

In the HIGH Court of JUSTICE

Case no: co/1822/99

QUEENS BENCH DIVISION

CROWN OFFICE LIST

The County Court

At Chester

Wednesday 15 March 2000

Before:

thE HON MR JUSTICE RICHARDS

THE QUEEN

-V-

LEICESTER COUNTY COUNCIL

HEPWORTH BUILDING PRODUCTS LIMITED and

ONYX (UK) LIMITED

RESPONDANT

EX PARTE

APPLICANT

BLACKFORDBY & BOOTHCORPE ACTION GROUP LTD

(Transcript of the Handed Down Judgment of
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COUNSEL: APPLICANT Mr D Wolfe instructed by public interest Lawyers

1st RESONDENT Mr R Griffiths QC & Mr J Strachan instructed by Leicester County
Council Legal Department

2nd RESPONDENT Mr A Gilbert QC instructed by Dibb Lupton Aslop (Solicitors)

Judgment

As Approved by the Court

MR JUSTICE RICHARDS:

The members of the applicant company are residents of the village Blackfordby and the hamlet of Boothorpe in Leicestershire. They seek to challenge through the company a decision by the first respondent, Leicestershire County Council, on 26 March 1999 to grant planning permission for the extraction of coal and clay and for the disposal of 3.9 million tonnes of putrescible waste on a site close to their homes. I shall refer to the site as a whole as “the Albion site”, though it contains a number of separate areas of which Albion and Moira are the two most important. The second respondents (“Hepworth” and “Onyx”) were parties to the joint application for planning permission.

The matter came before me as an application for permission to apply for judicial review, but on the basis that I would hear full argument and, if permission were granted, would proceed to determine the substantive application for judicial review. I have decided to grant permission. What follows is therefore my decision on the substantive application. In addition, I accede to the application by the second respondents that they be formally joined as parties to the substantive proceedings for judicial review.

The central question raised by the challenge is the status, for the purposes of a planning decision, of various environmental “objectives” laid down by the Waste Management Licensing Regulations 1994, which implement an EC directive. The applicant contends that it is not sufficient for the local planning authority to take those objectives into account as material considerations; they require the authority to go further and to minimise environmental impacts and risks. Subsidiary aspects of the challenge concern alleged failures to take into account

material considerations and arguments as to the rationality of the Council's decision on certain matters.

Factual background

The area has a long history of clay and coal extraction. The Albion site is subject to a number of extant minerals consents. It suffers from dereliction through uncontrolled workings and a piecemeal approach to mineral extraction over the years. There were at the time of the decision challenged three unrestored voids totalling 7.7 million cubic metres, a stockpile of 5 million tonnes of clay, and continuing ad hoc opencast coal and clay mineral extraction.

Since 1991 various strategies have been formulated to reclaim and improve derelict land to restore the voids. Those strategies have depended upon mineral working and land fill to fund the reclamation and enable restoration of the voids. In 1995 Hepworth, which is the largest land and clay owner in the Ashby Woulds, formed a joint venture company to submit a planning application for a comprehensive scheme of extraction and reclamation. Planning permission was refused by the Council in 1996. Coal and clay extraction resumed at the Albion site pursuant to the existing minerals consents in November 1997. But Hepworth, encouraged still to look at comprehensive proposals, obtained control of a larger area for the purposes of making a fresh planning application.

The fresh application was made in July 1998 and related to an area of 119 hectares, including Albion, Moira, Pickerings Farm and Swainspark. It involves the continuation of coal and clay extraction until 2005 (rather than 2042 as permitted under the current consents); the surrender of existing planning permissions and consents for coal and clay extraction at Pickerings Farm; the surrender of consents for mineral extraction at Moira; the restoration of the Moira void (1.2

million cubic metres) to woodland and wetland within 12 months by the importation of overburden from Albion by internal haul road; the restoration of the Albion void (3.9 million cubic metres) over 13 years to woodland, wetland and agriculture by engineered land fill; the construction of private haul roads to relieve local roads; the transfer of coal stocking to a less visible site at Swainspark; the restoration of Swainspark to woodland; the provision of rail freight facilities to enable coal to be transported otherwise other than by road; and the creation of areas of woodland, pasture, conservation grassland, wild flower meadow, new hedgerows and new footpaths. The application, which has substantial differences from that rejected in 1996, was put forward as giving rise to substantial benefits as compared with the existing situation.

The application was the subject of extensive consultation and publicity prior to the decision to grant planning permission. It was also the subject of very thorough consideration within the Council. The main report of the Director of Planning and Transportation to the Planning and Environment Protection Sub-Committee, dated 11 February 1999, extends to 86 pages. There were also supplementary reports. The decision was referred to the Environment Committee, which resolved to grant planning permission at a special meeting on 26 March 1999. Permission was granted subject to 103 conditions. Hepworth and Onyx have also entered into an extensive s.106 agreement.

Legislative and policy framework

Town and Country Planning Act 1990 (“the 1990 Act”)

The Council was required to have regard to the development plan and to all material considerations (s.70(1) of the 1990 Act) and to determine the application in accordance with the development plan unless material considerations indicated otherwise (s.54A of the 1990 Act).

The present application is not put on the basis of breach of either section by the Council. I refer below to the Waste Local Plan which is currently at the stage of a deposit draft. When adopted it will form part of the development plan, but in its present form it fell to be taken into account simply as a material consideration.

Waste Framework Directive & Regulations

In the course of argument reference was made to the environmental provisions of the Treaty of Rome, in particular the precautionary principle found in Article 174 EC (ex Article 130r EC). It was, however, common ground that those provisions do not have direct effect (see R v. Secretary of State for Trade and Industry, ex parte Duddridge [1995] Env LR 151) and that it was unnecessary to look beyond the directly relevant EC directive. That directive is Council Directive 75/442/EEC, as amended by Directive 91/156/EEC and Directive 96/350/EC (“the Waste Framework Directive”). The directive is relevant by way of background to the national provisions and the interpretation of those provisions, but it is again common ground that the directive has been implemented correctly and that its provisions are not directly effective.

The recitals to the Waste Framework Directive record that “the essential objective of all provisions relating to waste disposal must be the protection of human health and the environment against harmful effects caused by the collection, transport, treatment, storage and tipping of waste”. Article 3 requires Member States to take appropriate measures to encourage, firstly, the prevention or reduction of waste production and its harmfulness and, secondly, the recovery of waste by recycling or other means and the use of waste as a source of energy. Article 4 requires them to take the necessary measures to ensure that waste is recovered or disposed of without endangering human health and without using processes or methods which

could harm the environment. Article 5 requires them to take appropriate measures, in co-operation with other Member States where this is necessary or advisable, to establish an integrated and adequate network of disposal installations. Article 6 requires them to establish or designate a competent authority or authorities to be responsible for the implementation of the directive. Article 7 requires those authorities to draw up as soon as possible one or more waste management plans.

