*589 West Midlands Probation Committee v Secretary of State for the Environment

Positive/Neutral Judicial Consideration

Court
Court of Appeal (Civil Division)

Judgment Date
7 November 1997

Report Citation
(1998) 76 P. & C.R. 589

Court of Appeal

(Hirst , Swinton Thomas and Pill L.JJ.):

November 7, 1997

Town and country planning—Material planning consideration pursuant to Town and Country Planning Act 1990, section 70(2) —Extension to bail hostel—Fear of crime—Impact of development on use of neighbouring land

The appellants were refused planning permission to extend a bail and probation hostel to accommodate a further 8 bailees. It was located within the green belt adjacent to a quiet suburban housing estate. On appeal, the Inspector found on the evidence, that the apprehensiveness and insecurity of nearby residents was justified because there had been an established pattern of behaviour arising from the hostel in the form of drunken and anti-social behaviour and some of the bailees had committed crimes in the area. He refused the appeal on the basis that the proposal would be likely to exacerbate the disturbance and accentuate the fears of local residents and so impair their living conditions. The Inspector's decision was upheld in the High Court. On appeal to the Court of Appeal, the appellants submitted, amongst other things, that apprehension and fear were not material planning considerations because they did not relate to the character of the use of land. They argued that a distinction had to be drawn between the use of land and the behaviour of people on and off the land.

Held, dismissing the appeal, that where it is justified, a fear of crime emanating from a proposed development is capable of being a material planning consideration to a planning decision. The pattern of anti-social behaviour arose from the use of the land as a bail hostel and did not arise merely because of the identity of the particular occupier or of particular residents.

Legislation referred to:

Town and Country Planning Act 1990, section 70(2) .

Cases referred to:

(1) *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation [1948] 1 K.B. 223* .
(2) *Blum v. Secretary of State for the Environment [1987] J.P.L. 278* .
(3) *Bushell v. Secretary of State for the Environment [1981] A.C. 75* .
(4) *East Barnet Urban District Council v. British Transport Commission [1962] 2 Q.B. 491* .
(5) *Finlay v. Secretary of State for the Environment [1983] J.P.L. 802* .
(6) *Fitzpatrick Developments Ltd v. Minister of Housing and Local Government (unreported, May 24, 1965)* .

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(7) *Gateshead Metropolitan Borough Council v. Secretary of State for the Environment [1994] 1 P.L.R. 85* .
(8) *Newbury District Council v. Secretary of State for the Environment [1981] A.C. 578* .
(9) *Newport C.B.C. v. Secretary of State for Wales (transcript June 18, 1997*).
(10) *Stringer v. Minister of Housing and Local Government [1970] 1 W.L.R. 1281; [1971] 1 All E.R. 65.*
(11) *Tesco Stores v. Secretary of State for the Environment [1995] 1 W.L.R. 759* .
(12) *Westminster City Council v. Great Portland Estates plc [1985] A.C. 661* .

Appeal by West Midlands Probation Committee against the decision of Robin Purchas, Q.C. sitting as a Deputy High Court Judge on August 20, ***590*** 1996, whereby he dismissed an application to quash a decision of the Secretary of State for the Environment who, through his Inspector, had dismissed an appeal by the appellants against a refusal by Walsall Metropolitan Borough Council to grant planning permission in respect of the extension of a bail and probation hostel at Stonnall Road, Aldridge, West Midlands. The facts are stated in the judgment of Pill L.J.

Representation

Robert Griffiths, Q.C. for the appellants.
Michael Bedford for the first respondent.
Ian Ponter for the second respondent.

Pill L.J.:

This is an appeal from a decision of Mr Robin Purchas, Q.C. sitting as a Deputy High Court Judge on August 20, 1996. The judge dismissed an application to quash a decision of the Secretary of State for the Environment ("the Secretary of State") whereby he dismissed an appeal by West Midlands Probation Committee ("the Committee") against a refusal by Walsall Metropolitan Borough Council ("the Council") to grant planning permission in respect of the extension of a bail and probation hostel at Stonnall Road, Aldridge, West Midlands. The appeal was determined by an Inspector appointed by the Secretary of State and was announced by letter dated December 7, 1995 following a local public inquiry.

Planning permission was granted in 1980 for the erection of a secure unit for severely disturbed adolescents. The unit formed part of the Druids Heath Community House complex, most of which had later been transformed into a nursing home. The unit was converted in 1989 to a bail hostel, it being determined, given the existing permission, that planning permission was not required for the conversion. Bail and probation hostels were treated by the Council, without objection, as a *sui generis* use, outside the specified use classes in the Use Classes Order .

The hostel provides accommodation for up to 12 bailees, a typical stay being about four weeks. They are required to reside at the hostel by virtue of a condition of residence imposed by the court when granting bail. A curfew operates between 11 p.m. and 6 a.m. During the day bailees are normally supervised by two professional officers and up to four administrative or domestic staff are also involved in running the hostel. At night, an assistant warden and a relief supervisor are present at the hostel.

The committee is a body corporate established under the Probation Services Act 1993 and its responsibilities with respect to the probation service are set out in the Act. Pursuant to section 7 of the Act, the committee is empowered to provide hostels to accommodate those remanded on bail with a condition of residence at an approved bail or bail and probation hostel, those subject to a probation order including a condition to reside at such a hostel, and prisoners released on licence from custody with a condition of residence at such a hostel. Section 27 of the Act empowers the Home Secretary to approve a hostel and he is also empowered to make grants for expenditure in providing bail and probation hostels under section 17 of the Act. In December 1992, the Home Office issued a Guidance Note entitled "Approved Bail and Probation/Bail Hostels Development Guide". It included guidelines on site selection.

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Aldridge is described by the Inspector as a modest town and is two miles from Walsall. The hostel is described as being at the very edge of Aldridge and within the West Midlands Green Belt. Opposite, the Inspector found, ***591** stand the neat houses and bungalows of a suburban estate. Adjacent to the hostel is a large nursing home in extensive grounds and a substantial dwelling. The proposal involved a two-storey extension to the side of the building. It would accommodate an additional eight bailees and there would be some increase in staffing.

Planning permission was refused by the council on January 3, 1995, contrary to the advice of the Director of Engineering and Town Planning. The reason given was:

> The residents of the area and the adjoining properties now experience severe and material problems and incidents arising from the existing use of the premises, which are incompatible with the surrounding residential area. The further expansion of a use which, in the considered view of the Local Planning Authority, is unsuitable for that area has the potential to further exacerbate these problems, to the detriment of the amenities which local residents could reasonably be expected to enjoy.

