letter dated May 24, 1993 allowed the appeal and granted outline permission subject to conditions. Gateshead applied to the High Court under section 288 of the Town and Country Planning Act 1990 for an order that the Secretary of State's decision be quashed. On September 29, 1993, Jeremy Sullivan Q.C. sitting as Deputy High Court Judge dismissed the application. Gateshead now appeal to this Court. The relevant provision of the Town and Country Planning Act comprises sections 54A, 72(2) and 79(4) . The effect of those sections is that, in determining the appeal the Secretary of State was requird to decide in accordance with the provisions of the Development Plan unless material considerations indicated otherwise, and to decide in accordance with othr material considerations.

In the Environmental Protection Act 1990, s.2(1) provides:

> The Secretary of State may, by regulations, prescribe any description of process as a process for the carrying on of which after a prescribed date an authorisation is required under section 6 below.

It is agreed that the operation of the incinerator is such a process. By section 6(1) :

> No person shall carry on a prescribed process after the date prescribed or determined for that description of process by ….

relevant regulations,

> except under an authorisation granted by the enforcing authority and in accordance with the conditions to which it is subject.

The enforcing authority in this case means, strictly, the Chief Inspector, but in practice H.M.I.P. Section 6(2) provides:

> An application for any authorisation shall be made to the enforcing authority in accordance with Part I of Schedule 1 of the Act ….

*353 Section 6 continues:

> (3) Where an application is duly made to the enforcing authority, the authority shall either grant the authorisation subject to the conditions required, authorisation to be imposed by section 7 below or refuse the application.
>
> (4) An application shall not be granted unless the enforcing authority considers that the applicant will be able to carry on the process so as to comply with the conditions which would be included in the authorisation.

Section 7(1) deals with conditions which are required to be attached to any authorisation. By s.7(1)(a) :

> There shall be included in an authorisation—such specific conditions as the enforcing authority considers are appropriate … for achieving the objectives specified in subsection (2) below.

Those objectives are:

> (a) ensuring that, in carrying on a prescribed process, the best available techniques not entailing excessive cost will be used—
>
> > (i) for preventing the release of substances prescribed for any environmental medium into that medium or, where that is not practicable by such means, for reducing the release of such substances to a minimum and rendering harmless any such substances which are so released; and
> >
> > (ii) for rendering harmless any other substance which might cause harm if released into any environmental medium.

Finally by subsection (4) :

> Subject to subsections (5) and (6) below, there is implied in every authorisation a general condition that, in carrying on the process to which the authorisation applies, the person carrying it on use make the best available techniques not entailing excessive cost for …

precisely the same purposes as those set out in subsection (2) . When the inquiry was held an application had been made to H.M. Inspectorate for an authorisation, but that had not yet been determined.

The Development Plan consisted of the approved Tyne and Wear Structure Plan, together with a Local Plan for the area. In the structure plan the relevant policy is numbered EN16. It reads:

> Planning applications for development with potentially noxious or hazardous consequences should only be approved if the following criteria can be satisfied:
>
> (a) adequate separation from other development to ensure both safety and amenity;
> (b) the availabiliy of transport routes to national networks which avoid densely built-up areas and provide for a safe passage of hazardous materials;
> (c) acceptable consequences in terms of environmental impact.

It was agreed at the inquiry, and is agreed before us, that crieria (a) and (b) are met. The issue revolves around criterion (c), whether the development will have "acceptable consequences in terms of environmental impact".

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I comment first about the relationship between control under the Town and Country Planning Act and the Environmental Protection Act . In very broad terms the former Act is concerned with control of the use of land, and the Environmental Protection Act with control (at least in the present respect) of the damaging effect on the environment of a process which causes pollution. Clearly these control regimes overlap.

Government policy overall is set out in a White Paper called "This Common Inheritance, Britain's Environmental Strategy", which is Cm. 1200. The main part of this to which reference was made during the hearing of the appeal and before the Learned Deputy Judge is paragraph 6.39 which reads:

> Planning control is primarily concerned with the type and location of new development and changes of use. Once broad land uses have been sanctioned by the planning process it is the job of the pollution control to limit the adverse effects the operations may have on the environment. But in practice there is common ground. In considering whether to grant planning permission for a particular development a local authority must consider all the effects including potential pollution; permission should not be granted if that might expose people to danger.

