GATESHEAD METROPOLITAN BOROUGH COUNCIL v. SECRETARY OF STATE FOR THE ENVIRONMENT AND NORTHUMBRIAN WATER GROUP PLC

QUEEN'S BENCH DIVISION

(Mr. J. Sullivan, Q.C.—sitting as a Deputy Judge of the Q.B. Division): September 29, 1993

Challenge under section 288 of the Town and Country Planning Act 1990—Secretary of State granted outline planning permission for clinical waste incineration—contrary to Inspector's recommendation—Secretary of State considered the separate nature of the planning system and pollution control under the Environmental Protection Act 1990—Secretary of State leaving "planning issues" to HMIP—overlap of planning and pollution control—whether matters upon which there was insufficient data or uncertainty could be left to HMIP—appeal dismissed—in granting planning permission the Secretary of State decide that remaining pollution concerns are capable of being dealt with under the Environmental Protection Act 1990

The appellant challenged the Secretary of State's decision to grant outline planning permission for a clinical waste incinerator at Follingsby Lane, Wardley, Gateshead to Northumbrian Water plc. The Inspector hearing the appeal of Northumbrian Water at public inquiry had recommended refusal of planning permission. The Secretary of State had disagreed and hence this application to the High Court.

In reporting his conclusions, the Inspector looked at the question of need, policy background, the details of the proposal, its technical viability, its environmental impact and its impact on development potential of the area. At paragraph 506 to his report he stated:

> "I am therefore satisfied that while an appropriate plant could be built to meet the various standards, the impact of 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 emissions 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."

In considering the Inspector's report the Secretary of State agreed that

the main issues relevant to his decision were those identified by the Inspector. The Secretary of State also agreed with the Inspector's analysis and that the appeal had to be determined in accordance with the development plan unless material considerations indicated otherwise given that section 54A to the Town and Country Planning Act 1990 had been enacted since the close of the inquiry. In this instance the provisions of policy EN16 set out the criteria by which this special industrial use should be gauged. The Secretary of State dealt with all aspects of the criteria in EN16 save for the environmental impact of emissions to atmosphere. The critical conclusions on this issue (in summary) were:

> ... the Secretary of State considers that it is not the role of the planning system to duplicate controls under the Environmental Protection Act 1990.
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> ... 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.
>
> ... in view of the stringent requirements relating to such an authorisation under Part I of the Environmental Protection Act 1990 for this proposal are such that there would be no unacceptable impact on the adjacent land.
>
> ... it is clear that the predicted maximum emission levels set out in document NW9 ... 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 HMIP in the pollution control authorisation process.

The applicant countered the Secretary of State's approach asserting (*inter alia*) that:

(1) The Secretary of State could not lawfully say "I leave those matters to the EPA" as that would be an abrogation of his planning responsibilities. There was no evidence on which he should be satisfied that EPA controls would be adequate; and, moreover, he has given no adequate reasons for reaching such a conclusion which differs from that of the Inspector and the assessor.

(2) If he could not properly be satisfied that these concerns could be dealt with under the EPA régime, it would follow that the proposal would not comply with the third criterion of policy EN16, which speaks of unacceptable consequences in terms of environmental impact and, hence, the proposal would be contrary to the development plan.

Held, in dismissing the appeal:

(1) It is clear beyond doubt that the environmental impact of emissions to atmosphere is a material consideration at the planning stage. It follows that the Secretary of State could not lawfully adopt a policy of hiving off all consideration of such environmental effects, in their entirety to the Environmental Protection Act régime.

(2) Where two statutory controls overlap it is not helpful to try to define where one control ends and another begins. At one extreme there will be cases where the evidence at the planning stage demonstrates that potential pollution problems have been substantially overcome, so that any reasonable person will accept that the remaining details can sensibly be left to the Environmental Protection Act authorisation process. At the other extreme, there may be cases where the evidence of environmental problems is so damning at the planning stage that any reasonable person would refuse planning permission, there being in effect no point in trying to resolve very grave problems through the Environmental Protection Act process. Between those two extremes there will be a whole spectrum of cases disclosing pollution problems of different types and differing degrees of complexity and gravity.