The Inspector defined the issues in the case as follows:

(1) Whether the scheme would noticeably impair the living conditions that nearby residents might reasonably expect to enjoy in an area like this and, if so,
(2) Whether the need to provide more places in bail hostels throughout the West Midlands would provide a sufficiently cogent reason to warrant expansion of the hostel at Stonnall Road.

On the first issue, the Inspector found that the hostel had attracted numerous police visits, many late at night or early in the morning. Some of the visits involved arrests, personal injuries or the breach of bail conditions. The Inspector stated that:

> It is not surprising that local residents living in such a quiet, sylvan and suburban street should be seriously disturbed by the noise of police cars, police radios and the impact of flashing lights close to their homes, particularly when events occur at times of relative peace and quiet or when police cars have to wait in the street while the hostel gates are opened. The evidence demonstrates that residents might well have to endure such occurrences at fairly regular and frequent intervals. And, of course, the need for ambulances or other vehicles to attend in emergencies must add to this intrusive impact.

The Inspector went on to consider the implications of an expansion of the hostel. He concluded:

> I consider that the proposed expansion of this hostel would be likely to significantly increase the disturbance endured by those living nearby.

He next considered the apprehensiveness and insecurity of residents living in the vicinity of the hostel and stated that:

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> Such harmful effects would be capable of being a material consideration provided, of course, that there were reasonable grounds for entertaining them; unsubstantiated fears—even if keenly felt—would not warrant such consideration, in my view.

The Inspector found that residents' apprehensions had some justification. Having considered the evidence, he referred to bailees fighting in the street, ***592** or moaning and mutilating themselves, or smashing crockery in private driveways and milk bottles in the road. These he described as "disturbing incidents". Bailees had committed robberies in the area and had broken into cars. Reference is made to "drunken, intimidating or loutish behaviour". The Inspector stated:

> I consider that such occurrences give reasonable grounds for residents to feel apprehensive; and, the cumulative effect of such events could reasonably be expected to fuel a genuine "fear of crime". That is recognised as a significant problem in its own right particularly if affecting the more vulnerable sections of the community, like some of the relatively elderly people here (Circular 5/94). I think that expansion of the hostel would increase the potential frequency of those occurrences and so exacerbate the "fear of crime" that already exists.

He noted that:

> Rowdy or raucous activity is particularly noticeable amongst the quiet drives and avenues of this neat suburban estate … It would be hard to imagine a more incongruous juxtaposition. Quite apart from the fact that there are numerous instances where the identity of an occupant is crucial to the acceptability of a planning proposal (as Circular 11/95 clearly demonstrates), a defining characteristic of using land for a "probation and bail hostel" is that it may provide accommodation for probationers or a particular category of bailee. The proposed extension inevitability increases the possibility of residents encountering more bailees. I consider that local people would thus have good reason to feel more apprehensive than they do now.

The Inspector concluded as follows:

> Taking all those matters into account, I conclude that the expansion of this hostel would be likely to exacerbate the disturbance, and accentuate the fears of those living nearby, and so noticeably impair the living conditions that residents might reasonably expect to enjoy in an area like this.

On the first issue, Mr Robert Griffiths, Q.C. for the committee, submits that apprehension and fear are not material planning considerations since they do not relate to the character of the use of land. Anti-social and criminal behaviour of some of the hostel residents on or near the land was not a material planning consideration. As Mr Griffiths put it, the isolated and idiosyncratic behaviour of some of the residents did not stamp their identity onto the use of the land. A distinction has to be drawn between the use of land and behaviour of people on and off the land. Moreover, apprehension and fear cannot be measured objectively and provide no basis for establishing that there is demonstrable harm to interests of acknowledged

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importance. Anti-social or criminal behaviour should not be taken into account; the application should be considered on the assumption that the use of the land would be lawful and activities on it would not involve breaches of the law.

It is also submitted that, by his reference to "the identity of an occupant," the Inspector misunderstood Circular 11/95. The Circular is concerned with planning conditions and provides only that, sometimes and exceptionally, the identity of the occupier of land may be relevant for the purpose of ***593** *granting* permission by attaching an occupancy condition where otherwise permission would have to be refused. It contains no warrant for *refusing* planning permission by reason of the identity of the occupier.

I say at once that I accept Mr Griffiths' submission that, in the present context, reference to Circular 11/95 was inappropriate. Under the heading "Occupancy: general conditions," paragraph 92 provides:

> Since planning controls are concerned with the use of land rather than the identity of the user, the question of who is to occupy premises for which permission is to be granted will normally be irrelevant. Conditions restricting occupancy to a particular occupier or class of occupier should only be used when special planning grounds can be demonstrated, and where the alternative would normally be refusal of permission.

The following paragraphs of the Circular deal with a series of situations in which permission for development would normally be refused but there are grounds for granting it to meet a particular need. Examples are "granny" annexes ancillary to the main dwelling-house, permission for a dwelling to meet an identified need for staff accommodation, and permission to allow a house to be built to accommodate an agricultural or forestry worker. Planning conditions which tie the occupation of the dwelling to the identified need will be appropriate. That principle has, in my view, no bearing upon the present issue as to whether permission can be refused because of the behaviour of bailees and I disagree with the judge on that point. However, I regard the Inspector's reference to the Circular as merely an aside which does not affect the acceptability of his reasoning.

Section 70(2) of The Town and Country Planning Act 1990 requires a planning authority upon an application for planning permission to have regard *inter alia* to "material considerations". In *Stringer v. Minister of Housing and Local Government [1970] 1 W.L.R. 1281* , Cooke J. stated at p. 1295:

> In principle it seems to me that any consideration which relates to the use and development of land is capable of being a planning consideration. Whether a particular consideration falling within that broad class is material in any given case will depend on the circumstances. However, it seems to me that in considering an appeal the Minister is entitled to ask himself whether the proposed development is compatible with the proper and desirable use of other land in the area. For example if permission is sought to erect an explosives factory adjacent to a school, the Minister must surely be entitled and bound to consider the question of safety. That plainly is not an amenity consideration.