There is also an earlier passage which is relevant in paragraph numbered 1.18 headed precautionary action. The latter part of that paragraph reads:

> Where there are significant risks of damage to the environment, the Government will be prepared to take precautionary action to limit the use of potentially dangerous materials or the spread of potentially dangerous pollutants, even where scientific knowledge is not conclusive, if the balance of likely costs and benefits justifies it. This precautionary principle applies particularly where there are good grounds for judging either that action taken promptly at comparatively low cost may avoid more costly damage later, or that irreversible effects may follow if action is delayed.

More specific guidance relating to the application of Planning Control under the Planning Act is to be given a Planning Policy Guidance Note. That was in draft at the time of the enquiry. The Draft of Consultation was issued in June 1992 and, as I understand it, is still in that state. However, reference was made to it during the enquiry and Mr Mole, for Gateshead, has referred us to two paragraphs in particular. These are:

> 125. It is not the job of the planning system to duplicate controls which are the statutory responsibility of other bodies (including local authorities in their non-planning functions). Planning controls are not an appropriate means of regulating the detailed characteristics of industrial processes. Nor should planning authorities substitute their own judgment on pollution control issues for that of the bodies with the relevant expertise and the responsibility for statutory control over those matters.
>
> 126. While pollution controls seek to protect health in the environment, planning controls are concerned with the impact of development on the use of land and the appropriate use of land. Where the potential for harm to man and the environment affects the use of land (*e.g.* by precluding the use of neighbouring land for a particular purpose or by ***355** making use of that land inappropriate because of, say, the risk to an underlying aquifer) then planning and pollution controls may overlap. It is important to provide safeguards against loss of amenity which may be caused by pollution. The dividing line between, planning and pollution control consideration is therefore not always clear-cut. In such cases close consultation between planning and pollution control authorities will be important at all stages, in particular because it would not be sensible to grant planning permission for a development for which a necessary pollution control authorisation is unlikely to be forthcoming.

Neither the passages which I have read from the White Paper nor those from the draft Planning Policy Guidance are statements of law. Nevertheless, it seems to me they are sound statements of common sense. Mr Mole submits, and I agree, that the extent to which discharges from a proposed plant will necessarily, or probably, pollute the atmosphere and/or create an unacceptable risk of harm to human beings, animals or other organisms, is a material consideration to be taken into account when deciding to grant planning permission. The deputy judge accepted that submission also. But the deputy judge said at page 17 of his judgment, and in this respect I also agree with him,

> Just as the environmental impact of such emissions is a material planning consideration, so also is the existence of a stringent regime under the E.P.A. for preventing or mitigating that impact for rendering any emissions harmless. It is too simplistic to say, 'The Secretary of State cannot leave the question of pollution to the E.P.A. '.

The inspector, having considered the advice of his assessor and having set out the evidence and submissions made to him in very considerable detail in his report, concluded that save for the effect of discharges from the plant on air quality and thus on the environment generally, all the other criteria in the Structure Plan Policy and all other possible objections were met. In particular, summarising, first, all the responsible authorities agreed that incineration was the proper solution to the problem of the disposal of clinical waste. It followed also that one or more incinerators for that purpose were needed to be constructed in the area generally. Secondly, this site was at an acceptable distance from a built-up area and the road access to it is satisfactory. Thirdly, the inspector found that the construction of this plant on the site might inhibit some other industrial processes, particularly for food processing, from being established nearby. But it certainly would not inhibit many other industrial processes. Therefore that was not sufficient to justify a refusal. Fourthly, he and the assessor considered in some detail the possible malfunction of the plant. Indeed, we are told that this occupied a major part of the time of the inquiry. In conclusion, the inspector said in paragraph 488 of his report:

> I am therefore satisfied that an appropriate plant could be designed with sufficient safeguards included, such that a reliaibility factor, within usual engineering tolerances, could be achieved.

