Bell Cornwell
CHARTERED TOWN PLANNERS

Bell Cornwell LLP
Oakview House, Station Road,
Hook, Hampshire RG27 9TP
T : 01256 766673 F : 01256 768490

Also at
Sowton Business Centre, Capital Court,
Bittern Road, Exeter, Devon EX2 7FW
T : 01392 357515 F : 01392 268167

St Mary's Court, The Broadway,
Amersham, Buckinghamshire HP7 0UT
T : 01494 618444 F : 01494 582020

bcp@bell-cornwell.co.uk
www.bell-cornwell.co.uk

Please reply to: AMERSHAM

Our ref: SA

RBKC,
Directorate of Planning & Borough Development,
Kensington Town Hall,
Hornton Street,
London, W8 7NX

25th March 2014

Basements Publication Planning Policy – Partial Review of the Core Strategy February 2014
Representations submitted on behalf of Cranbrook Basements on Planning Matters by Bell Cornwell LLP.

These representations complement those submitted in September 2013 on the Basements Publication Planning Policy – Partial Review of the Core Strategy July 2013, which should therefore continue to be read in conjunction with these additional comments, which address only those newly proposed changes to the text of the written justification and of Policy CL7 publicised by RBK&C in February 2014.
These representations therefore focus specifically on the effect of basement extensions on the character and appearance of rear gardens and the proposed Policy CL7 a. criterion, taking into account the new evidence and justification proposed by the Council.
The references below are to the February 2014 text.
Paragraph 34.3.50 – "Planning deals with the use of land and it is expedient to deal with these issues proactively and address the long term harm to residents' living conditions rather than rely on mitigation. For these reasons the Council considers that careful control is required over the scale, form and extent of basements".
Response: This fails the test of applying the *Gateshead* principles, as does the text from July 2013, as set out in our September 2013 representations for this paragraph.
Furthermore, the impact on the landscape of rear gardens can be readily controlled where it is deemed to make an important contribution to the character of an area by applying a standard landscaping Condition on the planning approval. This adequately controls the design appearance and character of the rear garden, without reducing the area of it capable of accommodating a basement extension beneath it from the current Policy limitation of 85% of its total area.
The evidence put forward by the Council to address the impact on visual appearance of rear gardens is set out in the February 2014 Basements Visual Evidence documents.
The planning permission letters for those properties either:
1) contain no Condition requiring the prior approval of a detailed hard and soft landscaping plan, or 2) they do have such a Condition and the scheme has been undertaken in accordance with the subsequently approved scheme.
In both cases what that evidence demonstrates is NOT that basement extensions cause harm to the character and appearance of the rear gardens, but that the Council considered the character and appearance of the rear gardens to be either:
1) of no significance and therefore not needing to be controlled, or

Bell Cornwell refers to Bell Cornwell LLP, a Limited Liability Partnership registered in England and Wales with registered number OC340551.
The registered office is at Oakview House, Station Road, Hook, Hampshire RG27 9TP. A list of members' names is available at the above address.
We use the word 'partner' to refer to a member of the LLP or an employee or consultant with equivalent standing and qualifications.

2) capable of being controlled by a landscaping Condition and the completed scheme demonstrates what the Council deem to be a satisfactory appearance.

Where no trees are lost by the development, the open character is preserved and the detailed design will dictate how informally picturesque and tranquilly ambient the resulting landscaping is, controlled by Condition if necessary.

Where trees are lost, the Officer Report takes that into account and landscaping Conditions are imposed to replace those trees which are considered acceptable to lose, so long as the verdant character is reinstated.

Where the loss of trees is not acceptable, the existing adopted Policy CL2 g iii. already provides adequate regulatory protection to safeguard against that occurring [as repeated in draft Policy CL7 d.].

Paragraph 34.3.55 – "However, rear gardens are often a contrast, with an informal picturesque and tranquil ambience, regardless of their size. Whilst basements can preserve the remaining openness of the townscape compared with other development forms, it can also introduce a degree of artificiality into the garden area and restrict the range of planting".

Response: Please refer to our September 2013 representations for this paragraph and to our response above to paragraph 34.3.50, which explains how adequate controls existing through the use of standard Conditions to dictate how "artificial" a garden landscape appears.