Cooke J. cited the statement of Widgery J. in *Fitzpatrick Developments Ltd v. Minister of Housing and Local Government (unreported) May 24, 1965* that; "An essential feature of planning must be the separation of different uses or activities which are incompatible the one with the other".

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In *Westminster Council v. Great Portland Estates plc [1985] A.C 661* at 670 Lord Scarman stated that:

> The test, therefore, of what is a "material consideration" in the preparation of plans or in the control of development … is whether it serves a planning purpose: see *Newbury District Council v. Secretary of State for the Environment [1981] A.C. 578* , 599 *per* Viscount Dilhorne. ***594*** And a planning purpose is one which relates to the character of the use of the land.

Mr Bedford, for the Secretary of State, relies on two other authorities to demonstrate circumstances in which the impact of a development upon neighbouring land may operate as a material consideration. In *Finlay v. Secretary of State for the Environment [1983] J.P.L. 802* the Secretary of State refused planning permission for use of premises as a private members club where sexually explicit films were shown. The Secretary of State regarded as an important consideration the fact that the residential use of a maisonette above the appeal site "shared its entrance with the exit from the cinema club. This fact, particularly in view of the nature of the films being shown, is likely to deter potential occupiers and could effectively prevent the occupation of this residential accommodation". It was submitted that the Secretary of State had taken into account an immaterial consideration, namely the nature of the films being shown. Forbes J. is reported as stating that:

> The Secretary of State was not saying "I dislike pornographic films" what he was saying was a pure planning matter, namely if people show pornographic films downstairs, it was likely to be a deterrent to potential occupiers of the residential accommodation upstairs. That may mean that the accommodation may be difficult to let or use for residential purposes. That seemed to him [Forbes J.] to be a wholly unexceptionable way of looking at it from a planning point of view. In other words, that took, in his view, a planning judgment made by the Secretary of State with which the court should not interfere.

In *Blum v. The Secretary of State for the Environment [1987] J.P.L. 278* , an enforcement notice was served in respect of a riding school. Upon an application for planning permission, the Inspector identified as the main issue whether or not a riding school use caused significant harm to the bridleway network in the adjoining public open land and detracted from its visual amenities as part of a conservation area. He found that the very poor state of the network was attributable in large part to horses coming from the appeal site. Simon Brown J. stated, at p. 281, that he:

> recognised that a planning authority might very well place greater weight on questions of, for instance, highway danger, and to considerations of purely visual amenity but that was a very far cry from holding it immaterial and impermissible and an abuse of planning powers to have regard to the environmental impact of a development of this character upon the visual amenities of surrounding land.

The relevance of public concern was considered by this Court in *Gateshead M.B.C. v. Secretary of State for the Environment [1994] 1 P.L.R. 85* . A clinical waste incinerator was proposed and there was public concern about any increase in the emission of noxious substances, especially dioxins, from the proposed plant. Glidewell L.J., with whom Hoffman and Hobhouse L.J., agreed stated:

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> 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—indeed very little development of any kind— would ever be permitted.

***595** In the recent decision of this court in *Newport C.B.C. v. Secretary of State for Wales (transcript June 18, 1997)* an award of costs by the Secretary of State was challenged on the basis that the Inspector had been inconsistent in his reasoning on the question of public perception of danger from a proposed chemical waste treatment plant. Hutchison L.J. stated that the Secretary of State had made an error of law in reaching a decision "on the basis that the genuine fears on the part of the public, unless objectively justified, could never amount to a valid ground for refusal" (page 14E). Aldous L.J. stated (page 15D) that the planning authority should have accepted; "that the perceived fears, even though they were not soundly based upon scientific or logical fact, were a relevant planning consideration".

Mr Bedford relies upon the above statements to support his submission that public concern about the effect of a proposed development is a material planning consideration. The difference between Glidewell L.J., on the one hand, and Hutchison and Aldous L.JJ. on the other, need not be resolved in the present case because the Inspector found that the fears were justified. Mr Griffiths submits that there is a distinction between fear of noxious substances emanating from a site and fear of antisocial behaviour. He also submits that the concession made in the *Newport* case that public perception is relevant to the decision whether planning permission should be granted (page 11A) should not have been made.

The manner in which the Inspector dealt with the second issue he identified, that of need, is also challenged in this appeal. It is submitted that the Inspector erred in going behind the judgment of the committee and of the Home Office. Their view that there was a compelling need to provide more hostel places in the West Midlands should not have been subjected to investigation. The Chief Probation Officer for the West Midlands Probation Service gave evidence.

The committee's evidence, as summarized by the Inspector, was that demand for places exceeded supply by almost 13 per cent. The Home Office had compelled the committee to close two existing hostels with the loss of 31 beds. The Home Office had agreed with the proposed extension at Stonnall Road. It was one of the hostels identified for expansion. Extension would be physically possible at reasonable cost, the demand from local courts was high and the hostel is conveniently located. The other options were to create "cluster units," where bailees are not under direct supervision, or to countenance less onerous bail conditions. Either possibility could expose the community to more risk from criminal elements.

The Inspector stated that he was not convinced that the inability to find accommodation for some of those referred necessarily indicated that there was a pressing need for additional hostel space. He did not find a compelling requirement to replace some of the 31 bed-spaces lost in the closure of the other hostels. He thought it inconsistent to claim that the spaces were essential when the committee and the Home Office had implemented the closure without any guarantee that replacement spaces could easily be found. The lack of bed-spaces could not be regarded as an unacceptable impediment; "since it must have been realised that an inevitable consequence of the hostel closures would be to deprive the courts of their capacity for however long it took to find suitable replacements". The need for planning permission did not appear to have been countenanced.

Having made his analysis of need, the Inspector stated that "even if there is a need for more hostel space in the West Midlands I consider that there is ***596** little justification for providing more of it at Stonnall Road". He concluded that the need to

provide more places in bail hostels throughout the West Midlands would not provide a sufficiently cogent reason to warrant expansion of the hostel at Stonnall Road.

Mr Griffiths accepts that the Inspector was entitled to balance need for additional hostel spaces with other material considerations and to decide whether the need should be met on this particular site. What he was not entitled to do, Mr Griffiths submits, was to challenge the committee's assessment of the need itself. That was a wrongful intrusion into matters within the sphere of the Home Office and the Secretary of State for the Environment (represented by the Inspector) should not thwart the policy of the Home Office.