He summarised his conclusions at paragraphs 505 and 506 of his report. In 505 he said:

> … I have examined each of the subject areas that led to G.M.B.C. ***356*** refusing the application and have come to the following main conclusions:
>
> (1) The maximum emission limits specified by the Appellants accord with the appropriate standards.
> (2) It would be possible to design a plant to perform within those limits in routine operation.
> (3) It would be possible to design sufficient fail-safe and stand-by systems such that the number of emergency releases could be reduced to a reasonable level.
> (4) While some visual detriment would occur from the presence of the stack and some industrialists might be deflected from the locality, neither effect would be sufficient to justify refusal of the proposal on those grounds alone.
> (5) The background air quality of the area is ill-defined and comparison with urban air standards for this semi-rural area gives an incomplete picture.
> (6) Discharges of chemicals such as cadmium, although within set limits, are unacceptable onto rural/agricultural areas.
> (7) In relation to public concern regarding dioxin omissions, the discharge data is only theoretical and insufficient practical experience is available for forecasts to be entirely credible.
>
> 506. I am therefore satisfied that while an appropriate plant would be built to meet the various standards, the impact on air quality and agriculture in this semi-rural location is insufficiently defined, despite the efforts of the main parties at the inquiry, and public disquiet regarding fears as to environmental pollution and in particular dioxin omissions cannot be sufficiently allayed to make the proposed development of a clinical waste incinerator on this site acceptable. I have reached this conclusion in spite of the expectation that all of the conditions suggested would be added to any permission and in spite of the suggestion that the valuable Section 106 agreement could be provided.

Therefore, in paragraph 507 he recommended that the appeal be dismissed.

In his decision letter, the Secretary of State considered environmental impact and the Inspector's conclusions in the passage leading up to the paragraphs to which I have just referred, in paragraphs 19, 20 and 21. In paragraph 19 he said that "the other principal environmental impact would be that of emissions to the atmosphere from the plant". He noted that NWG, for the purposes of assessing the impact, indicated that the maximum emission limits for normal operation to which they were prepared to tie themselves were set out in a document numbered NW9, and that that became part of the description of the plant, the subject of the application permission. The Inspector

> … also notes the view of the assessor that these limits were in keeping with current United Kingdom prescriptive standards and that H.M.I.P. accepted these limits were a valid starting point for their authorisation procedures under Part I of the Environmental Protection Act 1990 . He further notes the Inspector's statement that any emission standards set by H.M.I.P. in a pollution control authorisation for the plant would be lower than those indicated in document NW9. The Secretary of State accepts it

will not be possible for him to predict the emission limits **357* which will be imposed by H.M.I.P. but he is aware of the requirements for conditions which must be included in an authorisation under section 7 of the Environmental Protection Act 1990 .

20. The Inspector's conclusion that the impact of some of the maximum emission limits indicated in document NW9 are not acceptable in a semi-rural area is noted. While this would weigh against your clients' proposals, the Secretary of State considers that this conclusion needs to be considered in the context of the Inspector's related conclusions. Should planning permission be granted the emission controls for the proposed incinerator will be determined by H.M.I.P. Draft Planning Policy Guidance on 'Planning and Pollution Controls' was issued by the Department of the Environment for consultation in June 1992. It deals with the relationship between the two systems of control and takes account of many of the issues which concerned the Inspector. While the planning system alone must determine the location of facilities of this kind, taking account of the provisions of the development plan and all other material considerations, the Secretary of State considers that it is not the role of the planning system to duplicate controls under the Environmental Protection Act 1990 . Whilst it is necessary to take account of the impact of potential emissions on neighbouring land uses when considering whether or not to grant planning permission, control of those emissions should be regulated by H.M.I.P. under the Environmental Protection Act 1990 . The controls available under Part I of the Environmental Protection Act 1990 are adequate to deal with emissions from the proposed plant and the risk of harm to human health.

21. An application for a pollution control authorisation had been made when the inquiry began, but H.M.I.P. had not determined it. However, in view of the stringent requirements relating to such an authorisation under Part I of the Environmental Protection Act 1990 , the Secretary of State is confident that the emission controls available under the Environmental Protection Act 1990 for this proposal are such that there would be no unacceptable impact on the adjacent land. He therefore concludes that the proposed incinerator satisfies the criteria in Policy EN16 and is in accordance with the development plan. This is a key point in favour of the proposal.