That said, no garden landscape is not representative of the "climax landscape", so that every garden is to that extent "artificial" in appearance. The "Picturesque" movement in landscape design is no less artificial in that respect than other more formal designs. Whilst it is principally associated the 18th century and early 19th century, which pre-dates most of the urban development of Kensington and Chelsea, if a garden which is the subject of a basement extension application has an existing "picturesque" character and appearance, then a landscaping Condition can ensure that a similar appearance is achieved in association with the development.

There is no requirement to limit the area of garden development to 50% in order to achieve that end result.

Paragraphs 34.3.63 and 34.3.66 – The text is unchanged from that of paragraphs 34.3.64 and 34.3.67 respectively in the July 2013 text. We made no specific comment on them then, but they should now be considered in the light of our comments above. In neither case do they provide any justification for changing the existing adopted Policy CL2, which covers these matters appropriately and adequately in sections CL2 a.- e. inclusive.

Paragraph 34.3.69 – The text is unchanged from that of paragraph 34.3.70 in the July 2013 text and our September 2013 response still applies.

As a further comment, it has been recognised by Officers and Councillors at Planning Applications Committees in 2014 that traffic and parking matters are appropriately controlled and managed already through a standard Condition requiring the approval of a Construction Traffic Management Plan [CTMP] as an "approval of details" matter after planning permission has been granted. Indeed Officer advice is that it is preferable for management purposes for the CTMP to be submitted and approved as close to the implementation of construction as possible, so that prevailing conditions beyond the site boundary and outside the direct control of the operator can be taken fully into account.

It is a wholly inappropriate criterion for determining whether the principle of a basement extension is acceptable.

Policy CL7 a. – NOT JUSTIFIED – see our responses on paragraphs 34.3.50, 34.3.51, 34.3.54, 34.3.55, 34.3.63 and 34.3.66 above and in September 2013.

Policy CL7 b.- k. inclusive – see our September 2013 responses on the July 2013 draft Policy CL7 b. - j. inclusive, which still apply in full.

Policy CL7 l. – NOT JUSTIFIED and NOT EFFECTIVE - see our response on paragraph 34.3.69 above and paragraph 34.3.73 of our September 2013 response.

Policy CL7 m. – see our September 2013 responses on paragraph 34.3.48 of the July 2013 draft Policy CL7 l., which still apply in full.

SIMON AVERY - BELL CORNWELL LLP.

Basement Publication Consultation; July-Sep 2013

Representations submitted on behalf of Cranbrook Basements on Planning Matters by Bell Cornwell LLP.

In order to assess whether the most recently published consultation draft of the Basement Publication Planning Policy July 2013 has been prepared in accordance with legislative requirements, each part of the proposed policy and proposed supporting text has been assessed to establish whether it is Sound. In determining the soundness of a Local Plan policy, it is necessary to establish whether this policy is:

-Justified;

-Effective; and

-Consistent with National Planning Policy.

Paragraph No.	Basement Publication Planning Policy July 2013 Text	Cranbrook Comments and Soundness Compliance Assessment
34.3.46	The policy applies to all basement proposals whether constructed as part of new buildings, or as extensions under or in the gardens of existing buildings across all land uses. 'Basement' is any storey that is completely below the prevailing ground level of the back gardens within the immediate area.	There are properties in the Borough which are built across sloping land, such the front may be a storey lower than the rear, as well as vice versa. The definition of "basement" needs to acknowledge this and to be changed to include both front and back gardens and the "curtilage areas" of non-residential properties. Use of the latter term also overcomes the uncertainty of the definition of "the immediate area". The restriction of the definition to "back gardens" is not therefore justified. The last sentence should therefore read: ***"Basement" is any storey that is completely below the prevailing ground level of both the front and back curtilage areas of the property.***

34.3.47	Basements are a useful way to add extra accommodation to homes and commercial buildings. Whilst roof extensions and rear extensions add visibly to the amount of built development, basements can be built with much less long term visual impact – provided appropriate rules are followed. This policy, and the associated supplementary planning document which will be produced on basements, set out those rules.	RBKC's heritage assets and their preservation or enhancement is a key principle embedded in the Core Strategy policies covering the majority of the borough. As such, the minimal visual impact of basement extensions is integral to providing additional accommodation in a manner which is consistent with preserving the heritage assets of the borough. The draft policy is significantly more restrictive than the Core Strategy policies adopted in December 2010, imposing greater limitations on the ability to adapt accommodation to meet the prevailing social needs of the borough's residents and businesses, with concomitant adverse social and economic impacts. These outweigh any possible beneficial environmental impacts that reducing the size of basement extensions may or may not achieve. That is not taking a balanced approach to social, economic and environmental sustainability and is therefore in conflict with national policy as set out in the National Planning Policy Framework ("the Framework") paragraphs 7 and 8.