The Waste Management Licensing Regulations 1994 (SI 1994/1056) (“the 1994 Regulations”) implement material provisions of the Waste Framework Directive. The 1994 Regulations impose duties on the Council as a competent authority in carrying out specified functions. Those functions include the making of its waste plans and the determination of planning applications involving waste disposal. For present purposes the most important provisions of the regulations are paragraphs 2 and 4 of Schedule 4:

“Duties of competent authorities

2(1) Subject to the following provisions of this paragraph, the competent authorities shall discharge their specified functions, insofar as they relate to the recovery or disposal of waste, with the relevant objectives.

(2) Nothing in sub-paragraph (1) above requires a planning authority to deal with any matter which the relevant pollution control authority has power to deal with.

....

Relevant objectives

4(1) For the purposes of this Schedule, the following objectives are relevant objectives in relation to the disposal or recovery of waste -

(a) ensuring that waste is recovered or disposed of without endangering human health and without using processes or methods which could harm the environment and in particular without-

risk to water, air, soil, plants or animals; or

causing nuisance through noise or odours; or

(iii) adversely affecting the countryside or places of special interest;

(b) implementing, so far as material, any plan made under the plan-making provisions.

(2) The following additional objectives are relevant objectives in relation to the disposal of waste-

(a) establishing an integrated and adequate network of waste disposal installations, taking account of the best available technology not involving excessive costs; and

(b) ensuring that the network referred to at paragraph (a) above enables -

(i) the European Community as a whole to become self-sufficient in waste disposal, and the Member States individually to move towards that aim taking into account geographical circumstances or the need for specialised installations for certain types of waste; and

(ii) waste to be disposed of in one of the nearest appropriate installations, by means of the most appropriate methods and technologies in order to ensure a high level of protection for the environment and public health.

(3) The following further objectives are relevant objectives in relation to functions under the plan-making provisions -

(a) encouraging the prevention or reduction of waste production and its harmfulness, in particular by-

(i) the development of clean technologies more sparing in their use of natural resources;

(ii) the technical development and marketing of products designed so as to make no contribution or to make the smallest possible contribution, by the nature of their manufacture, use or final disposal, to increasing the amount or harmfulness of waste and pollution hazards; and

(iii) the development of appropriate techniques for the final disposal of dangerous substances contained in waste destined for recovery and

(b) encouraging-

(i) the recovery of waste by means of recycling, reuse or reclamation or any other process with a view to extracting secondary raw materials; and

(ii) the use of waste as a source of energy.”

Waste disposal plans

The waste disposal plans required by Article 7 of the Waste Framework Directive were provided for by s.50 of the Environmental Protection Act 1990. Section 50 was repealed by the Environment Act 1995 and a national waste strategy is now under preparation, but plans prepared under s.50 remain in force until the new strategy is determined.

In November 1995 the Council produced the Leicestershire Waste Disposal (Management) Plan for the period 1995-2006. Chapter 1 of that plan summarises relevant aspects of government policy in this area. It sets out, for example, the “waste hierarchy” which favours (in this order) waste reduction, re-use, recovery (recycling, composting and recovering energy) over disposal by incineration or landfill without energy recovery. Chapter 2 includes general policies to promote the waste hierarchy and thus minimise the use of landfill. Chapter 5 looks at likely future conditions. In relation to landfill sites, it notes in paragraph 5.3.4.4 that alternative facilities might be needed on completion of some of the present contracts and that the identification of those alternatives is a matter for the Waste Local Plan. Chapter 7 concerns the waste management strategy and implementation. It indicates that all efforts will be made to limit the quantity of waste taken to final disposal. As regards future landfill requirements, paragraph 7.3.14.1 states:

“Present licensed landfill sites are listed in Appendix II. These, along with waste disposal contract arrangements given in chapter 5, and any applications for landfill facilities currently under consideration which may receive

planning approval represent the facilities likely to be available during the Plan period for the management and disposal of household waste. In order that the Waste Local Plan can determine land use requirements for future landfill sites it is essential that an estimate of the waste requiring disposal is indicated in this Plan. These estimates assume 100% internal management of the waste. It is not possible to predict the import or export of the wastes as these are matters of future contractual arrangements.”

In Appendix 2 it is noted that the Plan is not expected to consider specific sites or criteria for new facilities and that this element of Article 7 of the Waste Framework Directive will be implemented through the Waste Local Plan.

In February 1998 the Council placed on deposit the Leicestershire, Leicester and Rutland Waste Local Plan 1995-2006. The deposit draft has been the subject of a public inquiry but the Inspector has not yet reported on it. It states that the purpose of the Plan is to set out detailed policies and guidance on waste development in the Plan area during the Plan period, and to provide a basis for informed decisions on planning applications. The main objectives are said to be (i) to identify existing waste disposal sites with capacity, (ii) to calculate waste disposal requirements, (iii) to identify where appropriate the amount and location of waste management facilities required to meet the waste disposal requirements, (iv) to interpret the priorities for managing waste set out in the Waste Disposal (Management) Plan into land-use planning policies, and (v) to set out criteria against which planning applications for waste management will be assessed (paragraph 1.3). Reference is made to the objectives under Articles 3 and 4 of the Waste Framework Directive and to the promotion of the waste hierarchy, with disposal being the least attractive option. Chapter 4, on provision for future waste disposal, contains detailed calculations of predicted waste arisings in the area during the Plan period, considers the scope for reducing disposal by landfill through measures higher up the waste hierarchy, and

calculates a shortfall in landfill capacity (by reference to existing sites or sites with planning permission) in the Plan period of 4.96 million cubic metres. It concludes that two new landfill operations are needed to meet waste disposal requirements to the year 2006. It examines a number of options, concluding that sites at Longcliffe and Newhurst and at Moira are to be preferred to others including Albion. Longcliffe Quarry is said to have a potential capacity of around 3.7 million cubic metres up to existing ground level which could be operational for between 12 and 15 years. Newhurst Quarry has a potential capacity, after further mineral extraction, of 6.3 million cubic metres up to existing ground level which could be operational for between 21 and 25 years and a proportion of which could be made available for waste disposal up to 2006. In relation to Moira a timescale of 6 years and provision for approximately 1.2 million cubic metres of waste are assumed.

Policy WLP7 of the draft Waste Local Plan provides that the assessment of all proposals for waste management development will take account of the demonstrated need for the facility, amongst other factors. Policy WLP16 identifies Longcliffe/Newhurst and Moira as sites to be allocated for release for landfill. Policy WLP17 states:

“Proposals for waste disposal sites for household/civic amenity/commercial and industrial waste other than the facilities to be released identified in Policy WLP16 will not be permitted unless they meet both of the following criteria:

- (a) it can be demonstrated that the need to release an unallocated site cannot otherwise be reasonably met.
- (b) that the development does not cause demonstrable harm to interests of acknowledged importance having regard to Policy WLP8.”

Environmental assessment

Another set of environmental provisions to which the planning application was subject was the Town and Country Planning Assessment of Environmental Effects Regulations 1988

(though now replaced by the 1999 regulations). Nothing turns, however, on the application of those provisions.