A further, and separate, point taken by Mr Griffiths is that the Inspector should not have had regard to the "site selection" criteria in the Home Office Guidance Note. Paragraph 2.0.3 reads:

> Finding a site in a suitable location for a hostel is not easy and can be very time consuming. The purpose of hostels is to enable residents to remain under supervision in the community so, as far as possible, hostels should be sited in areas where they can have good access to public transport, employment, social, recreational and other community facilities. This may not always be possible, but any selection of a site should take into account the possible impact of the hostel on local surroundings.

The guidance was not intended for the Inspector, it is submitted, but for the committee and was irrelevant to the Inspector's function as a planning Inspector. The Inspector formed the view that the Home Office's own criteria were not met at the appeal site. In the Inspector's opinion, for example, there was not "good access to public transport, employment, social, recreational and other community facilities". (It is not submitted by the Secretary of State that the last sentence in paragraph 2.03 is relevant to the first issue in this appeal.)

The Inspector also referred to Circular 5/94 when considering fear of crime. The Circular does not in my view throw light on whether such fear is a "material consideration" under the Planning Acts. The Circular is entitled "Planning out Crime" and is said to provide "fresh advice about planning considerations in crime prevention, particularly through urban design measures". The Inspector, in the paragraph already set out, echoes the wording of paragraph A1 of the Circular where it is stated: "Fear of crime, whether warranted or not, is a significant problem in its own right, particularly among those in the more vulnerable sectors of society, such as the elderly, women and ethnic minorities". I regard that as an uncontestable statement but not one which throws light upon the present issue. As the title indicates, the Circular is concerned with the importance of security in the design of development. It is stated in paragraph 3 that, "there should be a balanced approach to design which attempts to reconcile the visual quality of a development with the need for crime prevention". That consideration has no bearing upon the present issue and the Inspector's adoption of a part of the narrative in the Circular does not involve a misdirection upon the point at issue.

In considering the evidence in this case, I do not consider that the "disturbing incidents" and "occurrences" found by the Inspector to have ***597** occurred can be divorced or treated as a separate consideration from the concerns and fears of residents which he also found to be present. The fears arise from the disturbances and the Inspector was entitled to link them in the way he did in his conclusions. It is the impact of the occurrences upon the use of neighbouring land which is said to be relevant.

These propositions, relevant to the first issue, emerge from the authorities:

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(1) The impact of a proposed development upon the use of and activities upon neighbouring land may be a material consideration.
(2) In considering the impact, regard may be had to the use to which the neighbouring land is put.
(3) Justified public concern in the locality about emanations from land as a result of its proposed development may be a material consideration.

The contentious point in the present case is whether behaviour on and emanating from the development land in present circumstances attracts the operation of those principles. The "particular purpose of a particular occupier" of land is not normally a material consideration in deciding whether the development should be permitted. (*East Barnet UDC v. British Transport Commission [1962] 2 Q.B. per* Lord Parker C.J. at p. 491.)

A significant feature of the present case is the pattern of conduct and behaviour found by the Inspector to have existed over a substantial period of time. I include as part of that pattern the necessary responses of the police to events at the hostel. That behaviour is intimately connected with the use of the land as a bail and probation hostel. As analyzed by the Inspector, it was a feature of the use of the land which inevitably had impact upon the use of other land in the area. On the evidence, the Inspector was entitled not to dismiss it as isolated and idiosyncratic behaviour of particular residents. The established pattern of behaviour found by the Inspector to exist, and to exist by reason of the use of the land as a bail and probation hostel, related to the character of use of the land, use as a bail and probation hostel. Given such an established pattern, I would not distinguish for present purposes the impact of the conduct upon the use of adjoining land from the impact of, for example, polluting discharges by way of smoke or fumes or the uses in *Finlay* and *Blum* . There can be no assumption that the use of the land as a bail and probation hostel will not interfere with the reasonable use of adjoining land when the evidence is that it does. Fear and concern felt by occupants of neighbouring land is as real in this case as in one involving polluting discharges and as relevant to their reasonable use of the land. The pattern of behaviour was such as could properly be said to arise from the use of the land as a bail and probation hostel and did not arise merely because of the identity of the particular occupier or of particular residents.

If that is right, it is a question of planning judgment what weight should be given to the effect of the activity upon the use of the neighbouring land. (*Tesco Stores v. Secretary of State for the Environment [1995] 1 W.L.R. 759 per* Lord Hoffmann at page 780F.) The weight to be given in that context to the more intensive use of the hostel proposed by the development at issue is also a question of planning judgment.

Before expressing general conclusions, I turn to the second issue. Had the proposal been by a private developer for residential or shopping use, for example, it would have been open to the Inspector to consider need as a ***598*** material consideration. Mr Griffiths relies on the fact that the committee are a statutory body acting under the statute and government guidelines and he submits that different considerations apply.

I regard it as a significant feature of the present case that, neither in their evidence given by the Chief Probation Officer, nor in their submissions, did the committee seek to limit the scope of the Inspector's investigation of need. The witness was cross-examined upon need in the usual way. It is not suggested that a statement of government policy, not susceptible to challenge, was placed before the public local inquiry. That being so, I am not surprised that the Inspector conducted inquiries into need as he did.

The question of the extent to which policy matters may be investigated at a public local inquiry was considered by the House of Lords, in the context of road proposals, and in different circumstances, in *Bushell v. Secretary of State for the Environment [1981] A.C. 75* . In the present context, there is a potential clash of interest between the Secretary of State for the Environment and the Secretary of State for the Home Department and it may fall for consideration whether there are matters of Home

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Office policy which ought not to be subject to challenge at a local public inquiry into a planning appeal. Upon the procedure followed in this case, however, I do not consider that the Inspector can be criticized for adopting the course he did.

In any event, the Inspector directed his attention to development on the particular site and, subject to the committee's subsidiary point, he stated his conclusion in terms that, even if the need existed, there was "little justification for providing more of it at Stonnall Road." He added, in relation to meeting the need, that; "a location like this one, on the very edge of a small town and in the sort of quiet suburb where the impact of the hostel must be particularly apparent, would be incongruous". That was a proper approach for a planning Inspector to take. I could not envisage a Home Office policy statement which in effect directed the Secretary of State for the Environment to provide for the need at a particular location as distinct from identifying the need. I do express the view that the extent of the Inspector's assumed power to challenge Home Office policy, and indeed criticize it as inconsistent, may be scrutinized in a future case. His conduct does not however, invalidate the conclusion he reached in this case. His finding was based upon the application of planning criteria to a particular site and followed a procedure at the Inquiry to which no objection was taken.