34.3.48	Basement development in recent years has been the subject of concern from residents. Basements have given rise to issues about noise and disturbance during construction, the management of traffic, plant and equipment, and concerns about the structural stability of nearby buildings. These concerns have been heightened by the growth in the number of planning applications for basements in the Royal Borough with 46 planning applications in 2001, increasing to 182 in 2010, 186 in 2011 and 307 in 2012. The vast majority of these are extensions under existing dwellings and gardens within established residential areas.	The increased number of proposals which include basement extensions reflects the improved construction techniques now available, the prevailing social and economic needs to be able to adapt housing and non-residential buildings to meet 21st century living and working requirements, within the context of the restrictive heritage constraints which apply in a borough predominantly developed in the19th century. That increase of itself does not justify changing the recently adopted permissive policy, which applies the appropriate principle of seeking to manage the impact of basement development through applying Conditions to "how" the construction process is undertaken, and not as in the draft to "if" the principle of the basement extension is acceptable. This new draft policy thereby fails to comply with the regulatory approach established by *Gateshead Metropolitan Borough v. Secretary of State for the Environment (1995) Env.L.37* [a copy is appended at the back of these representations],and embodied in Circular 11/95. The onus should not be placed on the applicant at the original application stage to demonstrate that a proposal can be implemented without unacceptable impacts on residential amenity. It is for the planning authority to demonstrate that exceptional circumstances may exist that cannot be overcome by the imposition of Conditions if a refusal of planning permission is to be justified. To demand that level of evidence at the application stage is inappropriate, as well as being disproportionate and thereby in conflict with the Growth and Infrastructure Act 2013 and Paragraph 158 of the Framework.
34.3.49	In the Royal Borough, the construction impact of basements is a significant material consideration in planning. This is because the Borough is very densely developed and populated. Tight knit streets of terraced and semi-detached houses can have several basement developments under way at any one time. The duration of construction is longer than for above ground extensions, the excavation process has a high impact on neighbours and the removal of spoil requires many more vehicle movements.	The cumulative impact on the highway network of simultaneous construction can only be accurately assessed at the time that construction on any individual project commences. That is undertaken by the highway authority already and their powers provide adequate and appropriate controls to manage the impacts. To the extent that noise and disturbance are material planning considerations, they too are best managed through the Environment Acts regulatory provisions, as at present, and again should be dealt with by Conditions on planning permissions where necessary and not

		as part of determining whether planning permission should itself be granted. In evidential terms, the impacts of the excavation (noise and disturbance) are not directly proportionate to the depth of excavations, but in principle relate to the methodology employed to undertake the works. For example hand digs for a single storey extension can take the same length of time and create the same disruption as three storey extensions done with mechanical methods. To this end each application should be assessed on a case by case basis- if deeper excavations can be achieved mechanically, these should be approved.
34.3.50	A basement development next door has an immediacy which can have a serious impact on the quality of life, whilst the effect of multiple excavations in many streets can be the equivalent of having a permanent inappropriate use in a residential area with long term harm to residents' living conditions. There are also concerns over the structural stability of adjacent property, character of rear gardens, sustainable drainage and the impact on carbon emissions. For all these reasons the Council considers that careful control is required over the scale, form and extent of basements.	This text in red should be removed. Applying the *Gateshead* principles, the onus is on the planning authority to demonstrate that construction activity of whatever extent and duration is incapable of being managed through other directly related regulations if that is to be a material consideration in the determination of the planning application. The word "inappropriate" in planning terms means "unacceptable in principle". There is no evidential basis for suggesting that is the case with basement extensions. Each planning application should be determined on its merits. The appropriate form of "control" by the planning authority is as with the current Core Strategy approach, namely by the imposition of Conditions when they are deemed necessary.
34.3.51	The policy therefore restricts the extent of basement excavation under gardens to no more than half the garden and limits the depth of excavation to a single storey in most cases. The extent of basements will be measured as gross external area (GEA).	There is no evidential justification to demonstrate why the existing policy of 85% of the garden area being available for a basement extension is harmful to residential amenity.