(3) The Secretary of State does not operate a blanket "leave it all to the EPA" policy. In this case, he has concluded that the controls available under the EPA "for this proposal" are such that there would be "no unacceptable impact on adjacent land." He did not act perversely in reaching the decision as, first, the Inspector's concerns related to the incomplete or inadequate data rather than positive evidence of harm, and, secondly, the Inspector does not appear to have considered whether and, if so, to what extent his remaining concerns could have been met by the EPA authorisation procedure. That is a matter which the Secretary of State has addressed in the decision letter thereby remedying that omission.

(4) A fair reading of the Inspector's and the Assessor's conclusions as to background air quality shows that they were related to the health implications of emissions—their ingestion or inhalation by humans or animals. As such, those concerns were capable of being addressed satisfactorily by HMIP.

(5) It is a question of judgment as to whether the "lack of definition" in the data could be remedied via the EPA process, based on the Inspector's first three conclusions, and HMIP's acceptance of the standards specified in the inquiry document NW9 as a starting

point for the authorisation process the Secretary of State was entitled to conclude that it could.

(6) Cadmium is a prescribed substance for the purposes of section 7(2)(a)(i) of the EPA. Thus, HMIP would be bound to impose a condition on any authorisation, if they choose to grant one, with the objective of ensuring that the best available techniques not entailing excessive cost are used for preventing its release; and, if that is not practicable, for minimising it and for rendering it harmless. On the basis that the Inspector concluded that the proposed maximum emission limits were accepted by HMIP as a valid starting point for authorisation, but that the eventual standards in the authorisation would be lower than those indicated in NW9, and given that the limits in NW9 may *slightly* exceed WHO recommendations for rural areas, the Secretary of State was perfectly entitled to adopt the course set out in his decision letter.

Case cited

Associated Provincial Picture Houses v. Wednesbury Corporation [1948] 1 K.B. 223; [1947] 2 All E.R. 680.

J. Steel, Q.C. and *T. Hill* for the appellant.
S. Richards and *R. Drabble* for the first respondent.
W. Hicks and *R. Harris* for the second respondent.

MR. J. SULLIVAN Q.C.: This is a challenge under section 288 of the Town and Country Planning Act 1990 to a decision of the Secretary of State for the Environment to grant outline planning permission for a clinical waste incinerator at Follingsby Lane, Wardley, Gateshead. The decision letter is dated May 24, 1993. The inquiry took place over a number of days between April 9 to May 1, 1991. The Inspector produced a substantial report dated August 3, 1992. He was assisted by a technical assessor, Dr. Waring, who also produced a lengthy report. The Inspector recommended that permission should be refused. The Secretary of State disagreed and granted permission. Hence, this application by the local planning authority, Gateshead Metropolitan Borough Council.

It is impossible to do justice to such a lengthy Inspector's report whilst, at the same time, keeping the duration of this judgment within reasonable bounds. At this stage it is sufficient to note that the Inspector listed 52 findings of fact in his paragraph 464. He began his conclusions in paragraph 465 and, between that paragraph and paragraph 504, he looked at the question of need, policy background, the details of the proposal, its technical viability, its environmental impact and its impact on the development potential of the area.

He summarised his conclusions in paragraph 505 as follows:

"In summarising my conclusions, I refer again to the Environmental Statements which formed the platform on which the examination of the proposal at the inquiry was based. I have examined each of the subject areas that led to GMBC 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 emissions, the discharge data is only theoretical and insufficient practical experience is available for forecasts to be entirely credible."

He continued in paragraph 506:

"I am therefore satisfied that while an appropriate plant could 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 emissions can not 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."

In paragraph 507, he recommended that permission be refused.

The Secretary of State, having dealt with a number of legal submissions which are not relevant for present purposes, agreed in paragraph 11 of his decision letter that the main issues which were relevant to his decision were those identified by the Inspector. He then referred, in paragraph 13, to the fact that section 54A had been enacted since the inquiry closed, so that the appeal had to be determined in accordance with the development plan unless material considerations indicated otherwise.