The committee's further submission is in relation to the use made by the Inspector of the site selection criteria, already cited, in the Home Office Guidance Note. The criteria included matters which an Inspector may properly regard as material planning considerations. They may be intended for guidance of committees seeking to establish hostels but, in so far as the considerations set out are material planning considerations, I see no reason why the Inspector should not adopt them, if he sees fit, in considering whether the development on the site should be permitted. He is not obliged to assume that the particular site, from the planning point of view, meets the planning criteria stated by the Home Office.

The Inspector's application of the criteria in the Guidance Note to the appeal site was also attacked on *Wednesbury* grounds. His conclusions were in my view within the range permitted as a matter of planning judgment.

The Inspector expressed as his general conclusion that; "the need to provide more places in bail hostels throughout the West Midlands would not provide a sufficiently cogent reason to warrant expansion of the hostel at ***599*** Stonnall Road". For the reasons I have given, and in agreement with the judge, that was in my judgment a conclusion he was entitled to reach and I would dismiss this appeal.

Swinton Thomas L.J.:

I agree.

Hirst L.J.:

I also agree.

Representation

Solicitors— Wragge and Co. , Birmingham; Treasury Solicitor ; Solicitor to Walsall Metropolitan Borough Council.

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Order

Reporter —Megan Thomas.

Appeal dismissed with costs. Leave to appeal to House of Lords refused. ***600***

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IN THE SUPREME COURT OF JUDICATURE QBC0F 96/1605/D
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
CROWN OFFICE LIST
(Mr. Robin Purchas Q.C.
sitting as Deputy High Court Judge)

Royal Courts of Justice
Friday, 7th November 1997

Before:

LORD JUSTICE HIRST
LORD JUSTICE SWINTON THOMAS
LORD JUSTICE PILL

WEST MIDLANDS PROBATION COMMITTEE Appellan

-v-

(1) SECRETARY OF STATE FOR THE ENVIRONMENT
(2) WALSALL METROPOLITAN BOROUGH COUNCIL Respondents

(Transcript of the Handed Down Judgment of
Smith Bernal Reporting Limited,
180 Fleet Street, London, EC4A 2HD.
Telephone No: 0171-421 4040.
Shorthand Writers to the Court.)

MR. R. GRIFFITHS Q.C. (instructed by Messrs Wragge & Co., Birmingham) appeared on behalf of the Appellant/Appellant.

MR. M. BEDFORD (instructed by the Treasury Solicitor) appeared on behalf of the Respondent/Respondent.

J U D G M E N T
(As approved by the Court)
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Pill LJ:

This is an appeal from a decision of Mr Robin Purchas QC sitting as a Deputy High

Court Judge on 20 August 1996. The judge dismissed an application to quash a decision of the Secretary of State for the Environment ("the Secretary of State") whereby he dismissed an appeal by West Midlands Probation Committee ("the Committee") against a refusal by Walsall Metropolitan Borough Council ("the Council") to grant planning permission in respect of the extension of a bail and probation hostel at Stonnall Road, Aldridge, West Midlands. The appeal was determined by an Inspector appointed by the Secretary of State and was announced by letter dated 7 December 1995 following a local public inquiry.

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The hostel provides accommodation for up to 12 bailees, a typical stay being about 4 weeks. They are required to reside at the hostel by virtue of a condition of residence imposed by the court when granting bail. A curfew operates between 11 pm and 6 am. During the day bailees are normally supervised by 2 professional officers and up to 4 administrative or domestic staff are also involved in running the hostel. At night, an assistant warden and a relief supervisor are present at the hostel.

The Committee is a body corporate established under the Probation Services Act 1993 and its responsibilities with respect to the probation service are set out in the Act.

Pursuant to s 7 of the Act, the Committee is empowered to provide hostels to accommodate those remanded on bail with a condition of residence at an approved bail or bail and probation hostel, those subject to a probation order including a condition to reside at such a hostel and prisoners released on licence from custody with a condition of residence at such a hostel. S 27 of the Act empowers the Home Secretary to approve a hostel and he is also empowered to make grants for expenditure in providing bail and probation hostels under s 7 of the Act. In December 1992, the Home Office issued a Guidance Note entitled "Approved Bail and Probation/Bail Hostels Development Guide". It included guidelines on site selection.

Aldridge is described by the Inspector as a modest town and is 2 miles from Walsall. The hostel is described as being at the very edge of Aldridge and within the West Midlands Green Belt. Opposite, the Inspector found, stand the neat houses and bungalows of a suburban estate. Adjacent to the hostel is a large nursing home in extensive grounds and a substantial dwelling. The proposal involved a two-storey extension to the side of the building. It would accommodate an additional 8 bailees and there would be some increase in staffing.

Planning permission was refused by the Council on 3 January 1995, contrary to the advice of the Director of Engineering and Town Planning. The reason given was:

> "The residents of the area and the adjoining properties now experience severe and material problems and incidents arising from the existing use of the premises, which are incompatible with the surrounding residential area. The further expansion of a use which, in the considered view of the Local Planning Authority, is unsuitable for that area has the potential to further exacerbate these problems, to the detriment of the amenities which local residents could reasonably be expected to enjoy."

The Inspector defined the issues in the case as follows:

> "1. Whether the scheme would noticeably impair the living conditions that nearby residents might reasonably expect to enjoy in an area like this and, if so,
>
> 2. Whether the need to provide more places in bail hostels throughout the West Midlands would provide a sufficiently cogent reason to warrant expansion of the hostel at Stonnall Road."

On the first issue, the Inspector found that the hostel had attracted numerous police visits, many late at night or early in the morning. Some of the visits involved arrests, personal injuries or the breach of bail conditions. The Inspector stated that:

> "It is not surprising that local residents living in such a quiet, sylvan and suburban street should be seriously disturbed by the noise of police cars, police radios and the impact of flashing lights close to their homes, particularly when events occur at times of relative peace and quiet or when police cars have to wait in the street while the hostel gates are opened. The evidence demonstrates that residents might well have to endure such occurrences at fairly regular and frequent intervals. And, of course, the need for ambulances or other vehicles to attend in emergencies must add to this intrusive impact."