Government guidance

Reliance is placed by the applicant on aspects of government guidance. That includes the provisions of PPG23, on planning and pollution control, which however add little of significance to matters covered elsewhere. More recent guidance of particular relevance is contained in the December 1998 draft of PPG10 on planning and waste management. That was the draft available at the time of the decision, though a new version has since been produced. The preface to the draft states, amongst other things, that the guidance “emphasises the need for close liaison and co-operation between planning authorities, the Environmental Agency and industry in identifying and applying the 'best practicable environmental option' (BPEO)”. Paragraph 1 of the introduction, having referred to the strengthening of the regulatory framework for waste management, states that “the planning system has an important and complementary role in securing adequate provision for appropriate waste management facilities in suitable locations”. Paragraph 11 describes the BPEO principle and refers to the Government’s view that “decisions on waste management should be taken in accordance with BPEO, consideration of which should be informed by the waste hierarchy”. Paragraph 13 states that “planning policies should aim to secure, as far as possible, waste management options towards the top of the hierarchy in preference to those lower down”. Paragraph 14 refers to the proximity principle, that all waste should be disposed of or otherwise managed as close as practicable to the point at which it is generated. Paragraph 17 refers to the principle of regional self-sufficiency, i.e. that most waste should be treated or disposed of within the region in which it is produced. Paragraph 18 then emphasises the importance of flexibility:

“The waste hierarchy, the proximity principle and regional self-sufficiency

need to be considered flexibly in order to identify the combination of facilities, and other waste management options, which gives the best balance between environmental, social and economic needs But in all cases a careful assessment should be made of the transportation and other environmental implications in order to identify the BPEO.”

The draft PPG10 also contains a section on development plans. One of the matters identified is that waste planning authorities, in ensuring that an adequate framework is in place to facilitate the provision of facilities by the industry, should inter alia prepare their development plans for waste as soon as possible; carefully consider the environmental implications of all waste management proposals; be guided by the waste hierarchy, the principles of proximity and regional self-sufficiency, and BPEO in considering the land use options for waste management facilities; where possible identify in their development plans sites for waste management and disposal facilities over the period of the plan; and bear in mind that the waste market is constantly changing.

A section on development control states, in paragraph 58:

“The planning system controls development in the public interest. It should enable adequate provision to be made for waste management facilities in appropriate locations, and without undue adverse environmental effects or nuisance. It should also control other forms of development in proximity to potential sources of pollution. It focuses on whether proposed development is an acceptable use of land rather than on the control of processes which is, in the case of wastes, a matter for the Environment Agency”

Annex A refers to planning considerations and planning conditions. In a section on location of waste management facilities, it states at paragraph A51:

“The preferred locations for waste management facilities depend on local circumstances. Locations will need to be considered within the context of national and regional policies, as set out in planning guidance, and the provisions of the development plan for the area. In general, the most appropriate locations will have the least impact from the local population and the environment. However, there is no simple formula for identification of such areas. Care should be taken to avoid locations where facilities may be

incompatible with existing land uses.”

R v. Bolton Metropolitan Council, ex parte Kirkman.

Some of the issues raised in the present proceedings were examined in R v. Bolton Metropolitan Council, ex parte Kirkman [1998] JPL 787, which was a challenge by way of judicial review to the grant of planning permission for the installation of a waste recovery system. The judgment of Carnwath J contains a very helpful account of the legal framework, including the relationship between relevant planning and environmental controls. Both his judgment and that of the Court of Appeal make findings to which it will be necessary for me to return when considering the submissions in the present case.

The decision under challenge

As already mentioned, the sub-committee, in deciding to grant planning permission, had before it extensive reports from the Director of Planning and Transportation. I need to refer to several of the passages in the main report. In the section on the policy background, the Director describes relevant government guidance, including PPG23 and draft PPG10. As to the latter he states that the guidance confirms that landfill and land raising is placed lowest in the waste management hierarchy for environmental reasons, but he refers to the statement that in some cases landfill may remain the BPEO for dealing with certain waste arisings. Turning to the development plan, he sets out what he believes to be the principal policy considerations as contained in the Structure Plan, the Minerals Local Plan Review and the deposit draft Waste Local Plan. In that connection he refers to regeneration, coal and clay extraction at Albion, and then waste disposal operations at Albion, before going on to consider reclamation of Moira and the position at Swainspark. He states the following concerning the Waste Local Plan:

“The Leicestershire, Leicester and Rutland Deposit Draft Waste Local Plan identifies a shortfall in disposal capacity of 4.96 million cubic metres during

the plan period (which runs from 1995 to 2006). It acknowledges that replacement disposal facilities need to be identified to serve North and West Leicestershire and Leicester City during the second half of the plan period following the closure of the Bradgate, Enderby Warren, Narborough and Lount sites. The Deposit Draft Waste Local Plan proposes that two new waste disposal sites be established at Moira Pottery and either Longcliffe or Newhurst Quarries, near Shepshed. Newhurst Quarry has a potential capacity of 6.3 million cubic metres and Longcliffe Quarry of around 3.7 million cubic metres. Recent discussions with the potential operator of Longcliffe/Newhurst Quarries have suggested that, subject to planning permission being obtained, only Newhurst Quarry will be available to take waste during the plan period and that the earliest that it would be available is 2001. Based on the scale of anticipated waste input, Newhurst Quarry would not be in a position on its own to meet the shortfall in landfill capacity to 2006. The Albion site could contribute to the potential shortfall within Leicestershire before 2006 (as a replacement for the Moira site) and also to waste disposal requirements after that date.

....

Policies WLP 16, 17, 18 and 19 deal with the identification of new and extensions to existing waste disposal sites for household, industrial, commercial and construction and demolition sites within the County. It is considered that two new landfill operations are needed to meet waste disposal requirements to 2006 for the landfilling of industrial/commercial, household and civic amenity waste. WLP 16 proposes that this requirement for new operations be met by sites at either Longcliffe or Newhurst Quarries and Moira Pottery.

Policy WLP 17 applies to unallocated sites and represents a 'fall back' situation in the event of the allocated sites not being released in the Plan period. The policy states

The current planning application provides for the Moira site to be restored by filling with overburden from mineral operations at Albion. This proposal means that the Moira site would be unavailable as a landfill site and that the allocation could not therefore be met.

A site at 'Albion Works' was considered as a potential waste disposal site during the preparation of the Waste Local Plan. The site that was considered comprised the residual void following extraction from the existing permitted area (and was therefore closer to Boothorpe than the current proposal). In assessing potential waste disposal sites, I concluded that the planning issues involved in choosing between the Albion and Moira sites as the preferred landfill site were finely balanced. Several issues overlapped including such matters as traffic and location within the Priority Area. The decisive consideration was how the sites might otherwise be restored. The problem of

the Moira site was felt to be more immediate and more difficult to resolve (in that there is no means under the current planning conditions governing the site to require the early restoration of the existing void). Following the review of old mineral permissions in respect of the Albion site, certain non-polluting industrial and inert waste can be imported into the site if it is agreed that it is necessary to achieve satisfactory restoration and natural drainage. It was therefore concluded that the allocation of the Moira site in the Waste Local Plan to allow the importation of waste materials in order to ensure satisfactory restoration appeared to be potentially more beneficial than Albion.

The New Albion Revised proposals will achieve both the rapid restoration of the Moira void and result in the restoration of the Albion void as well."