He dealt with the question of need in paragraph 14, noting that there

was no dispute between the main parties to the inquiry as to the likely clinical waste arisings in the area and no dispute that they should be incinerated. The Regional Health Authority were considering what sort of incineration strategy they should adopt and at the time of the inquiry had not decided whether they preferred a single, centrally-located incinerator, or a number of incinerators serving different part of the region.

Paragraph 14 then continued:

> "After the inquiry had closed, a report in the 'Northern Echo' dated 6 May 1992 was drawn to the Secretary of State's attention by Mrs. Joyce Quin M.P. This stated that the Northern Regional Health Authority would rather have a number of smaller incinerators than a single incinerator for clinical waste. A copy of the correspondence is enclosed with this letter. While that is a decision for the Northern RHA, it does not affect the Secretary of State's view that the appeal proposal is a possible solution to the disposal of clinical waste in the region and the Secretary of State does not consider that it is premature for him to determine this appeal at the present time."

The Secretary of State then turned to the development plan and agreed with the Inspector that the proposed industrial use would not be in conflict with development plan land use policies, but that as a special industrial use the acceptability of the proposal in planning terms would turn on whether it satisfied three criteria in structure plan policy EN16. Policy EN16 is set out in full in paragraph 173 of the Inspector's report and it is as follows:

> "EN16 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 availability 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."

In paragraphs 17 and 18 of the decision letter, the Secretary of State dealt with all aspects of the criteria in EN16, save for the environmental impact of emissions to atmosphere, and concluded that all those other aspects of the criteria would be met. The critical conclusions are those which are set out in paragraphs 19 to 21 of the decision letter under the heading "Environmental Impact." I set out those conclusions in full.

> "19. The other principal environmental impact would be that of emissions to the atmosphere from the plant. The Secretary of State notes that for the purpose of assessing their impact, your clients indicated the maximum

emission limits for normal operations to which they were prepared to be tied for enforcement purposes and that those limits, set out in inquiry document NW9 dated 25 April 1991, became part of the plant description. He also notes the view of the Assessor that these limits were in keeping with current United Kingdom prescriptive standards and that H.M. Inspectorate of Pollution 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 HMIP in a pollution control authorisation for the plant would be lower than those indicated in document NW9 (IR 482). The Secretary of State accepts that it will not be possible for him to predict the emission limits which will be imposed by HMIP 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 HMIP. Draft Planning Policy Guidance on 'Planning and Pollution Controls' were 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 HMIP 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 HMIP had not determined it. However, in view of the stringent requirements relating to such an authorisation under Part I of the Environment 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."

In paragraph 22, the Secretary of State considered technical viability

and concluded that an incinerator of the type proposed could be built and operated to the maximum emission standards which were set out in inquiry document NW9.

In paragraph 23 he concluded that the impact of an incinerator on the development potential of the area would be marginal and not sufficient on its own to warrant a refusal of planning permission.

Having dealt at some length with conditions and with whether there was a need for a section 106 agreement, he then reached certain overall conclusions in paragraphs 36 and 37 of his decision letter, which I also set out.

> "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 HMIP 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 HMIP in the pollution control authorisation process. While noting the Inspector's view that emission standards set by HMIP 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 HMIP authorisation 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."

He then said in paragraph 38:

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

Mr. Steel, Q.C., for the applicants, formulated his main argument in a number of ways, but his submissions boil down to the following propositions: first, the Secretary of State did not disagree with the Inspector's summary conclusions No. 5, 6, and 7; that is to say, first, that

there was insufficient data on air quality on which to judge the proposal; secondly, there would be an unacceptable impact on the rural/agricultural area by reason of the discharge of chemicals such as cadmium; and thirdly, that there was public disquiet, in particular there was concern as to dioxin emissions and that those concerns could not be sufficiently allayed.

Secondly, the Secretary of State did not suggest that those objections to the proposal were immaterial considerations for planning purposes.

Thirdly, he did say that those matters could be dealt with by the controls available under Part I of the Environmental Protection Act 1990 (EPA).

Fourthly, Mr. Steel says that the Secretary of State could not lawfully say, "I leave those matters to the EPA." He says that that would be an abdication of his planning responsibilities. There was no evidence on which he should be satisfied that EPA controls would be adequate; and, moreover, he has given no adequate reasons for reaching such a conclusion which differs from that of the Inspector and the assessor.