The Inspector went on to consider the implications of an expansion of the hostel. He concluded:

> "I consider that the proposed expansion of this hostel would be likely to significantly increase the disturbance endured by those living nearby."

He next considered the apprehensiveness and insecurity of residents living in the vicinity of the hostel and stated that:

> "Such harmful effects would be capable of being a material consideration provided, of course, that there were reasonable grounds for entertaining them; unsubstantiated fears - even if keenly felt - would not warrant such consideration, in my view."

The Inspector found that residents' apprehensions had some justification. Having considered the evidence, he referred to bailees fighting in the street, or moaning and mutilating themselves, or smashing crockery in private driveways and milk bottles in the road. These he described as "disturbing incidents". Bailees had committed robberies

in the area and had broken into cars. Reference is made to "drunken, intimidating or loutish behaviour". The Inspector stated:

> "I consider that such occurrences give reasonable grounds for residents to feel apprehensive; and, the cumulative effect of such events could reasonably be expected to fuel a genuine 'fear of crime'. That is recognised as a significant problem in its own right particularly if affecting the more vulnerable sections of the community, like some of the relatively elderly people here (Circular 5/94). I think that expansion of the hostel would increase the potential frequency of those occurrences and so exacerbate the 'fear of crime' that already exists."

He noted that:

> "Rowdy or raucous activity is particularly noticeable amongst the quiet drives and avenues of this neat suburban estate ¼ It would be hard to imagine a more incongruous juxtaposition. Quite apart from the fact that there are numerous instances where the identity of an occupant is crucial to the acceptability of a planning proposal (as Circular 11/95 clearly demonstrates), a defining characteristic of using land for a 'probation and bail hostel' is that it may provide accommodation for probationers or a particular category of bailee. The proposed extension inevitability increases the possibility of residents encountering more bailees. I consider that local people would thus have good reason to feel more apprehensive than they do now."

The Inspector concluded as follows:

> "Taking all those matters into account, I conclude that the expansion of this hostel would be likely to exacerbate the disturbance, and accentuate the fears of those living nearby, and so noticeably impair the living conditions that residents might reasonably expect to enjoy in an area like this."

On the first issue, Mr Robert Griffiths QC, for the Committee, submits that apprehension and fear are not material planning considerations since they do not relate to the character of the use of land. Anti-social and criminal behaviour of some of the hostel residents on or near the land was not a material planning consideration. As Mr Griffiths put it, the isolated and idiosyncratic behaviour of some of the residents did not stamp their identity onto the use of the land. A distinction has to be drawn between the use of land and behaviour of people on and off the land. Moreover, apprehension and

fear cannot be measured objectively and provide no basis for establishing that there is demonstrable harm to interests of acknowledged importance. Anti-social or criminal behaviour should not be taken into account; the application should be considered on the assumption that the use of the land would be lawful and activities on it would not involve breaches of the law.

It is also submitted that, by his reference to "the identity of an occupant", the Inspector misunderstood Circular 11/95. The Circular is concerned with planning conditions and provides only that, sometimes and exceptionally, the identity of the occupier of land may be relevant for the purpose of granting permission by attaching an occupancy condition where otherwise permission would have to be refused. It contains no warrant for refusing planning permission by reason of the identity of the occupier.

I say at once that I accept Mr Griffiths' submission that, in the present context, reference to Circular 11/95 was inappropriate. Under the heading "Occupancy: general conditions", paragraph 92 provides:

> "Since planning controls are concerned with the use of land rather than the identity of the user, the question of who is to occupy premises for which permission is to be granted will normally be irrelevant. Conditions restricting occupancy to a particular occupier or class of occupier should only be used when special planning grounds can be demonstrated, and where the alternative would normally be refusal of permission."

The following paragraphs of the Circular deal with a series of situations in which permission for development would normally be refused but there are grounds for granting it to meet a particular need. Examples are "granny" annexes ancillary to the main dwelling house, permission for a dwelling to meet an identified need for staff accommodation and permission to allow a house to be built to accommodate an

agricultural or forestry worker. Planning conditions which tie the occupation of the dwelling to the identified need will be appropriate. That principle has, in my view, no bearing upon the present issue as to whether permission can be refused because of the behaviour of bailees and I disagree with the judge on that point. However, I regard the Inspector's reference to the Circular as merely an aside which does not affect the acceptability of his reasoning.

S 70(2) of The Town and Country Planning Act 1990 requires a planning authority upon an application for planning permission to have regard *inter alia* to "material considerations". In *Stringer* v *Minister of Housing and Local Government* [1970] 1 WLR 1281 Cooke J stated at p 1295:

> "In principle it seems to me that any consideration which relates to the use and development of land is capable of being a planning consideration. Whether a particular consideration falling within that broad class is material in any given case will depend on the circumstances. However, it seems to me that in considering an appeal the Minister is entitled to ask himself whether the proposed development is compatible with the proper and desirable use of other land in the area. For example if permission is sought to erect an explosives factory adjacent to a school, the Minister must surely be entitled and bound to consider the question of safety. That plainly is not an amenity consideration."

Cooke J cited the statement of Widgery J in *Fitzpatrick Developments Ltd* v *Minister of Housing and Local Government* (unreported) May 25 1965 that "An essential feature of planning must be the separation of different uses or activities which are incompatible the one with the other".

In *Westminster Council* v *Great Portland Estates plc* [1985] AC 661 at 670 Lord Scarman stated that:

> "The test, therefore, of what is a 'material consideration' in the preparation of plans or in the control of development ¼ is whether it serves a planning purpose:

> see *Newbury District Council* v *Secretary of State for the Environment* [1981] AC 578, 599 per Viscount Dilhorne. And a planning purpose is one which relates to the character of the use of the land."

Mr Bedford, for the Secretary of State, relies on two other authorities to demonstrate circumstances in which the impact of a development upon neighbouring land may operate as a material consideration. In *Finlay* v *Secretary of State for the Environment & Anor* [1983] JPL 802 the Secretary of State refused planning permission for use of premises as a private members club where sexually explicit films were shown. The Secretary of State regarded as an important consideration the fact that the residential use of a maisonette above the appeal site "shared its entrance with the exit from the cinema club. This fact, particularly in view of the nature of the films being shown, is likely to deter potential occupiers and could effectively prevent the occupation of this residential accommodation". It was submitted that the Secretary of State had taken into account an immaterial consideration, namely the nature of the films being shown. Forbes J is reported as stating that:

> "The Secretary of State was not saying 'I dislike pornographic films' what he was saying was a pure planning matter, namely if people show pornographic films downstairs, it was likely to be a deterrent to potential occupiers of the residential accommodation upstairs. That may mean that the accommodation may be difficult to let or use for residential purposes.
> That seemed to him [Forbes J] to be a wholly unexceptionable way of looking at it from a planning point of view. In other words, that took, in his view, a planning judgment made by the Secretary of State with which the court should not interfere."