34.3.52	Restricting the size of basements will help protect residential living conditions in the Borough by limiting the extent and duration of construction and by reducing the volume of soil to be excavated. Large basement construction in residential neighbourhoods can affect the health and well-being of residents with issues such as dust, noise and vibration experienced for a prolonged period. A limit on the size of basements will reduce this impact.	The period of construction (and cumulative impact) is not directly related to the size of any given basement extension; it is equally likely to be a function of individual site constraints and of construction methodology. To seek to control the duration of construction by limiting the size of a development is therefore neither justified nor effective, even if in exceptional circumstances it may be a material planning consideration at the planning application stage.
34.3.53	The carbon emissions of basements are greater than those of above ground developments per square metre over the building's life cycle1 2. The embodied carbon3 in basements is almost three times the amount of embodied carbon in an above ground development per square metre. This is because of the extensive use of concrete and particularly steel both of which have high embodied carbon. Climate change mitigation is a key policy in the London Plan which promotes sustainable design and construction (including avoiding materials with a high embodied energy) and reducing carbon dioxide4. Limiting the size of basements will therefore limit carbon emissions and contribute to mitigating climate change.	Please refer to the "Comments by Cranbrook Basements – August 2013" on CL7J box Refs 87.00 to 89.00 and the associated Document 11 report, which refute the Council's claims in the first three sentences. There is no evidential justification for this policy criterion.
34.3.54	The townscape of the Borough is urban and tightly developed in character. However, rear gardens are often a contrast, with an informally picturesque and tranquil ambience, regardless of their size. Whilst basements can preserve the remaining openness of the townscape compared with other development forms, it can also introduce a degree of artificiality into the garden area and restrict the range of planting5. Retaining at least half of each garden will enable natural landscape and character to be maintained, give flexibility in future planting (including major trees), support biodiversity and allow water to drain through to the 'Upper Aquifer'6 7. 'Garden' is the private open area to the front, rear or side of the property, each assessed separately, and includes unpaved or paved areas such as yards. This policy takes into account the London Plan8 and the Mayor of London's Housing SPG9 both of which emphasise the important role of gardens. The National Planning	London Plan EiP panel report specifically acknowledges that basement extensions are not a strategic matter for the policy to consider With regard to London Plan Policy 3.5, on which the Council seek to rely, all reference is to the 'presumption against development ***on*** back gardens' (Policy 3.5 A) and it relates to ***'new*** housing developments'. Paragraph 3.34 of the London Plan reaffirms that the policy concerns the ***loss*** of gardens through development ***on*** back gardens. Basement extensions do not result in either the loss of back gardens or development on them. London Plan Policy 3.5 does not provide a justification for the change in the Core Strategy Basement Extensions Core Strategy policies.

	Policy Framework (NPPF)10 also supports local policies to resist inappropriate development of residential gardens and excludes private gardens from the definition of previously developed land.	
34.3.55	Keeping the unexcavated area of a garden in a single area and adjacent to similar areas in other plots allows better drainage, and continuity of larger planting supporting biodiversity. In back gardens this area will usually be the end of the garden furthest from the building.	Please refer to “Comments by Cranbrook Basements” on CL7A box Refs 16.00, 19.00, 25.00, 28.00, 32.00, 36.00, 37.00, 38.00 and the associated Documents 11, 20, 30 reports. There is no evidential justification for this policy criterion.
34.3.56	As well as causing greater construction impacts and carbon emissions, deeper basements have greater structural risks and complexities11. In order to minimise these risks to the high quality built environment of the Royal Borough the policy takes a precautionary approach by limiting basements to a single storey.	Please refer to “Comments by Cranbrook Basements” on CL7A box Refs 49.00, 51.00 to 53.00 and the associated Documents 3, 16, 23, There is no evidential justification for this policy criterion.
34.3.57	A ‘single storey’ is one that cannot be horizontally subdivided in the future to create additional floors. It is generally about 3 to 4 metres floor to ceiling height but a small extra allowance for proposals with a swimming pool may be permitted.	
34.3.58	A greater garden coverage and more than one storey may be permitted on larger comprehensively planned sites. These will generally be new developments located in a commercial setting or of the size of an entire or substantial part of an urban block12 and be large enough to accommodate all the plant, equipment and vehicles associated with the development within the site.	
34.3.59	Building additional basements underneath existing ones will result in deep excavations which have greater structural risks. Basements will therefore be restricted to single, one-off schemes and, once a Basement is built, a further basement underneath or in the garden will not be acceptable at the same site.	Please refer to “Comments by Cranbrook Basements” on CL7B box Refs 54.00 57.00 and the associated Documents 1, 3, 22, 23. Thereis no evidential basis for this policy criterion.
34.3.60	Trees make a much valued contribution to the character of the Borough, and bring biodiversity and public health benefits. Works to, and in the vicinity of, trees, need to be planned and executed with very Close attention to detail. All applications for basements likely to affect trees13 either on-site or nearby must be accompanied by a full tree survey and tree protection proposal for the construction phase. Core Strategy Policy CR6 Trees and Landscape will also apply.	
34.3.61	The significance “of heritage assets” needs to be identified so	