Fifthly, if he could not properly be satisfied that these concerns could be dealt with under the EPA régime, it would follow that the proposal would not comply with the third criterion in policy E16, which speaks of unacceptable consequences in terms of environmental impact and, hence, the proposal would be contrary to the development plan.

In support of these submissions he pointed to other decision letters where the same structure plan policy was being applied and where the Secretary of State refused permission for incinerator proposals notwithstanding the existence of EPA controls. Specifically in respect of the EPA controls, Mr. Steel pointed out that in deciding whether to grant authorisation under Part I of the EPA, Her Majesty's Inspectorate of Pollution (HMIP) would apply BATNEEC principles, that is to say they would require the use of best available techniques not entailing excessive cost. So that it might not be possible to prevent harm save at excessive cost.

Mr. Steel submits that the HMIP would be bound to issue an authorisation in those circumstances even though the emissions would be harmful. Moreover, he says, HMIP could not be relied on to consider "planning issues." He says that the Inspector's concern as to the impact of the rural/agricultural area was a locational point, as opposed to a point relating to the workings of the plant itself, and that was the sort of point that should be resolved at the planning stage.

He had a subsidiary argument in the light of the correspondence from Joyce Quin M.P., which raised doubts about the regional health authority's incineration strategy and, hence, Mr. Steel submitted, cast doubts on the need evidence which had been led at the inquiry. The

consequence of this was that the Secretary of State did not properly consider the question of need for the development, which was a relevant consideration given its environmental impact.

It was not suggested by Mr. Richards for the Secretary of State or by Mr. Harris for the second respondent that the environmental impact of emissions to atmosphere from the proposed incinerator plant were an immaterial consideration for planning purposes. There is a degree of overlap between the town and country planning and pollution controls and, before I turn to the respondents' submissions, it is convenient to refer to the policy documents in which this overlap is discussed.

Paragraph 6.39 of "This Common Inheritance" (Cm. 1200), under the heading "Planning and pollution control" says:

> "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 pollution control to limit the adverse effects that 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. And a change in an industrial process may well require planning permission as well as approval under environmental protection legislation."

Paragraph 6.40 of that document states:

> "... The Government will also consider the need for further guidance on the relationship between planning and pollution control in the light of new measures in [what was then] the Environmental Protection Bill.

That guidance has not yet emerged in final form, but in June 1992 a consultation draft, PPG, Planning and Pollution Control was issued. I was referred to a great number of passages. I merely note those between paragraphs 1.22 to 1.26, paragraph 3.1 and paragraph 3.11 to 3.18 and annex 7 which deals with environmental assessment. I think it unnecessary to set those out *in extenso* in this judgment. It is enough to say that the draft PPG makes it clear that the pollution implications of new development may be material planning considerations and that "the dividing line between pollution and planning controls is not always clear cut."

Mr. Richards, whose submissions were adopted by Mr. Harris, dealt first with the scope of the EPA. In paragraph 21 of his decision letter, the Secretary of State refers to the "stringent requirements" relating to an authorisation under Part I of the EPA. So, as a starting point, it seems sensible to see whether that is a fair description of those procedures. Under section 6(1) of the EPA, an authorisation is required by anyone carrying on a prescribed process. It is common ground that incineration of clinical waste is a prescribed process.

By section 6(3) the enforcing authority (in this case HMIP) shall either grant conditionally or refuse an authorisation. By subsection (4), it shall not grant an authorisation unless it is satisfied that the applicant will be able to comply with the conditions which would have to be imposed under section 7. Section 7 provides that there shall be included in an authorisation such specific conditions as HMIP consider appropriate, when taking together with the general condition which subsection (4) implies in any authorisation for achieving the objectives which are specified in subsection 7(2). 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 medium and for rendering harmless any such substances which are so released;
> (ii) for rendering harmless any other substances which might cause harm if released into any environmental medium;
> (b) compliance with any directions by the Secretary of State given for the implementation of any obligations of the United Kingdom under the Communities Treaties or international law relating to environmental protection;
> (c) compliance with any limits or requirements and achievement of any quality standards or quality objectives prescribed by the Secretary of State under any of the relevant enactments;
> (d) compliance with any requirements applicable to the grant of authorisation specified by or under a plan made by the Secretary of State under section 3(5) above."