In *Blum* v *The Secretary of State for the Environment & Anor* [1987] JPL 278, an enforcement notice was served in respect of a riding school. Upon an application for planning permission, the Inspector identified as the main issue whether or not a riding school use caused significant harm to the bridleway network in the adjoining public

open land and detracted from its visual amenities as part of a conservation area. He found that the very poor state of the network was attributable in large part to horses coming from the appeal site. Simon Brown J stated, at p 281, that he:

> "recognised that a planning authority might very well place greater weight on questions of, for instance, highway danger, and to considerations of purely visual amenity but that was a very far cry from holding it immaterial and impermissible and an abuse of planning powers to have regard to the environmental impact of a development of this character upon the visual amenities of surrounding land."

The relevance of public concern was considered by this Court in *Gateshead MBC* v *Secretary of State for the Environment* [1994] 1 PLR 85. A clinical waste incinerator was proposed and there was public concern about any increase in the emission of noxious substances, especially dioxins, from the proposed plant. Glidewell LJ, with whom Hoffman LJ and Hobhouse LJ, agreed stated:

> "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 - indeed very little development of any kind - would ever be permitted."

In the recent decision of this Court in *Newport CBC* v *Secretary of State for Wales & Anor* (transcript 18 June 1997) an award of costs by the Secretary of State was challenged on the basis that the Inspector had been inconsistent in his reasoning on the question of public perception of danger from a proposed chemical waste treatment plant. Hutchison LJ stated that the Secretary of State had made an error of law in reaching a decision "on the basis that the genuine fears on the part of the public, unless objectively justified, could never amount to a valid ground for refusal". (p 14E). Aldous LJ stated (p 15D) that the planning authority should have accepted "that the perceived fears, even though they were not soundly based upon scientific or logical fact, were a

relevant planning consideration".

Mr Bedford relies upon the above statements to support his submission that public concern about the effect of a proposed development is a material planning consideration. The difference between Glidewell LJ, on the one hand, and Hutchison and Aldous LJJ on the other, need not be resolved in the present case because the Inspector found that the fears were justified. Mr Griffiths submits that there is a distinction between fear of noxious substances emanating from a site and fear of antisocial behaviour. He also submits that the concession made in the *Newport* case that public perception is relevant to the decision whether planning permission should be granted (p 11A) should not have been made.

The manner in which the Inspector dealt with the second issue he identified, that of need, is also challenged in this appeal. It is submitted that the Inspector erred in going behind the judgment of the Committee and of the Home Office. Their view that there was a compelling need to provide more hostel places in the West Midlands should not have been subjected to investigation. The Chief Probation Officer for the West Midlands Probation Service gave evidence.

The Committee's evidence, as summarised by the Inspector, was that demand for places exceeded supply by almost 13%. The Home Office had compelled the Committee to close two existing hostels with the loss of 31 beds. The Home Office had agreed with the proposed extension at Stonnall Road. It was one of the hostels identified for expansion. Extension would be physically possible at reasonable cost, the demand from local courts was high and the hostel is conveniently located. The other options were to create "cluster units", where bailees are not under direct supervision or to

countenance less onerous bail conditions. Either possibility could expose the community to more risk from criminal elements.

The Inspector stated that he was not convinced that the inability to find accommodation for some of those referred necessarily indicated that there was a pressing need for additional hostel space. He did not find a compelling requirement to replace some of the 31 bed-spaces lost in the closure of the other hostels. He thought it inconsistent to claim that the spaces were essential when the Committee and the Home Office had implemented the closure without any guarantee that replacement spaces could easily be found. The lack of bed-spaces could not be regarded as an unacceptable impediment "since it must have been realised that an inevitable consequence of the hostel closures would be to deprive the courts of their capacity for however long it took to find suitable replacements". The need for planning permission did not appear to have been countenanced.

Having made his analysis of need, the Inspector stated that "even if there is a need for more hostel space in the West Midlands I consider that there is little justification for providing more of it at Stonnall Road". He concluded that the need to provide more places in bail hostels throughout the West Midlands would not provide a sufficiently cogent reason to warrant expansion of the hostel at Stonnall Road.

Mr Griffiths accepts that the Inspector was entitled to balance need for additional hostel spaces with other material considerations and to decide whether the need should be met on this particular site. What he was not entitled to do, Mr Griffiths submits, was to challenge the Committee's assessment of the need itself. That was a wrongful intrusion into matters within the sphere of the Home Office and the Secretary of State

for the Environment (represented by the Inspector) should not thwart the policy of the Home Office.

A further, and separate, point taken by Mr Griffiths is that the Inspector should not have had regard to the "site selection" criteria in the Home Office Guidance Note. Paragraph 2.0.3 reads:

> "Finding a site in a suitable location for a hostel is not easy and can be very time consuming. The purpose of hostels is to enable residents to remain under supervision in the community so, as far as possible, hostels should be sited in areas where they can have good access to public transport, employment, social, recreational and other community facilities. This may not always be possible, but any selection of a site should take into account the possible impact of the hostel on local surroundings."

The guidance was not intended for the Inspector, it is submitted, but for the Committee and was irrelevant to the Inspector's function as a planning inspector. The Inspector formed the view that the Home Office's own criteria were not met at the appeal site. In the Inspector's opinion, for example, there was not "good access to public transport, employment, social, recreational and other community facilities". (It is not submitted by the Secretary of State that the last sentence in paragraph 2.0.3 is relevant to the first issue in this appeal).