	that it is not harmed.	
34.3.62	The special architectural or historic interest of listed buildings goes beyond appearance. It includes the location and hierarchy of rooms and historic floor levels, foundations, the original purpose of the building, its historic integrity, scale, plan form and fabric among other things. Consequently, the addition of a new floor level underneath the original lowest floor level of a listed building, or any extension of an original basement, cellar or vault, will affect the hierarchy of the historic floor levels, and hence the original building's historic integrity. Basements under listed buildings are therefore resisted by the policy.	The heritage asset impact test needs to be applied on a case-by-case basis, to assess what is of significance and what is not, in accordance with the National Planning Policy Framework requirements. It is wrong to impose an "inappropriate" development presumption. The Inspectors' appeals decisions have undertaken the National Planning Policy Framework process and where the hierarchy of floor levels is considered to be of significance and harmed by an additional floor below the building, then appeals have been dismissed. That does not amount to a justification for a blanket refusal policy. Please refer to "Comments by Cranbrook Basements" on CL7F box Refs 68.00 to 73.00 and the associated Documents 16, 32. There is no evidential justification for this policy criterion and it is in conflict with the National Planning Policy Framework paragraphs 128 to 140.
34.3.63	Foundations are part of the historic integrity of a listed building. Basements in the gardens of listed buildings can result in extensive modifications to the building's foundations. This can harm the historic integrity and pose risks of structural damage to the building. Basements under the gardens of listed buildings are therefore also normally resisted. However, they may be acceptable in a large garden where the basement can be built without extensive modifications to the foundations by being substantially away from the listed building so that it does not harm the significance of the listed building and the link between the listed building and the basement is discreet and of an appropriate design.	It is factually wrong to state that basements under the gardens of listed buildings are normally resisted – on the contrary they are normally approved even in small gardens, two examples of which from the last 12 months are at 16 Halsey Street and 25 Holland Park, in which Bell Cornwell LLP was involved in each case – Please also note Listed Building Consent for Construction of Garden Basements at 10a Holland Park Road and 75 Clabon Mews There is no evidential justification for this policy criterion and it is in conflict with the National Planning Policy Framework paragraphs 128 to 140.
34.3.64	In conservation areas, development should preserve or enhance the character or appearance of the conservation area. Basements by themselves with no external manifestations are not considered to affect the character or appearance of conservation areas. It is the other aspects such as the externally visible elements that can affect their character or appearance.	

34.3.65	Archaeological remains are a finite and fragile resource. The conservation, protection or setting of such remains must not be threatened by development, directly or indirectly, to ensure the Borough's past is not lost forever. Policy CL 4(g) of the Core Strategy requires development to protect the setting of sites of archaeological interest.	
34.3.66	The impact of basements on non-designated heritage assets must be assessed on their merits to avoid harm to their significance.	
34.3.67	It is very important to minimise the visual impact of light wells, roof lights, railings, steps, emergency accesses, plant and other externally visible elements. Care should be taken to avoid disturbance to neighbours from light pollution through roof lights and other forms of lighting. Introducing light wells where they are not an established and positive feature of the streetscape can harm the character or appearance of an area. Where external visible elements are allowed they need to be located near the building, and sensitively designed reflecting the existing character and appearance of the building, streetscape and gardens in the vicinity.	Each case must be judged on its merits. There is no evidence of light wells causing disturbance to neighbours. There is no reason to assume that introducing any new lightwell in an area not already characterised by them will necessarily harm that character. Please refer to "Comments by Cranbrook Basements" on Policy CL7g box Refs 74.00, 75.00 and the associated Document 1. There is no evidential justification for this policy criterion and it is not in accord with the National Planning Policy Framework paragraphs 58 to 60.
34.3.68	Policy CE 2 of the Core Strategy requires surface water run-off to be managed as close to its source as possible. A minimum of one metre of suitably drained permeable soil above any part of a basement within a garden provides for both reducing the amount and speed of water runoff to the drainage system and the long term future of shrub and other garden planting. Other SUDs measures may also be required.	
34.3.69	The carbon emissions of basements are greater than the equivalent above ground development and the policy contains a provision to mitigate this impact. A BREEAM methodology is used as a proxy to achieve energy savings across a whole dwelling or commercial property to which the basement relates. For residential development (including listed buildings), the standard is BREEAM Domestic Refurbishment "very good" including a minimum standard of "excellent" in the energy section and a minimum of 80% of credits in the waste category. For non-residential development, the standard is BREEAM "very good".	Please see comments above on paragraphs 34.3.53. There is no evidential justification for this policy criterion. Requiring the upgrade of an existing property to a higher BREEAM standard, rather than just the part proposed for extension, is in conflict with Circular 11/95 advice and National Planning Policy Framework paragraph 206