Subsection (4) implies a general condition in every authorisation to a similar effect.

Cadmium is a prescribed substance and references to "harm" and "harmless" must be read in the light of the very wide definition of those words which is to be found in section 1(4) of the Act. It seems to me that these are, indeed, stringent controls and I do not accept Mr. Steel's submission that HMIP may be obliged to issue an authorisation even though an emission would be harmful, merely because the best available techniques not entailing excessive cost may not be sufficient to render the substance harmless when released.

Section 6(4) defines certain circumstances in which an application shall not be granted. But, in my view, it does not otherwise derogate from HMIP's power to refuse authorisation if they consider that the release of a particular substance would do harm as defined by the Act. Some support for this view is to be found in section 4(2), which provides that the Chief Inspector's functions are to be exercised "for the purpose of preventing or

minimising pollution of the environment due to the release of substances into any environmental medium."

It is also relevant to note that when expressing confidence as to the efficacy of controls under the EPA the Secretary of State for the Environment is dealing with subject matter for which he has ministerial responsibility. He also has an extensive array of reserve powers in section 6(5), section 7(1)(b) and subsection (3), and section 13(3) which deal with authorisations, conditions and enforcement respectively.

Against that background, Mr. Richards submits that the Secretary of State was entitled, in the circumstances of this case, to reach the conclusion that the remaining matters of concern to the Inspector could properly be left to the EPA régime. He submitted there was no rigid rule—it was a question of fact and degree in each case—as to whether the concerns were such that permission should be refused, or whether the decision-maker could conclude that they would be satisfactorily addressed by the EPA so that there would be no harmful environmental impact and, hence, no planning objection.

Both he and Mr. Harris pointed to particular features of this Inspector's report which made the latter course appropriate in this case. In particular, they referred to the first three summary conclusions of the Inspector and paragraphs 482 to 484 of his report. It is unnecessary to set them out, but I note that although paragraph 484 refers to "uncertainties" in respect of dioxins and furans, I was also referred to the Inspector's finding of fact 34, which says:

> "Emissions of Dioxins and Furans would be likely to produce ground level concentrations which are relatively small compared with concentrations found in urban air and within any likely standard."

In addition, I was referred to a number of passages in the assessor's report, in particular a lengthy paragraph 6.2.5 entitles "Significance of air quality changes" and also to the assessor's conclusions in this paragraph 11.

In essence, Mr. Richards and Mr. Harris submitted, the Inspector was not concluding that the proposed incinerator would give rise to unacceptable pollution; he was merely saying there was insufficiency of data. They contended that the Inspector's concern for the rural/agricultural area was a concern, not for its rural qualities, which would be solely a planning consideration, but for the health implications of emissions over such an area, which was a matter which could be addressed by HMIP.

The respondents argued that the approach adopted in this decision letter was not a departure from the policies that I have referred to earlier in this judgment, namely "This Common Inheritance" and the draft PPG, but rather an application of them to the facts of this case. They said that

the Secretary of State had explained in a perfectly intelligible way why the Inspector's remaining concerns could be addressed by the EPA process. So far as the subsidiary argument is concerned, they contended that the M.P.'s letter did not change the position on need as it had been discussed at the Inquiry. It merely confirmed that, in 1992, the regional health authority had still not made up its mind as to which incineration stragegy it wished to pursue. Indeed, there was no evidence that that position had changed by the date of the decision letter nearly a year later in May 1993.

Having summarised the submissions, I now set out my conclusions. In my view, the appropriate starting point is the Secretary of State's obligation to have regard to the development plan and other material considerations (s.70(2) of the Town and Country Planning Act 1990). It is clear beyond any doubt that the environmental impact of emissions to atmosphere is a material consideration at the planning stage. In support of that proposition, one need look no further than the Town and Country Planning (Assessment of Environmental Effects) Regulations 1988. It follows, in my judgment, that the Secretary of State could not lawfully adopt a policy of hiving off all consideration of such environmental effects in their entirety to the EPA régime. But, just as the environmental impact of such emissions is a material planning consideration, so also is the existence of a stringent régime under the EPA for preventing or mitigating that impact and for rendering any emissions harmless. It is too simplistic to say "the Secretary of State cannot leave the question of pollution to the EPA."