The Inspector also referred to Circular 5/94 when considering fear of crime. The Circular does not in my view throw light on whether such fear is a "material consideration" under the Planning Acts. The Circular is entitled "Planning out Crime" and is said to provide "fresh advice about planning considerations in crime prevention, particularly through urban design measures". The Inspector, in the paragraph already set out, echoes the wording of paragraph A1 of the Circular where it is stated: "Fear of crime, whether warranted or not, is a significant problem in its own right, particularly

among those in the more vulnerable sectors of society, such as the elderly, women and ethnic minorities". I regard that as an uncontestable statement but not one which throws light upon the present issue. As the title indicates, the Circular is concerned with the importance of security in the design of development. It is stated in paragraph 3 that "there should be a balanced approach to design which attempts to reconcile the visual quality of a development with the need for crime prevention". That consideration has no bearing upon the present issue and the Inspector's adoption of a part of the narrative in the Circular does not involve a misdirection upon the point at issue.

In considering the evidence in this case, I do not consider that the "disturbing incidents" and "occurrences" found by the Inspector to have occurred can be divorced or treated as a separate consideration from the concerns and fears of residents which he also found to be present. The fears arise from the disturbances and the Inspector was entitled to link them in the way he did in his conclusions. It is the impact of the occurrences upon the use of neighbouring land which is said to be relevant.

These propositions, relevant to the first issue, emerge from the authorities:

1. The impact of a proposed development upon the use of and activities upon neighbouring land may be a material consideration.

2. In considering the impact, regard may be had to the use to which the neighbouring land is put.

3. Justified public concern in the locality about emanations from land as a result of its proposed development may be a material consideration.

The contentious point in the present case is whether behaviour on and emanating from the development land in present circumstances attracts the operation of those

principles. The “particular purpose of a particular occupier” of land is not normally a material consideration in deciding whether the development should be permitted. (*East Barnet UDC* v *British Transport Commission* [1962] 2 QB per Lord Parker CJ at p 491).

A significant feature of the present case is the pattern of conduct and behaviour found by the Inspector to have existed over a substantial period of time. I include as part of that pattern the necessary responses of the police to events at the hostel. That behaviour is intimately connected with the use of the land as a bail and probation hostel. As analysed by the Inspector, it was a feature of the use of the land which inevitably had impact upon the use of other land in the area. On the evidence, the Inspector was entitled not to dismiss it as isolated and idiosyncratic behaviour of particular residents. The established pattern of behaviour found by the Inspector to exist, and to exist by reason of the use of the land as a bail and probation hostel, related to the character of use of the land, use as a bail and probation hostel. Given such an established pattern, I would not distinguish for present purposes the impact of the conduct upon the use of adjoining land from the impact of, for example, polluting discharges by way of smoke or fumes or the uses in *Finlay* and *Blum*. There can be no assumption that the use of the land as a bail and probation hostel will not interfere with the reasonable use of adjoining land when the evidence is that it does. Fear and concern felt by occupants of neighbouring land is as real in this case as in one involving polluting discharges and as relevant to their reasonable use of the land. The pattern of behaviour was such as could properly be said to arise from the use of the land as a bail and probation hostel and did not arise merely because of the identity of the particular occupier or of particular

residents.

If that is right, it is a question of planning judgment what weight should be given to the effect of the activity upon the use of the neighbouring land. (*Tesco Stores* v *Secretary of State for the Environment* [1995] 1 WLR 759 per Lord Hoffman at p 780F). The weight to be given in that context to the more intensive use of the hostel proposed by the development at issue is also a question of planning judgment.

Before expressing general conclusions, I turn to the second issue. Had the proposal been by a private developer for residential or shopping use, for example, it would have been open to the Inspector to consider need as a material consideration. Mr Griffiths relies on the fact that the Committee are a statutory body acting under the statute and Government guidelines and he submits that different considerations apply.

I regard it as a significant feature of the present case that, neither in their evidence given by the Chief Probation Officer, nor in their submissions, did the Committee seek to limit the scope of the Inspector's investigation of need. The witness was cross-examined upon need in the usual way. It is not suggested that a statement of Government policy, not susceptible to challenge, was placed before the public local inquiry. That being so, I am not surprised that the Inspector conducted enquiries into need as he did.

The question of the extent to which policy matters may be investigated at a public local inquiry was considered by the House of Lords, in the context of road proposals, and in different circumstances, in *Bushell* v *Secretary of State for the Environment* [1981] AC 75. In the present context, there is a potential clash of interest between the Secretary of State for the Environment and the Secretary of State for the

Home Department and it may fall for consideration whether there are matters of Home Office policy which ought not to be subject to challenge at a local public inquiry into a planning appeal. Upon the procedure followed in this case, however, I do not consider that the Inspector can be criticised for adopting the course he did.

In any event, the Inspector directed his attention to development on the particular site and, subject to the Committee's subsidiary point, he stated his conclusion in terms that, even if the need existed, there was "little justification for providing more of it at Stonnall Road". He added, in relation to meeting the need, that "a location like this one, on the very edge of a small town and in the sort of quiet suburb where the impact of the hostel must be particularly apparent, would be incongruous". That was a proper approach for a planning inspector to take. I could not envisage a Home Office policy statement which in effect directed the Secretary of State for the Environment to provide for the need at a particular location as distinct from identifying the need. I do express the view that the extent of the Inspector's assumed power to challenge Home Office policy, and indeed criticise it as inconsistent, may be scrutinised in a future case. His conduct does not however invalidate the conclusion he reached in this case. His finding was based upon the application of planning criteria to a particular site and followed a procedure at the Inquiry to which no objection was taken.

The Committee's further submission is in relation to the use made by the Inspector of the site selection criteria, already cited, in the Home Office Guidance Note. The criteria included matters which an Inspector may properly regard as material planning considerations. They may be intended for guidance of committees seeking to establish hostels but, in so far as the considerations set out are material planning

considerations, I see no reason why the Inspector should not adopt them, if he sees fit, in considering whether the development on the site should be permitted. He is not obliged to assume that the particular site, from the planning point of view, meets the planning criteria stated by the Home Office.

The Inspector's application of the criteria in the Guidance Note to the appeal site was also attacked on *Wednesbury* grounds. His conclusions were in my view within the range permitted as a matter of planning judgment.

The Inspector expressed as his general conclusion that "the need to provide more places in bail hostels throughout the West Midlands would not provide a sufficiently cogent reason to warrant expansion of the hostel at Stonnall Road". For the reasons I have given, and in agreement with the judge, that was in my judgment a conclusion he was entitled to reach and I would dismiss this appeal.

SWINTON THOMAS LJ

I agree.

HIRST LJ

I also agree.

Order: Appeal dismissed with costs; application for leave to appeal to the House of Lords refused.

Order not part of the judgment of the court