The report then has a section on environmental effects. Reference is made to the advice contained in PPG23 that "the role of the planning system focuses on whether the development itself is an acceptable use of the land rather than the control of the processes or substances themselves". It is stated that none of the pollution control authorities consulted (Environmental Health Authority, Environmental Agency) has raised any objection to the proposed development and that the Director is therefore satisfied that the applicant for planning permission had given adequate consideration of the potential for escapes and emissions and had put forward appropriate control measures which would, as far as possible, minimise the potential for nuisance. Detailed comments are then made on matters such as noise, dust and the potential effect on health.

In relation to health, consideration is given first to the effects of opencast mining and then to the effects of waste disposal. In relation to the latter the point is made that in his decision on a recent planning appeal the Secretary of State had stated that the duty to ensure that waste is disposed of without endangering human health lay in that case with the Environment Agency and would be assessed as part of any subsequent application for the grant of a Waste Management Licence. The Director nevertheless addresses the health issues associated with

landfill. He does so at considerable length. One of the matters to which he refers is a set of comments by the Leicestershire Health Authority in respect of the planning application. Those comments refer in turn to the fact that the Department of Health had commissioned a national study of adverse health effects around landfill sites, the report on which would be available in about two years' time. The conclusion to the comments was that the Health Authority should ask Leicestershire County Council to note various matters including the fact that concerns about the health effects of landfill sites had not been resolved. The Director observes, however, that the Area Health Authority did not raise any overriding objections to the proposal on health grounds. Specific concerns identified by them are addressed in the Director's report.

The Director goes on to make a comparison between the present application and the application for permission which was refused in 1996, and to examine possible future scenarios for each part of the application site in the event that the current proposals are refused.

He then comes to his summary and conclusions. In that section of his report he identifies factors for and against the proposed development by reference to its principal elements. As regards coal and clay extraction at Albion, he refers to a number of benefits and disadvantages. In the latter category are: "noise levels at Boothorpe will be increased, but are predicted to remain below levels advised by Government. Concerns about dust increases could be mitigated by good working practice." In relation to waste disposal operations at Albion he states:

"The site is not allocated in the deposit draft waste Local Plan. It would, however, satisfy an identified demand for landfill in the general area. It facilitates the restoration of the existing Albion void area together with the subsequent mineral working area. Certain operations, especially capping and restoration, will have a temporary visual impact. Restoration will be to woodland and conservation grassland, which would accord with the National Forest Strategy. Operations will continue for 13 years. The applicants are prepared to sign a legal agreement not to extend the life of the landfill operations. Noise levels at Boothorpe are predicted to be less than those

advised by Government. The site has previously been undermined but the void is capable of being engineered such that any environmental pollution and risk to health can be reduced by taking appropriate measures. Protective measures and the stringent control of day to day operations as would be required under the terms of any Waste Management Licence would restrict potentially adverse impacts of landfill operations.”

He also refers to the advantages and disadvantages in relation to Moira, Swainspark and traffic movements. He says that as far as cumulative impact is concerned the disturbance could be reduced by careful management of the more disruptive activities and by the ability to offer wider, improved restoration as part of the overall scheme. The proposed waste disposal operations at Albion would enable the restoration of Moira to be accomplished. He examines the relevant minerals planning policy and then, turning to the Waste Local Plan, continues and concludes as follows:

“It could be argued that the proposal is prejudicial to the outcome of the Waste Local Plan. It is appropriate however to take account of other material considerations which might indicate that the development should nevertheless proceed. The Albion site is not allocated in the Deposit Plan, but it is clearly linked to, and would provide a direct replacement for, the Moira allocation. In doing so, the application would involve the early restoration of the Moira site, concern over which was an important consideration in choosing to allocate the site in the Deposit Plan. I consider that the current proposal accords with the release of sites in the context of Waste Local Plan Policy 17 (dealing with unallocated waste disposal sites) and would not otherwise be contrary to the intentions of the plan. The implications for delaying a decision until the Plan has been adopted should also be borne in mind. In the circumstances of this application, I consider that the balance of the above factors supports the granting of planning permission without delay.

....

I consider that the benefits to be gained from allowing the development to go ahead, subject to stringent safeguards and controls to protect sensitive adjacent areas, outweigh the disadvantages. There will be clear gains to be had from the early reclamation and restoration of the Moira void creating an attractive new landform in a well controlled manner over a relatively short period, the progressive restoration of the Albion site over a longer term, the highway improvements and the traffic management proposals, the removal of coal by rail and the revocation of old planning permissions. The proposals

will provide a fully contained landfill facility for 13 years, thus reducing demand for other sites to meet future waste planning requirements in the County. The package of proposals provides a greater degree of certainty for the area and provides a means of achieving many of the aspirations of the Ashby Wolds Regeneration Strategy. These gains more than compensate for the element of environmental disturbance that would be caused by the proposed development.

I therefore recommend that the proposed development be permitted subject to the imposition of conditions and the completion of a legal agreement relating to certain aspects of the proposal.”

A supplementary report dated 1 March 1999 (updating an earlier supplementary report dated 11 February 1999) summarises further representations received, including an amended response from the Leicestershire Health Authority which, in relation to the health effects of mineral extraction, stated:

"The literature which examines the health effects in populations around opencast mines and for exposure studies suggests that respiratory illnesses such as upper respiratory tract infections and asthma may be associated with opencast mining."

The question of risk to health was also a matter raised in further representations on behalf of residents, who "have suffered health effects already and these will be intensified if the present application is permitted." The effect of the proposed development on property values was also raised.

Such concerns are vividly illustrated by an affidavit of Susan Reiblein in support of the present application. She describes the problems which she experienced with nose bleeds as an apparent result of the mining operations. She also refers to noise and dust pollution and to the onset of severe depression. The depression was in large part attributable to anxiety that she would be unable to sell her house at a reasonable price or at all. The house had been on the market for £169,950 in 1997, but once news of the development proposals got out there was no interest in

it and she had to take it off the market. By late autumn 1998, when open cast mining had begun on the site under an existing consent, Hepworths put a value of £125,000 on it on the basis of the mining, £82,500 with the landfill operation, or £40,000 if there was any doubt about the stability of the land. Her own valuers had estimated that the property was worth £150,000 on the basis of agricultural use of the surrounding land, and virtually nothing on the basis of mining and/or landfill operations. She had abandoned the house and moved away from the area.

In the course of dealing with such issues as they had been raised in representations at the time, the Director points to the absence of clear evidence to suggest that landfill would result in an increased health risk, and draws attention to a recent letter by the Department of Health to a local resident which stated that "the Department would not recommend, on the basis of current evidence, that there is a need to prohibit the development of new, licensed landfill sites". He states that in coming to his recommendation he has exercised precaution in the light of health reports on landfill sites and the expressed public concerns and has suggested in his report that it would be prudent to restrict the deposition of hazardous wastes at the site. As to the effect on individual property owners, he points to the countervailing benefits of the proposal and the steps taken to keep the environmental effect to an acceptable level. He also deals with a contention that the grant of permission would violate the rights of local residents under the European Convention on Human Rights.