It is acceptable by the applicants that there may come a point in the planning appeal process when the Secretary of State is entitled to be satisfied that, having regard to the existence of EPA controls, a residual difficulty or uncertainty is capable of being overcome, so that there is no reason to refuse planning permission. Whether that point has been reached is a question for the judgment of the decision taker on the facts of each individual case.

Where two statutory controls overlap, it is not helpful, in my view, to try to define where one control ends and another begins in terms of some abstract principle. If one does so, there is a very real danger that one loses sight of the obligation to consider each case on its individual merits. At one extreme there will be cases where the evidence at the planning stage demonstrates that potential pollution problems have been substantially overcome, so that any reasonable person will accept that the remaining details can sensibly be left to the EPA authorisation process.

At the other extreme, there may be cases where the evidence of environmental problems is so damning at the planning stage that any reasonable person would refuse planning permission, saying, in effect, there is no point in trying to resolve these very grave problems through

the EPA process. Between those two extremes there will be a whole spectrum of cases disclosing pollution problems of different types and differing degree of complexity and gravity. Reasonable people might well differ as to whether the proper course in a particular case would be to refuse planning permission, or whether it would be to grant planning permission on the basis that one could be satisfied that the problems could and would be resolved by the EPA process. But that decision is for the Secretary of State to take as a matter of planning judgment, subject, of course, to challenge on normal *Wednesbury* principles.

It is clear that the Secretary of State does not operate a blanket "leave it all to the EPA" policy. In certain cases referred to by Mr. Steel, the Secretary of State had concluded that the potential pollution problems revealed at the planning stage are so serious that he should refuse planning permission. In this case, he has concluded that the controls available under the EPA "for this proposal" are such that there would be "no unacceptable impact on adjacent land." That is paragraph 21 of the decision letter.

The reasoning in the decision letter is perfectly intelligible. Can it then be said that the Secretary of State was perverse or that there was no basis on which he could have reached that conclusion? In my judgment, two aspects of the Inspector's report are significant. First, setting aside for a moment the discharge of Cadmium, the Inspector's concerns in his summary paragraphs 505.5 and 505.7, seems to relate to incomplete or inadequate data rather than positive evidence of harm. Secondly, notwithstanding the fact that submissions were made to him as to the relationship between town and country planning and EPA control, the Inspector does not appear to have considered whether and, if so, to what extent his remaining concerns could have been met by the EPA authorisation procedure. That is a matter which the Secretary of State has addressed in the decision letter thereby remedying that omission.

Reverting to the first aspect of the Inspector's report to which I referred, the Inspector's first concern was that the air quality data gave an incomplete picture. It was not disputed by Mr. Steel that if HMIP felt that the picture was incomplete for the purposes of authorisation, they could and would require more information. Mr. Steel argues that, in considering that and other matters, HMIP would not be able to have regard to "planning considerations." He says that the location of the area of maximum impact in a rural or a semi-rural area is such a consideration.

To an extent, the first proposition is correct. One would not expect HMIP to have regard, for example, to the effect of emissions on the development potential of an area: the question whether they would make the perception of the area less attractive from the point of view of securing regeneration or of attracting particular types of industry to an area. But

there may be other "planning considerations" where there is a very considerable degree of overlap if not duplication. For example, compliance with national and international air quality standards which are imposed or recommended in the interests of health. Such considerations, though clearly relevant for planning, also fall squarely within the expertise of HMIP.

It seems to me that a fair reading of the Inspector's and the Assessor's conclusions as to background air quality shows that they were related to the health implications of emissions—their ingestion or inhalation by humans or animals. As such, these concerns were capable of being addressed satisfactorily by HMIP.