34.3.70	Basement construction can cause nuisance and disturbance for neighbours and others in the vicinity, through construction traffic, parking suspensions and the noise, dust and vibration of construction itself. The applicant must demonstrate that these impacts are kept to acceptable levels under the relevant acts and guidance, taking the cumulative impacts of other development proposals into account. The building compound and the skip location should be accommodated on site or in exceptional circumstances in the highway immediately outside the application site.	This change of approach from the adopted Core Strategy is conflict with the *Gateshead* principles and there is no evidence base to justify that change.
34.3.71	Basement development can affect the structure of existing buildings. The applicant must thoroughly investigate the ground and hydrological conditions of the site and demonstrate how the excavation, demolition, and construction work (including temporary propping and other temporary works) can be carried out whilst safeguarding structural stability. Minimising damage means limiting damage to an adjoining building to Category 121 (Very Slight - typically up to 1mm). These are fine cracks which can be treated easily using normal decoration. The structural stability of the development itself is not controlled through the planning system but through Building Regulations and the Party Wall Act is more suited to dealing with damage related issues.	
34.3.72	Given their nature, basements are more susceptible to flooding, both from surface water and sewage, than conventional extensions, and applicants are advised to see Policy CE222. Fitting basements with a 'positive pumped device'23 (or equivalent reflecting technological advances) will ensure that they are protected from sewer flooding. Fitting only a 'non return valve' is not acceptable as this is not effective in directing the flow of sewage away from the building.	
34.3.73	Applicants wishing to undertake basements are strongly advised to discuss their proposals with neighbours and others, who will be affected, commence party wall negotiations and discuss their schemes with the Council before the planning application is submitted. Sharing emerging proposals related to traffic and construction with residents and businesses in the vicinity is beneficial as local knowledge and their needs can be more	The distinction between submission of a Construction Management Plan at the application stage and a Construction Traffic Management Plan at that stage is that the former is applicable at whatever date the permission is implemented, whereas the acceptability of the latter is dependent upon the circumstances prevailing at the date of implementation, which could be at any time within the normal 3 year period of the planning permission.

	readily taken into account. Construction and traffic management plans and demolition and construction management plans should be discussed with the Council at pre-application stage, and submitted with the planning application.	It is not effective therefore to require this traffic information at the application stage, nor is it justified.
Policy CL7	**Policy CL7** **Basements** All basements must be designed, constructed and completed to the highest standard and quality. Basement development should: a. not exceed a maximum of 50% of each garden. The unaffected garden must be in a single area and where relevant should form a continuous area with other neighbouring gardens. Exceptions may be made on large comprehensively planned sites;	NOT JUSTIFIED – see paragraphs 34.3.51 and 34.3.54 responses above.
	b. not comprise more than one storey. Exceptions may be made on large comprehensively planned sites;	NOT JUSTIFIED – see paragraph 34.3. 59 response
		NOT ACCORD WITH NATIONAL POLICY – see paragraph 34.3.48
	c. not be built under an existing basement;	NOT JUSTIFIED – see paragraph 34.3.59 response
		NOT ACCORD WITH NATIONAL POLICY – see paragraph 34.3.48
	d. not cause loss, damage or long term threat to trees of townscape or amenity value;	
	e. not cause harm to the significance of heritage assets;	