Other aspects of the residents' representations considered in the supplementary report include Article 4 of the Waste Framework Directive and the need to take into consideration BPEO. As to the latter point, the Director refers to the waste disposal plans and states:

"The Waste Local Plan deals with the land use implications of the waste strategy as set out in the Management Plan. This includes a recognition of

the continuing need for landfill for the majority of waste arisings from the County. The County's waste strategy does not conflict with government guidance on waste management [T]he Government recognizes that landfill will remain BPEO for certain wastes and in certain locations and will continue to play an important role in waste management in the UK for many years to come.

In respect of the current application, the proposals incorporate sustainable waste management techniques in accordance with the objectives of the waste management strategy The current proposal also accords with the proximity principle I consider that the application is in accordance with the approved waste management strategy for the County which recognises landfill as the BPEO for final disposal."

I should mention finally that in an affidavit sworn on behalf of the Council by Mr Nigel Hunt, a Principal Planning Officer, a number of additional comments are made on the very extensive consideration that the Council gave to the application before permission was granted.

Standing

I should deal first with an issue raised by the respondents as to the standing of the applicant. It is not disputed that one or more of the individual residents who made representations against the grant of planning permission would have had a sufficient interest to bring an application for judicial review. The objection relates to the status of the applicant company, a company limited by guarantee (with a liability of up to £1 per member) which was incorporated only on 19 March 1999.

Mr Gilbert QC, for the second respondents, invites the court to infer that the company was incorporated primarily to enable it to be the applicant in these proceedings. Reference is made to the timing of its formation (just before the actual decision to grant planning permission, and at a time when it was known that the Council's officers were recommending approval), the company's objects (which include the taking of legal action to oppose landfill and mineral

workings) and the absence of mention of the company in correspondence until the application to the court came to be made. The court is further invited to infer that it was incorporated with the intention that its members would not be liable in costs should the proceedings fail. Mr Gilbert submits that as a matter of public policy the court should not accord standing to a company created simply for the purposes of making an application to the court and in such a way as to avoid liability for costs if the application fails.

In my view those adverse inferences cannot properly be drawn in the light of the evidence as to the actual reasons for incorporation of the applicant company. One of the residents, Mr Nettleton, has given evidence that the decision to incorporate by guarantee was taken for only two reasons. First, to achieve a proper and formal legal structure to administer the action group's funds and manage its affairs quickly and easily (thereby meeting a long-standing concern about the need for a proper constitution). Secondly, to enable the group to represent the community in a democratic manner: membership could be made open to residents and others provided that they were acceptable to the directors. Mr Nettleton denies that the group took into account the possibility of avoiding the consequences of unsuccessful litigation if it was incorporated. That evidence has not been challenged or tested by cross-examination. On the available material it would be wrong to reject it.

There still remains, however, a real question as to whether the company should be accorded standing. Mr Griffiths QC, for the Council, contends that this challenge is not pursued in the wider community interest. The concern is with the effect of the development on the health and property values of local residents. Yet the company does not have any private interest of its own to pursue. It is merely representative of the private interests of individual residents. That does not give the company a sufficient interest in the matter.

In my view the incorporation of a local action group ought not to be a bar to the bringing of an application for judicial review. Technically, it may be said, the company does not have a relevant interest of its own; but in substance it represents the interests of local residents who, or many of whom, do have a relevant interest. Incorporation has a number of advantages, some of which motivated incorporation of the action group in this case. It is true that another advantage is the avoidance of substantial personal liability of members for the costs of unsuccessful legal proceedings. But that should not preclude the use of a corporate vehicle, at least where incorporation is not for the sole purpose of escaping the direct impact of an adverse costs order (and possibly even where it is for that purpose). The costs position can be dealt with adequately by requiring the provision of security for costs in a realistically large sum. In the present case security was ordered in the sum of £15,000. Whether that was sufficient may be open to doubt, given the sheer size of the case (with a large number of documents and a full two-day hearing). It is, however, the right approach in principle.

Those views accord with the decision of Comyn J in R v. Hammersmith and Fulham LBC, ex parte People before Profit Ltd (1981) 80 LGR 322 (in particular at 331-3 and 336) and Sedley J in R v. Secretary of State for the Environment, ex parte Kirkstall Valley Campaign Ltd, [1996] 3 All ER 304 (in particular at 308j-309d). Since the members of the company, or many of them, would undoubtedly have standing in their own right, even the reasoning of Schiemann J in R v. Secretary of State for the Environment, ex parte Rose Theatre [1990] 1 QB 504 does not present a serious obstacle. In any event the increasingly liberal approach of the courts towards the standing of interest groups since the Rose Theatre decision (see e.g. the survey in R v. Secretary of State for Foreign and Commonwealth Affairs [1995] 1 WLR 386) tells against the adoption of a restrictive approach in the present context even if it is right that the

applicant represents the private interests of local residents rather than the wider community interest. (Mr Griffiths cited passages in R v. Lord Chancellor, ex parte CPAG [1999] 1 WLR 347 about the nature of public interest challenges. In my view, however, those passages, which relate to the court's discretion to make pre-emptive orders as to costs, have no real bearing on the present issue.)

Accordingly I hold that the applicant company has a sufficient interest to bring the application.

The grounds of challenge

The applicant advances an array of points, to some extent overlapping and difficult to disentangle, by way of challenge to the decision. At the heart of them, as Mr Wolfe has made clear in his submissions, is the contention that the Council failed to give lawful effect to the relevant objectives contained in paragraph 4 of Schedule 4 to the 1994 Regulations. I think it appropriate to start by considering that central issue, before turning to examine the various other ways in which the applicant's case is put.

Relevant objectives: alleged error of approach

Mr Wolfe's submission is that various passages in the Director's report and Mr Hunt's affidavit show that the Council, although taking the relevant objectives into account, approached its assessment of the application in terms of whether the risk of harm to human health or the environment could be kept to an "acceptable level". That was not good enough. The Council was obliged by Schedule 4 to the 1994 Regulations to go further and to avoid or minimise such risk. For that purpose it should have analysed the impacts of different options and have chosen the one with the lowest impact (which might have involved refusing the application but indicating a willingness to grant permission for a smaller facility). In failing to do so it

misapplied the objectives or misdirected itself as to their legal effect.

Mr Wolfe accepts that the objectives are not absolute requirements in the sense of requiring a local planning authority in each case to achieve the result pursued by the objective. That would amount to a requirement to refuse planning permission if there were any risk to human health or the environment, which would in turn lead to the refusal of permission for any or almost any landfill site. Such a result would be contrary to existing waste plans and policies (the validity of which was not in dispute in these proceedings), existing guidance (see, in particular, paragraph 1.26 of Annex 1 to DoE Circular 11/94), the terms of the objectives themselves (compare, for example, paragraph 4(1)(a) with paragraph 4(2)(b)(ii)) and common sense. As the Advocate General observed in Comitato di Coordinamento per la Difesa della Cava v. Regione Lombardia [1994] Env LR 281 at 289 paragraph 37, "any measure for the disposal of waste is inherently liable to produce pollution".