It is, of course, a question of judgment as to whether the "lack of definition" in the data could be remedied via the EPA process, but given in particular the Inspector's first three conclusions, and HMIP's acceptance of the standards specified in inquiry document NW9 as a starting point for the authorisation process, I am satisfied that the Secretary of State was entitled to conclude that it could. It is clear from paragraph 496 of the Inspector's report that the residents' concerns as to the emission of Dioxins and Furans were also based on health grounds. Once again, the Inspector does not conclude that there would be harm to health. He merely concludes that there is an "area of uncertainty" (para. 497) and hence there would be "public disquiet."

It is, therefore, a question for the Secretary of State whether that uncertainty meant that permission should be refused or whether the uncertainty underlying the disquiet could be addressed in the EPA process. His answer to that question is set out in paragraph 36 of the decision letter. It is clear from that paragraph that he did have regard to the concerns raised by the public, but that he was satisfied that they could and would be addressed by HMIP. In so far as they were well-founded, they would be dealt with. In so far as they were not, it would be difficult to see that that could be a proper reason for refusal of planning permission (see para. 42 of PPG1).

Lastly, Cadmium. Here the Inspector concluded that discharges of such chemicals, though within set limits, were unacceptable onto rural/agricultural areas. It is important to set that conclusion into context. In his findings of fact 49 and 50, the Inspector said:

> "49. In rural areas WHO standards recommend that cadmium levels should not be allowed to increase.
>
> 50. Increases in cadmium levels are contemplated in this proposal. These are small in relation to urban levels."

The Assessor has said in paragraph 11.9 of his report:

> "WHO air quality guidelines for a rural environment are for some species more stringent than for an urban setting. In particular this relates to

> sulphur dioxide, nitrogen dioxide, and cadmium. The lack of ambient air quality on the green belt area which would experience maximum plume impact makes it impossible to make a completely valid assessment, but, on the limited data presented, the total predicted levels (*i.e.* summing existing air quality and predicted incremental changes) for all three key species would be comparable or may slightly exceed the WHO recommendations for rural areas."

I have already observed that cadmium is a prescribed substance for the purposes of section 7(2)(a)(i) of the EPA. Thus, HMIP would be bound to impose a condition on any authorisation, if they choose to grant one, with the objective of ensuring that the best available techniques not entailing excessive cost are used for preventing its release; and, if that is not practicable, for minimising it and for rendering it harmless.

It will be remembered that the Inspector concluded in paragraph 482 that the proposed maximum emission limits were accepted by HMIP as a valid starting point for authorisation, but that the eventual standards in the authorisation would be lower than those indicated in NW9. Given that the limits envisaged in NW9 may *slightly* exceed WHO recommendations for rural areas, the Secretary of State was, in my view, perfectly entitled to adopt the course which is set out in paragraphs 36 and 37 of this decision letter.

There may well be other cases where the evidence discloses not merely a lack of information, or uncertainty, or a marginal excess over standards and hence public concern, but positive evidence of a serious risk of harm. In such cases, the Secretary of State may well conclude that it would not be appropriate to leave any outstanding pollution issue to be resolved through the EPA process. Which is the proper course to adopt in any particular case must be for the Secretary of State to decide.

Lest this judgment be misinterpreted, I stress that this decision is not carte blanche for applicants for planning permission to seek to ignore the pollution implications of their proposed development and say "leave it all to the EPA." This decision simply recognises that whilst environmental pollution is a material planning consideration, so too is the system of authorisation under the EPA. So that in appropriate cases the planning authority or the Secretary of State may decide that they are satisfied that any remaining pollution concerns are capable of being dealt with by the EPA. It is for them to decide which cases are appropriate and which are not.

I turn finally to the subsidiary argument. I say at the outset that I am satisfied that the Secretary of State properly considered the issue of need in paragraph 14 of his decision letter. It will be remembered that at the inquiry there was agreement as to waste arisings and as to the need for incineration somewhere. The RHA have not decided whether to adopt

the disposal strategy of one large or of a number of smaller incinerators. On the evidence, that position prevailed right up to the date of the decision letter in May 1993.