His overall conclusions are set out in paragraphs 36, 37 and 38 of the decision letter.

36. The Secretary of State agrees that it would be possible to design and operate a plant of the type proposed to meet the standards which would be likely to be required by H.M.I.P. if a pollution control authorisation were to be granted. It is clear that the predicted maximum emission levels set out in document NW9 which your clients were prepared to observe raised some concerns with respect to their impact on a semi-rural area. However the Secretary of State is satisfied that, in the event of planning permission being granted, these concerns could and would be addressed by H.M.I.P. in the pollution control authorisation process. While noting the Inspector's view that emission standards set by H.M.I.P. would be more stringent than those in document NW9, the Secretary of State considers that the standards in document NW9 simply represent the likely starting point for the H.M.I.P. authorisation **358* process, and do not in any way fetter their discretion to determine an application for an authorisation in accordance with the legal requirements under the Environmental Protection Act 1990 .

37. Those issues being capable of being satisfactorily addressed, the remaining issue on which the decision turns is whether the appeal site is an appropriate location for a special industrial use, taking into account the provisions of the development plan. The proposal does not conflict with the development plan and it is clear that its impact in visual and environmental terms on the surrounding land would not be adverse. Its impact on the development potential of the surrounding land is more difficult to assess but, while the Secretary of State accepts the view that an incinerator may deter some types of industry, he also accepts that the overall impact would not be clear-cut and possible deterrence to certain industries is not sufficient to justify dismissing the appeal.

> 38. The Secretary of State therefore does not accept the Inspector's recommendation and for these reasons has decided to allow your clients' appeal.

He therefore granted permission subject to a substantial list of conditions.

Mr Mole's argument on behalf of Gateshead on this appeal falls under two heads. First, the Secretary of State did not give proper or adequate reasons for rejecting the inspector's recommendation and the reasoning which led the inspector to that recommendation. This, submits Mr Mole, is a failure to comply with "relevant requirements". The requirements are to be found set out in the Town and Country Planning Inquiry Procedures Rules 1992, rule 17.1 . Thus, this is a ground upon which, provided prejudice be shown to Gateshead (and Mr Mole submits it is) action can be taken to quash the Secretary of State's decision under section 288(1)(b) .

It is a commonplace that a decision-maker, including both a Local Planning Authority when refusing permission and particularly the Secretary of State when dealing with an appeal, must give reasons for the decision. The rules so provide. The courts have held that those reasons must be "proper, adequate and intelligible". The quotation is from the speech of Lord Scarman in *Westminster City Council v. Great Portland Estate* . [1] While of courts accepting that it is necessary to look and see whether the Secretary of State's reasons are proper, adequate and intelligible, I do not accept Mr Mole's argument that they are not. In the paragraphs of his decision letter to which I have referred, the Secretary of State says, in effect:

> I note that the Inspector says that the impact of some of the maximum emission limits indicated in document NW9 would not be acceptable in a semi-rural area. But H.M.I.P. will not be obliged, if they grant an authorisation, to adopt those limits. On the contrary, they have already indicated that the limits they would adopt would be lower. Thus, H.M.I.P. will be able to determine what limits will be necessary in order to render the impact of the emissions acceptable, and impose those limits.

That seems to me to be coherent and clear reasoning. It depends upon the proposition which I accept, and I understand Mr Mole to have accepted in argument, that in deciding what limits to impose H.M.I.P. are entitled, ***359** indeed are required, to take into account the nature of the area in which the plant is to be situated and the area which will be affected by the maximum deposit of chemicals from the stack.

That brings me to Mr Mole's main argument. I summarise this as follows. Once planning permission has been granted, there is in practice almost no prospect of H.M.I.P. using their powers to refuse to authorise the operation of the plant. Thus, whatever the impact of the emissions on the locality will be, H.M.I.P. are likely to do no more than ensure that the best available techniques not entailing excessive costs be used, which may leave the amounts of deleterious substances released at an unacceptable level.