The submission made, however, is that the relevant objectives nonetheless impose more onerous obligations on local planning authorities than would be the case if they fell simply to be taken into account as material considerations. In particular, the Waste Framework Directive, and therefore the 1994 Regulations giving effect to it, should be interpreted as requiring the authorities to avoid or minimise any risk to health or to the environment, or (expressing the same point in another way) to do all that is practical to achieve the objectives. The underlined words represent the approach advocated by Professor Michael Purdue in a chapter contributed by him to a volume published in 1997 on "The Impact of EC Environmental Law in the United Kingdom". In this case, Mr Wolfe submits, the Council did not approach the matter in terms of doing all that was practical to achieve the objectives.

In considering those submissions, it is necessary first to examine the authorities upon which Mr Griffiths and Mr Gilbert place heavy reliance.

In Lombardia (above) the European Court of Justice held that Article 4 of the Waste Framework Directive does not have direct effect because it is neither unconditional nor sufficiently precise. It stated:

"12. Considered in its context, Article 4 of the directive, which essentially repeats the terms of the third recital in the preamble, indicates a programme to be followed and sets out the objectives which the Member States must observe in their performance of the more specific obligations imposed on them in Articles 5 to 11 of the directive concerning planning, supervision and monitoring of waste-disposal operations.

13. It must also be noted that the Court has already held, in relation to the Members States' obligations under Article 10 of the directive, that the provision does not lay down any particular requirement restricting the freedom of the Member States regarding the way in which they organise the supervision of the activities referred to therein but that that freedom must be exercised having due regard to the objectives mentioned in the third recital in the preamble to the directive and Article 4 thereof" (see [1994] Env LR page 296, emphasis added).

Mr Wolfe points out that the language used in Lombardia is drawn from an earlier decision, in Joined Cases 372-374/85 Ministere Public v. Oscar Traen & Others [1987] ECR 2141, in which the Court went on to rule that the discretion under Article 10 "is qualified only by the requirement that the objectives of the directive, namely the protection of human health and of the environment, must be complied with" (see page 2159 paragraphs 21-22). The Advocate General in Oscar Traen had referred to the existence of a considerable degree of freedom in determining the measures to be taken, "provided, of course, that such measures do not conflict with the objectives of the directive as laid down in Article 4" (page 2151 paragraph 6). I do not, however, read those passages as laying down a different or higher test than to have "due regard to" the objectives, or as holding that "due regard" has some special meaning to be

equated with actual compliance with the objectives. The language of "due regard", specifically picked up by the Court in Lombardia, seems to me to reflect the fact that the obligation is not an obligation to achieve the result pursued by the objectives. Although used there in the context of the Member States' discretion under Article 10, it lends some support to the respondents' contention that the obligation of a competent authority, in reaching decisions to which the directive applies, is likewise an obligation to have due regard to the objectives rather than the more onerous obligation for which the applicant contends.

In Kirkman (above) an important part of the applicant's case was that the local planning authority had misunderstood and failed to discharge its duties under Article 4 of the Waste Framework Directive as implemented by Schedule 4 of the 1994 Regulations. The first ground on which leave to appeal was sought was that the effect of Schedule 4 to the 1994 Regulations was "to impose on local planning authorities a duty to ensure that waste is not disposed of in a manner which endangers human health or could harm the environment". In rejecting that ground, the Court of Appeal plainly regarded it as sufficient that the local planning authority had taken the relevant objectives into consideration. Schiemann LJ, giving the leading judgment, stated (at [1998] JPL page 805):

"However the question that faces the court in the present case is whether the local planning authority arguably failed to have in mind the Regulation 4 objectives or alternatively, even if they did have them in mind, failed to have regard to them in a legally permissible manner.... I am satisfied that the Applicant would not be able to show that the relevant objectives were not considered by the local planning authority."

I am not at all persuaded by Mr Wolfe's attempts to distinguish Kirkman. The case seems to me to be wholly in point, though it is fair to observe that the issue does not appear to have been developed before the Court of Appeal in Kirkman in the way in which it has been developed

before me. It may further be noted, for what is worth, that the commentator on Kirkman at [1998] JPL page 808 appears to be the same Professor Purdue whose article is relied on by Mr Wolfe, but that the commentary contains no criticism of this aspect of the Court of Appeal's approach to the relevant objectives.

I therefore take the view that the balance of authority is against Mr Wolfe's submissions. Even leaving aside authority, the proposition for which he contends should in my view be rejected. It would give to the relevant objectives an indeterminate status, lying in unsatisfactory middle ground between that which must be taken into account in the decision-making process and that which must be achieved by the decision. It is true that in the course of argument I had some concern that to treat the objectives "merely" as material considerations might be to water down their legal status. Paragraph 2(1) of Schedule 4 to the 1994 Regulations does not use the language of taking the objectives into consideration. It requires that planning decisions be taken "with" the relevant objectives. This may be contrasted with certain other statutory provisions which impose in terms an obligation to "have regard to" specified objectives (e.g. Airports Act 1986 s.43(5), Police Act 1997 s.2(4)). I have come to the conclusion, however, that there is no real distinction between those formulations. What matters is that the objectives should be taken into consideration (or had regard to) as objectives, as ends at which to aim. If a local planning authority understands their status as objectives and takes them into account as such when reaching its decision, then it seems to me that the authority can properly be said to have reached the decision "with" those objectives. The decision does not cease to have been reached with those objectives merely because a large number of other considerations have also been taken into account in reaching the decision and some of those considerations militate against the achievement of the objectives.

A further argument advanced by Mr Wolfe in support of the proposition that the objectives must amount to more than a material consideration is that it is generally open to a decision-maker to decide what weight to give to a material consideration, whereas it must be contrary to the directive to give the objectives little or no weight. It may be that the general rule concerning the weight to be given to material considerations would need to be qualified in the case of the objectives and that it would amount to a misdirection to fail to give them substantial weight. I do not consider it necessary to decide that point in the present case because there was in my view no failure by the Council to give them substantial weight.

Mr Wolfe also sought to derive support for his submissions from the language of s.50 of the Environmental Protection Act 1990. That section is concerned, however, with the formulation of waste disposal plans and cannot assist the applicant's case in relation to the grant of planning permission.

It follows that the applicant fails on the central plank of its submissions. I understand Mr Wolfe to concede that the objectives were properly taken into account as material considerations if that was the limit of the Council's obligation, though it may be that his concession does not extend to an acceptance that the Council took the objectives into account as objectives. In any event I am satisfied on the evidence that they were so taken into account. The Director's supplementary report of 1 March 1999 drew specific attention to, and commented on, the representations on behalf of members of the applicant company as to the objectives in Article 4 of the directive. Article 4 is also referred to in the Director's main report and consideration of the substance of the relevant objectives seems to me to permeate that report even where it is not expressed in those terms. The judgments made about, for example, the "acceptability" of increases in noise and dust do not in my view involve any inconsistency with the objectives.

The conditions imposed indicate a careful concern with minimising adverse impacts.