	f. not involve excavation underneath a listed building (including pavement vaults) or any garden of a listed building, except for gardens on large sites where the basement would not involve extensive modification to the foundation of the listed building by being substantially separate from the listed building;	NOT JUSTIFIED – see paragraphs 34.3.62 and 34.3.63
		NOT IN ACCORD WITH NATIONAL POLICY – see paragraphs 34.3.62 and 34.3.63
	g. not introduce light wells and railings to the front or side of the property unless they are already an established and positive feature of the local streetscape;	NOT JUSTIFIED – see paragraph 34.3.67
		NOT IN ACCORD WITH NATIONAL POLICY – see paragraph 34.3.67
	h. maintain and take opportunities to improve the character or appearance of the building, garden or wider area, with external elements such as light wells, roof lights, plant and means of escape being sensitively designed and discreetly sited;	
	i. include a sustainable urban drainage scheme (SUDs), including a minimum of one metre of permeable soil above any part of the basement beneath a garden. Where the character of the gardens within an urban block is small paved courtyards SUDs may be provided in other ways;	
	j. ensure that any new building which includes a basement, and any existing dwelling or commercial property related to a new basement, is adapted to a high level of performance in respect of energy, waste and water to be verified at pre-assessment stage and after construction has been completed;	NOT JUSTIFIED – see paragraph 34.3.69
		NOT ACCORD WITH NATIONAL POLICY – see paragraph 34.3.69
	k. ensure that traffic and construction activity does not harm pedestrian, cycle, vehicular and road safety, affect bus or other transport operations (e.g. cycle hire), significantly increase traffic congestion, nor	NOT JUSTIFIED – see paragraph 34.3.73
		NOT EFFECTIVE – see paragraph 34.3.73

	place unreasonable inconvenience on the day to day life of those living, working and visiting nearby;	NOT ACCORD WITH NATIONAL POLICY – see paragraph 34.3.48
	l. ensure that construction impacts such as noise, vibration and dust are kept to acceptable levels for the duration of the works;	NOT JUSTIFIED – see paragraph 34.3.48
		NOT ACCORD WITH NATIONAL POLICY – see paragraph 34.3.48
	m. be designed to minimise damage to and safeguard the structural stability of the application building, nearby buildings and other infrastructure including London Underground tunnels and the highway;	
	n. be protected from sewer flooding through the installation of a suitable pumped device.	
	A specific policy requirement for basements is also contained in Policy CE2, Flooding.	

Status: Positive or Neutral Judicial Treatment

*50 Gateshead Metropolitan Borough Council v Secretary of State for the Environment

Court of Appeal

12 May 1994

[1995] Env. L.R. 37

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

May 12, 1994

Clinical waste incinerator—overlap between the functions of the local planning authority and HMIP—information on air quality not available to Secretary of State in reaching decision on a planning appeal—evaluating this issue properly within the competence of HMIP—HMIP would be justified in refusing an authorisation notwithstanding grant of planning permission if criteria not met

The Northumbrian Water Group plc ("NWG") wanted to construct and operate an incinerator for the disposal of clinical waste on a disused sewage treatment works at Wardley in Gateshead. Under the Town and Country Planning Act 1990 planning permission is necessary for the construction and use of the incinerator. Incineration is a prescribed process within section 2 of the Environmental Protection Act 1990 and Schedule 1 to the Environmental Protection (Prescribed Processes and Substances) Regulations 1991 as amended. An authorisation to carry on the process of incineration is required by section 6 of the Environmental Protection Act . The enforcing authority responsible for granting an authorisation is HM Inspectorate of Pollution ("HMIP").

Two applications were made to Gateshead Metropolitan Borough Council ("the Council") for planning permission. The appeal was only concerned with the second, which was an outline application submitted on October 26, 1991. This application was refused by the Council on February 4, 1991. NWG appealed against the refusal to the Secretary of State. An inquiry into the appeal was heard. The Inspector recommended that permission be refused, but the Secretary of State, disagreed with the Inspector's recommendation, allowed the appeal and granted outline permission subject to conditions.

The Council 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 19, 1993 the High Court dismissed the application. The Council appealed.

The relevant provisions of the Town and Country Planning Act comprise sections 54A, 72(2) and 79(4) whereby the Secretary of State was ***38** required to decide in accordance with the provisions of the Development Plan unless material considerations indicated otherwise. The Inspector, having considered the advice of his assessor and having set out the evidence and submissions 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. However, he dismissed the appeal given his concern that "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 cannot be sufficiently allayed to make the proposed development of a clinical waste incinerator on this site acceptable."

The Secretary of State disagreed with this finding and at paragraph 36 to his decision letter said "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 that 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 ."