This, submits Mr Mole, could be prevented by refusing planning permission, which would then presumably leave it to NWG, if they were able to do so, to seek additional evidence to support a new application which would overcome the Inspector's concerns. The Secretary of State was thus wrong to say at paragraph 20 of his decision that the controls under the Environmental Protection Act are adequate to deal with the emissions and the risk of human health. By so concluding, the Secretary of State,

(1) misunderstood the powers and the functions of H.M.I.P.;

(2) contravened the precautionary principle, and/or

(3) reached an irrational conclusion.

I comment first that the matters about which the Inspector and his assessor expressed concern were three. First, the lack of clear information about the existing quality of the air in the vicinity of the site, which was a necessary starting point for deciding what impact the emission of any polluting substances from the stack would have. It was established that such substances would include dioxins, furans and cadmium. Secondly, in relation to cadmium though not in relation to the other chemicals, any increase in the quantity of cadmium in the air in a rural area is contary to the recommendations of the World Health Organisation. This, however, would not be the case in an urban area. In other words, an increase would not of itself contravene World Health Organisation recommendations relating to an urban area. Thirdly, there is much public concrn about any increase in the emission of these substances, especially dioxin, from the proposed plant. In the absence of either practical experience of the operation of a similar plant or clear information about the existing air quality, those concerns cannot be met. It was because of those concerns that the Inspector recommended refusal. I express my views as follows. Public concern is, of course, and must be recognised by the Secretary of State to be, a material consideration for him to take into account. But if in the end that public concern is not justified, it cannot be conclusive. If it were, no industrial development—indeed very little development of any kind—would ever be permitted.

The central issue is whether the Secretary of State is correct in saying that the controls under the Environmental Protection Act are adequate to deal with the concerns of the Inspector and the assessor. The decision which was to be made on the appeal to the Secretary of State lay in the area in which the regimes of control under the Planning Act and the Environmental Protection Act overlapped. If it had become clear at the inquiry that some of the discharges were bound to be unacceptable so that a refusal by H.M.I.P. to grant an authorisation would be the only proper course, the Secretary of State following his own express policy should have refused planning permission.

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But that was not the situation. At the conclusion of the inquiry, there was no clear evidence about the quality of the air in the vicinity of the site. Moreover, for the purposes of deciding what standards or recommendations as to emissions to apply, the Inspector described the site itself as “semi-rural”, whilst the area of maximum impact to the east he described as “distinctly rural”.

Once the information about air quality at both those locations was obtained, it was a matter for informed judgment (i) what, if any, increases in polluting discharges of various elements into the air were acceptable, and (ii) whether the best available techniques etc., would ensure that those discharges were kept within acceptable limits.

Those issues are clearly within the competence and jurisdiction of H.M.I.P. If in the end the inspectorate conclude that the best available techniques, etc., would not achieve the results required by section 7(2) and 7(4) , it may well be that the proper course would be for them to refuse an authorisation. Certainly, in my viw, since the issue has been expressly referred to them by the Secretary of State, they should not consider that the grant of planning permission inhibits them from refusing authorisation if they decide in their discretion that this is the proper course.

Thus, in my judgment, this was not a case in which it was apparent that a refusal of authorisation will, or will probably be, the only proper decision for H.M.I.P. to make. The Secretary of State was therefore justified in concluding that the areas of concern which led to the Inspector and the assessor recommending refusal were matters which could properly be decided by H.M.I.P., and that their powers were adequate to deal with those concerns.

The Secretary of State was therefore also justified in concluding that the proposed plant met, or could by conditions on an authorisation be required to meet, the third criterion in policy EN16 in the Structure Plan, and thus accorded with that plan.

For those reasons, I conclude that the Secretary of State did not err in law, nor did he reach a decision which was irrational or in any other way outside his statutory powers.

I have not in terms referred to much of the judgment given by the deputy judge. This is mainly because the matter was somewhat differently argued before us. Nevertheless, I agree with the conclusions he reached in his careful and admirable judgment. So agreeing and for the reasons I have sought to set out, I would dismiss this appeal.

Hoffmann L.J.

I agree.

Hobhouse L.J.

I also agree.

Representation

Solicitors— Sharpe Pritchard ; Treasury Solicitors McKenna & Co.

Order

Reporter —William Upton.

Appeal dismissed. Both Respondents to have their costs. Leave to appeal to House of Lords refused. ***361**

Footnotes

1 *[1985] A.C. 661* at 683.