Relationship with Waste Local Plan

One of the specific complaints made by the applicant is that the Council failed to give proper consideration to the implications of permitting a landfill of the size proposed on the Albion site. This ties in to some extent with other, more general arguments; but it is, I think, also advanced as an independent ground of challenge. The argument runs along these lines. The Director's report bases itself in part upon the consideration that had been given to the respective merits of Albion and Moira at the time of the draft Waste Local Plan, the fine balance that had been held to exist in favour of Moira (as reflected in WLP16 and WLP17) and the reasons why the present application was nonetheless compatible with the Waste Local Plan. But the analysis fails to take into account that the Albion site considered in the context of the Waste Local Plan was a different size from that now proposed. What was previously under consideration was a site with a voidspace of 1.5 million cubic metres increasing to a maximum of 2.5 to 2.75 million cubic metres over a three year period. The present application, by contrast, was for the disposal of 3.9 million tonnes - a much larger landfill, and one that would result in an over-provision of landfill capacity during the period of the Waste Local Plan. The implications of that difference were not considered.

The respondents meet that objection by a factual riposte. As the planning application makes clear, the figure of 3.9 million tonnes relates to the lifetime of the proposed landfill operation, a total of some 13 years. But the proposed rate of landfill is 300,000 cubic metres per year. Over the period of the Waste Local Plan that will produce a maximum of 1.8 million cubic metres and will not result in any significant over-provision of capacity.

I am persuaded by the respondents' submissions on that point. Mr Wolfe referred to the absence of any guarantee that the rate of 300,000 cubic metres would be adhered to. He said that it was merely an assumption and that there might be commercial pressures to exceed it. But he identified nothing that was remotely capable of casting doubt on that figure as a realistic basis upon which to assess the application. Accordingly I do not consider there to be any substance in the applicant's point that the Albion site was larger than that considered for the purpose of the Waste Local Plan. In any event there was in my judgment no failure on the part of the Council to take into account the size of the proposed landfill at the Albion site when considering the relationship between the present application and the Waste Local Plan.

Mr Wolfe sought in the alternative to focus attention on the implications of authorising landfill capacity at the Albion site for a period extending beyond that of the Waste Local Plan. This came into his submissions in various ways, including that it undermined the Waste Local Plan and that it amounted to a failure to apply the precautionary principle (a general argument that I deal with below). Whichever way it is deployed, I see no force in the point. The Council took into consideration the representations made on behalf of residents to the effect that the grant of permission would lead to surplus landfill capacity. But the Director's report, in passages that I have already quoted, expressed the view that the Albion site could contribute to the potential shortfall within the Plan period "and also to waste disposal requirements after that date", would "satisfy an identified demand for landfill in the general area" and would "reduc[e] demand for other sites to meet future waste planning requirements in the County". The Council was fully entitled, on the available material, to take the view that there would be a need for additional landfill capacity in the post-Plan period and that the Albion site would contribute to the meeting of that demand. There was therefore simply no question of undermining the Waste Local Plan

or the policies underlying that plan.

I have not forgotten that the Waste Local Plan is itself only a draft plan and that it is open to a local planning authority to depart even from an adopted plan. I do not think it necessary, however, to consider those additional reasons for rejecting this line of challenge by the applicant. Nor do any other issues raised with regard to the Waste Local Plan merit specific consideration.

Issues concerning effect on human health

The applicant points to the existence of material indicating that research is still being undertaken to consider the effects of landfill sites on human health and that concerns about the health effects of such sites have not been resolved. That material is relied on primarily in support of the contention that the Council failed to give effect to the relevant objectives under the 1994 Regulations. It is said that, given such uncertainty, the Council was wrong to grant permission for landfill operations extending far beyond the time when the uncertainty might be resolved. I have already rejected the general basis upon which that contention is advanced.

Mr Wolfe also presented the point, however, in terms of Wednesbury irrationality, bolstered by an argument (to which I shall come separately) about interference with human rights. The submission appeared to be plucked out of the air in the course of oral argument. In my judgment it was as insubstantial as the air out of which it was plucked. I have set out some of the passages in which the Director examined the health implications of the proposals, examining both the effects of opencast mining (to which Ms Reiblein's problems were related) and the effects of landfill operations. It is plain that the matter was given very careful and balanced consideration and that a suitably cautious approach was adopted. But there could be

no possible irrationality in authorising the landfill operation in circumstances where no clear evidence existed of increased health risks and the Department of Health had expressly disavowed any recommendation that further landfill sites should not be permitted.

A further point against the applicant's contentions, though one which in the circumstances does not need to be examined in any detail, is that the Council would probably have been entitled in any event to leave the health effects of the landfill operations to the waste regulation authority responsible for licensing such operations pursuant to the Environmental Protection Act 1990: see Gateshead MBC v. Secretary of State for the Environment [1995] PLR 87 and Kirkman per Schiemann LJ at [1998] JPL page 804. This was a matter mentioned by the Director in his main report. The detailed consideration given to health issues probably went beyond anything strictly necessary for a planning authority concerned with the land use implications of the application. (The same point has a feed-back into the issue on relevant objectives, in that paragraph 2(2) of Schedule 4 to the 1994 Regulations provides that nothing in paragraph 2(1) requires a planning authority to deal with any matter which the relevant pollution control authority has power to deal with.)

Alleged failure to consider BPEO

The applicant accepts that the Council considered the concept of BPEO but submits that there was an unlawful failure to apply the BPEO test and/or to take BPEO properly into account as a material consideration in allocating an excess of landfill capacity in this location and in conjunction with an extension to the existing opencast permission.

I do not accept that there was any failure to consider BPEO. The main report referred to the relevant part of draft PPG10. The residents' representations on BPEO were specifically

addressed in the supplementary report of 1 March 1999, where the Director pointed out that the waste management strategy for the county recognised landfill as the BPEO for final disposal. The applicant does not take issue with that. It does, however, rely on the absence of specific BPEO assessments in relation to individual sites either at the stage of formulating the draft Waste Local Plan or in relation to the present application.

In Kirkman Carnwath J cited the following definition of BPEO:

"A BPEO is the outcome of a systematic consultative and decision-making procedure which emphasises the protection and conservation of the environment across land, air and water. The BPEO procedure establishes, for a given set of objectives, the option that provides most benefits or least damage to the environment as a whole, at acceptable cost, in the long term as well as in the short term."

Although that might suggest a detailed cost-benefit exercise, Carnwath J held only that BPEO is a material consideration to which the local planning authority should have regard, its weight in any particular case being a matter for the authority. In refusing leave to appeal, the Court of Appeal rejected the contention that a specific BPEO determination has to be carried out.

Schiemann LJ stated (at page 807):

"[It] seems clear from the report to committee that the concept of BPEO was before them albeit that undoubtedly they lacked specific figures. It does not seem to me to be arguable that in every case particular figures must be produced. The authority is entitled to take a view as to what is the best practicable environmental option even in the absence of such figures. Like the judge I think that in substance this is what the committee did."

So too in my view a detailed BPEO exercise was not required in relation to this application, even if no such exercise had been carried out in relation to individual sites at the stage of the draft Waste Local Plan. The Council was entitled to take into account the BPEO concept in the way that it did. Authorisation of landfill at Albion in place of Moira did not involve any departure from the waste management strategy embodied in the Waste Local Plan. The

substantive advantages and disadvantages of the specific proposal, including the relative merits of Albion and Moira, were the subject of close examination. The overall effect was that sufficient consideration was given to BPEO.