The Council argued:

(1) 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 his recommendation. This was a failure to comply with "relevant requirements" set out in the Town and Country Planning Inquiry Procedure Rules 1992, rule 17.1 . Thus, this is a ground upon which, provided prejudice be shown to the Council, action can be taken to quash the Secretary of State's decision under section 288(1)(b);

(2) once planning permission had been granted, there was in practice no prospect of HMIP using their powers to refuse to authorise the operation of the plant. Thus, whatever the impact of the emissions on the locality will be, HMIP were 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 could be prevented by refusing planning permission, which would then 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 wrong to say at paragraph 20 of his decision that the controls under the Environmental Pollution Act are ***39** adequate to deal with the emissions and the risk to human health. By so concluding, the Secretary of State:

(a) misunderstood the powers and the functions of HMIP;
(b) contravened the precautionary principle, and/or
(c) reached an irrational conclusion.

Held, dismissing the appeal:

(1) 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" (*per* Lord Scarman in *Westminster City Council v. Great Portland Estate [1985] A.C. 661* at 683). In this decision letter, 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 HMIP will not be obliged, if they grant an authorization, to adopt those limits. On the contrary, they have already indicated that the limits they would adopt would be lower. Thus, HMIP will be able to determine what limits will be necessary in order to render the impact of the emissions acceptable, and impose those limits." This was sufficiently coherent and clear reasoning to fulfil the test.

(2) The decision made on the appeal to the Secretary of State lay in the area in which the regimes of control under the Town and Country 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 HMIP to grant an authorisation would be the only proper course, the Secretary of State following his own express policy should have refused planning permission. This was not the case here as at the end of the inquiry there was no clear evidence about the quality of the air in the vicinity of the site. These issues were clearly within the competence and jurisdiction of HMIP once information about air quality had been obtained. If in the end the Inspectorate concluded that the best available techniques, etc., would not achieve the results required by section 7(2) and 7(4) of the Environmental Protection Act , the proper course would be for them to refuse an authorisation.

Case cited:

Westminster City Council v. Great Portland Estate [1985] A.C. 661 at 683.

Representation

Mr D. Mole and Mr T. Hill on behalf of the applicant.
Mr S. Richards and Mr R. Drabble on behalf of the first respondent.
Mr W. Hicks and Mr R. Harris on behalf of the second respondent.

***40**

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 HM Inspectorate of Pollution ("HMIP").

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 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 Country Structure Plan; the use of the 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 inquiry into the appeal was heard by an Inspector of the Department of the ***41** 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 Mr 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 required to decide in accordance with the provisions of the Development Plan unless material considerations indicated otherwise, and to decide in accordance with other material considerations.

In the Environmental Protection Act 1990, section 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 HMIP. 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 . . ."

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." ***42**

Section 7(1) deals with conditions which are required to be attached to any authorisation. By 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 substances 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 HM 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 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."

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

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 ***43** respect) of the damaging effect on the environment for 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 the damage to 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 in a Planning Policy Guidance Note. That was in draft at the time of the inquiry. 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 inquiry 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 making use of that land *44 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 considerations 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 plan 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 EPA 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 EPA' ."

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: *45

> "I am therefore satisfied that an appropriate plant could be designed with sufficient safeguards included, such that a reliability 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 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.[ext-ext]
(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.

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 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."

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 ***46** 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 HMIP 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. The Secretary of State accepts 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' 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 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 plan 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." *47

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 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.

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 Procedure 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 ***48** 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 [1985] A.C. 661* at 683. While of course 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 HMIP 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, HMIP 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 HMIP are entitled, 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 HMIP using their powers to refuse to authorise the operation of the plant. Thus, whatever the impact of the emissions on the locality will be, HMIP 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 Pollution Act are adequate to deal with the emissions and the risk to human health. By so concluding, the Secretary of State,

(1) misunderstood the powers and the functions of HMIP;
(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 ***49** 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 contrary 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 concern 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 Pollution 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 Pollution 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 HMIP to grant an authorisation would be the only proper course, the Secretary of State following his own express policy should have refused planning permission.

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 HMIP. 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 ***50** authorisation. Certainly, in my view, 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 HMIP 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 HMIP, 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.

Representation

Solicitors— Sharp Pritchard on behalf of the appellant; Treasury Solicitors on behalf of the first respondent; McKenna & Co. for the second respondent.

© 2013 Sweet & Maxwell

24 hour customer support 0800 028 2200, +44 207 449 1110,
customer.service@westlaw.co.uk

We want to hear your feedback

Sweet & Maxwell is part of Thomson Reuters. © 2013 Thomson Reuters (Professional) UK Limited