In concluding that the appeal proposal was a possible solution to the problem of clinical waste disposal in the region, the Secretary of State was in effect agreeing with his Inspector's conclusion in paragraph 468 of the Inspector's report. It is not without significance that no alternative site appears to have been suggested at the inquiry. It was merely being argued that the regional health authority had not made up its mind. It was not necessary for the Secretary of State to conclude that the appeal proposal was the only possible solution. Questions of need cannot be considered in the abstract. They must always be related to the degree of environmental or other harm that would be done by the proposal and which has to be outweighed by the need.

Here the Inspector concluded in the appellant's favour on most of the issues and the Secretary of State was satisfied that the Inspector's remaining concerns could be dealt with through the EPA process. In short, there were no serious planning objections and, hence, it cannot be said that the Secretary of State was perverse in adopting the approach to need that he did in paragraph 14 of his decision letter.

In conclusion, I would say this, I am conscious of the fact that this judgment may not do full justice to the very detailed and extremely helpful submissions of all counsel. I would have welcomed a little more time for reflection, but this application was expedited and, given that this may well be merely the first stage in a more lengthy appeal process, it seems to me that it is in the interests of all parties to have a prompt decision and not a more detailed but inevitably more detailed treatise on the interrelationship between town and country planning and pollution control. That decision I now give in dismissing this application.

Solicitors—Messrs. Sharpe Pritchard for the appellant; Treasury Solicitors for the first respondent; McKenna & Co. for the second respondent.

COMMENTARY

This case examines the vexed question on the boundary between the planning and pollution control régimes. Here the Secretary of State left HMIP to determine whether the levels of emissions to atmosphere warranted the grant of an IPC authorisation, notwithstanding the doubt on this at the planning stage.

Two material issues not apparent from reading the judgment alone are:

—the extent of the evidence upon which the inspector came to the conclusion that "the impact of some of the maximum emission limits indicated in document NW9 are not acceptable in a semi-rural area"; and

—whether there was any evidence on the likelihood of the IPC authorisation being granted by HMIP.

Both these issues are significant when examining the basis for either granting or withholding planning permission on the grounds of potential pollution impact.

On the first point, the draft PPG on "Planning and Pollution Control" at paragraphs 3.13–3.15 makes it clear that it is open to Local Planning Authorities (as well as the Secretary of State and his inspectors) to take account of "wider land use planning implications" in circumstances where there "is a significant element of risk, whether actual or perceived, of a polluting incident or of continued exposure at some time in the future".

If planning permission is to be refused then the Local Planning Authority must be in a position to demonstrate "the land use planning reasons which have led them to conclude that the development is unacceptable", although "they should not substitute their own judgment on strictly pollution control issues for that of the pollution control authority".

In this case there is no indication that such a risk existed other than that arising from the "insufficiently defined" impact on air quality and agriculture in the semi-rural location. Whether this could amount to "a significant element of risk" is a matter of conjecture to the reader of this judgment, although it is certain from the summary of the applicant's case that this argument, whilst touched on, was not fully explored.

On the second point, the draft PPG indicates that if, through consultation on the application, the pollution control authority informs the planning authority that there is likely to be an insuperable obstacle to the granting of the pollution control authorisation the planning authority may:

— withhold consent;
— grant it subject to conditions precluding that part of the development requiring pollution consent; or
— refuse permission.

Again there appears to be no suggestion in this case that HMIP saw any insuperable obstacle in granting an authorisation—quite the reverse, as it seems that HMIP imply that an authorisation would be forthcoming albeit that it would use the standards submitted in Document NW9 as a starting point. That being the case the planning authority have to

determine the application on its own merits and in the absence of "a significant element of risk" or "an insuperable obstacle to the granting of the pollution control authorisation" have limited scope for sustaining a pollution related ground of objection.

The main thrust of the applicant's argument in this case concerned the insufficiency of data on air quality and the proposed development's impact on the locality through emissions to atmosphere. The applicant's failure to get home on this point underlines the proposition that a lack of evidence of this type is not fatal to the appellant's case at a planning inquiry provided it can be demonstrated that the issues can be satisfactorily addressed by HMIP at the IPC stage. Thus it appears that a successful challenge can only be maintained where there is compelling contrary evidence—as is common with High Court challenges of this type the ability to introduce new evidence is limited so there is little prospect of improving on the public inquiry case. The outcome in this case is not without precedent in that respect.