Alleged failure to apply the precautionary principle

Mr Wolfe further submits that the Council failed to apply the precautionary principle, particularly in the context of the health implications of further opencast mining and landfill. A lawful application of the principle should have led it to reject the application altogether pending resolution of the uncertainties surrounding the impact of such operations, or to consider indicating that it would be prepared to grant permission for a landfill no bigger than the identified need (which could therefore be located further from local housing).

It is difficult to see precisely how Mr Wolfe seeks to rely on the precautionary principle. He accepts that the principle as contained in the EC Treaty does not have direct effect. Although it is said to illuminate the Waste Framework Directive and the implementing provisions of the 1994 Regulations (which undoubtedly reflect the principle), it does not in my view take any further the arguments already considered in relation to those matters. In so far as reliance is placed on the incorporation of the principle within government policy and its consequent relevance as a material consideration, I understand it to be conceded (and it is in any event plainly right) that the Council did take it into account as a material consideration. The submission, briefly advanced and again plucked out of the air in the course of oral argument, that the decision was Wednesbury unreasonable in its application of the principle is untenable for reasons akin to those set out above in the specific context of issues relating to human health.

After the close of oral argument, I was supplied with a copy of a decision of Jowitt J in R v.

Environment Agency, ex parte Turnbull (12 January 2000) to which reference had been made in the course of argument and on which Mr Wolfe sought to place reliance. I also received written submissions from all parties in relation to the decision. I do not propose to say more about it, however, than that I have not found the decision to be of any assistance for the purposes of the present case.

I am therefore of the view that the precautionary principle takes the applicant's case no further.

Alleged failure to consider alternatives

I put on record that this issue, although raised in the skeleton argument, was not pursued in the applicant's submissions before me.

The human rights dimension

The final main element in Mr Wolfe's submissions is the contention that the grant of planning permission in this case involves an interference with the human rights of residents and that such interference requires substantial justification which is altogether absent here. The relevant rights are the right to respect for private life under Article 8 of the Convention and the right to peaceful enjoyment of one's possessions under Article 1 of the First Protocol. It is said that the operations permitted by the grant will result in increased levels of noise and dust and will have the adverse effect on property values identified in Ms Reiblein's affidavit (and without any compensation). Reliance is placed on the Commission's decision of 17 May 1990 in Case no. 13728/88, S v. France, where it was held that noise and other types of nuisance that could affect a person's physical well-being and the value of property were capable of engaging both provisions. So far as concerns domestic law prior to the coming into force of the Human Rights Act 1998, it is submitted that ownership of land is recognised as a constitutional right

which is protected by the adoption of a variable standard of review within Wednesbury (see Chesterfield Properties Plc v. Secretary of State for the Environment [1998] JPL 568); that the decision-maker is required to provide a substantial justification in the public interest for interfering with such a right; and that the more substantial the interference, the more the court will require by way of justification if it is to find the interference to be reasonable. Such an approach is confirmed, it is submitted, by the decision in R v. Lord Saville of Newdigate, ex parte A [1999] 4 All ER 860.

Factually this is a very different and in my judgment far less serious case than S v. France. There will be some increase in levels of noise and dust, but it has not been shown that the landfill operations authorised by the permission will have any material effect on health or that the opencast mining operations authorised by the permission will have a substantially greater adverse effect than those carried on pursuant to existing consents. On the other hand, I accept that there is unchallenged evidence of an adverse effect on property values.

If Article 8 of the Convention and Article 1 of the First Protocol are engaged at all in those circumstances, the degree of interference with the rights in question does not come high up the scale. The principles applied in Chesterfield themselves reflect those laid down in R v. Ministry of Defence, ex parte Smith [1996] QB 517. I do not read the decision in R v. Lord Saville as laying down any new or different principle. Applying the relevant principles on the assumption that there exists a human rights dimension makes little difference in this case to the analysis and no difference to the outcome. It is plain that substantial justification exists for the grant of planning permission despite the adverse consequences for local residents. I have referred earlier in this judgment to the substantial benefits to which the application gives rise as compared with the existing situation. I have also dealt specifically with the effect of the

development on health and the environment. The Council's evaluation of those matters is not arguably irrational even if the issues of health and property values bring into play rights under the Convention or equivalent constitutional rights under domestic law and therefore require correspondingly more by way of justification for interference with such rights. I note too that the arguments advanced by residents in relation to the Convention were taken specifically into account.

Other submissions

The way in which Mr Wolfe presented his case means that I have probably not covered every specific aspect of his overlapping submissions in this judgment. I have, however, covered what I consider to be the main points. There is nothing else that might be remotely capable of enabling this application to succeed.

Delay

The respondents submitted that, if otherwise there were any substance in the applicant's case, I should exercise my discretion to refuse leave or to withhold relief on grounds of delay. Although the application was lodged within 6 weeks from the date of the grant of planning permission, it is said that there was still undue and unjustified delay in bringing it and that any delay in the project will have serious adverse consequences. Reliance is also placed on the work done by the second respondents at considerable cost since the grant of planning permission, in particular so as to comply with certain of the conditions attached to the grant.

In the event nothing turns on the question of delay. Had it done so, I would have held that the application was brought promptly and the respondents' arguments on delay would not have caused me to refuse permission or to withhold any relief to which the applicant might otherwise

have been entitled.

Conclusion

In my judgment this application for planning permission was considered with great care and thoroughness, within the framework of the correct legal principles.

The only issue in respect of which I consider the applicant to have had an arguable case justifying the grant of permission to apply for judicial review concerns the status of the objectives under the 1994 Regulations. Nevertheless, having heard full argument on all the issues raised, I have decided that the sensible course is to grant permission generally, rather than on a limited basis, and to deal with the substantive application as a whole. For the reasons I have given, that application is dismissed.

Ruling on orders consequential upon the judgment (this ruling does not form part of the judgment itself but follows on for convenience)

I have handed down the judgment while out on Circuit. By consent of the parties, consequential orders have been the subject of written submissions so as to make it unnecessary for the parties to attend at court. I am grateful to counsel for their submissions and for their typographical corrections to the draft judgment.

Application for judicial review dismissed.

The applicant is to pay the first respondent's costs, to be subject to detailed assessment if not agreed. I consider it appropriate that I should make a costs order which is not limited to the amount paid into court by way of security. The submission that I should not "go behind" the order for security is in any event misconceived.

The sum of £15,000 paid into court by the applicant by way of security for costs in these proceedings and any interest accrued thereon is to be paid out forthwith to the first respondent by way of interim payment towards those costs.

No order as to the costs of the second respondents. The second respondents have made clear their position in relation to the costs of any appeal or application for leave to appeal but do not seek an award of costs at this stage.

Permission to appeal refused. I do not consider there to be a real prospect of success in respect of either issue on which the applicant seeks permission. Although I have held there to have been an arguable case in relation to the objectives, on detailed examination I have not found it to be of sufficient substance to warrant permission to appeal.

