*410 Cadogan v Secretary of State for the Environment and Others

Court of Appeal

(Sir Thomas Bingham M.R. , Glidewell and Leggatt L.JJ.):

October 16, 1992

Town and country planning—Application for permission to extract sand and gravel—Proposal provided for restoration using on-site materials and for the creation of two lakes—Permission granted subject to condition whereby alternative restoration scheme could be submitted to mineral planning authority—Site comprised grade 2 and grade 3a land—Whether minister had power to impose condition—Whether minister had failed to consider minerals policy guidance note number 7—Relationship of Circular 16/87 and policy G4 of structure plan—Whether minister misconstrued policy G4—Whether minister gave proper and valid reasons for decision

Pioneer Aggregates, the third respondents, applied for planning permission to extract 2.67 million tonnes of sand and gravel from 90.5 ha. of land at Wasperton Hill Farm. Of the land to be worked, some 18 ha. was classified in grade 2 of the Minister of Agriculture, Fisheries and Food's soil classification and some 19 ha. in grade 3a. The application described the proposal for restoration of the land as “Agriculture/Nature Reserve. Progressive restoration using on-site materials” and provided for the creation of two lakes. The Minerals Policy Guidance Note Number 7, paragraph 15 required the applicant to demonstrate that the site could be reclaimed satisfactorily. Paragraph 4 of Circular 16/87 stated “The best and most versatile land … should not be built on unless there is no other site suitable for the particular purpose.” Structure Plan policy G4, as modified by the Secretary of State to make it conform with Circular 16/87 , provided that the best and most versatile land “which in Warwickshire includes grade 3a in addition to grades 1 and 2” should not be developed unless there was no other site suitable. Warwickshire County Council as minerals planning authority refused the application. Pioneer Aggregates appealed to the Secretary of State and a local public inquiry was held. The inspector considered whether or not there would be substantial conflict with policy G4 where (as here) there was grade 2 land and so, arguably, the grade 3a land would not be among the best and most versatile. He did not consider whether there was an alternative site available. The Secretary of State, following the recommendation of his inspector, allowed the appeal and granted permission subject to conditions. Condition xxxvii provided that if the sufficiency of the water supply for the proposed lakes could not be demonstrated to the satisfaction of the mineral planning authority, an alternative restoration scheme should be submitted and agreed by the authority. The appellant, the tenant farmer of Wasperton Hill Farm, applied under section 245 of the 1971 Act to quash the Secretary of State's decision. Mr. David Widdicombe, Q.C. dismissed the application. He found that the inspector had not given adequate and intelligible reasons nor concluded a view on the meaning of policy G4. However, he dismissed the application on the basis that, on its true construction, policy G4 included grade 3a land only where there was no grade 1 or 2 land. On appeal to the Court of Appeal:

Held, allowing the appeal, that (i) condition xxxvii was part of a clearly worded permission which specifically referred to the application and the attached plan. If an alternative restoration scheme were submitted which was not within the ambit of the application and the plan, it would not be a scheme within the meaning of condition xxxvii to which the mineral planning authority could properly agree; (ii) if Pioneer Aggregates could not demonstrate that the water supply would be sufficient nor produce an alternative scheme which complied with the application, the county council would not be empowered to approve the scheme proposed. Hence, *411 there

Positive/Neutral Judicial Consideration

Court
Court of Appeal (Civil Division)

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would be no conflict with the minerals policy guidance note no. 7; (iii) however, the words of policy G4 were perfectly clear and intelligible. They defined the expression “the best and most versatile land” for the whole of the structure plan area as including both grades 1 and 2 and grade 3a. A further difficulty of the alternative interpretation argued would be knowing whether or not in relation to any particular application grade 3a land was, or was not, within the meaning of the policy. The judge was wrong to decide that policy G4 must be read as having a meaning which its clear words did not bear, because of an apparent conflict with circular 16/87 , and the basis upon which the judge exercised his discretion not to quash the Secretary of State's decision was wrong. The Secretary of State's decision was not within the powers of the Act and/or was not based upon adequate reasoning.

Cases cited:

(1) *Westminster City Council v. Great Portland Estates [1985] A.C. 661; [1984] 3 W.L.R. 1035; [1984] 3 All E.R. 744; 49 P. & C.R. 34, H.L.*
(2) *Wilson v. West Sussex County Council [1963] 2 Q.B. 764; [1963] 2 W.L.R. 669; [1963] 1 All E.R. 751; 14 P. & C.R. 669, C.A.*

Appeal by Charles John Cadogan from a decision of Mr. David Widdicombe, Q.C., sitting as a deputy judge of the High Court, given on December 21, 1990. The learned judge thereby dismissed an application under section 245 of the Town and Country Planning Act 1971 to quash a decision of the Secretary of State for the Environment given in a decision letter dated November 13, 1989, whereby he allowed an appeal by the third respondents, Pioneer Aggregates (U.K.) Ltd., and granted planning permission, subject to conditions, for the extraction and processing of sand and gravel at Wasperton Hill Farm, Wasperton, Warwickshire.

The grounds of the appeal were (i) that the Secretary of State had no power to impose condition no. xxxvii in relation to the restoration and after-use of the land in that it offended against the principle that a condition on a planning permission would not be valid if it altered the extent or nature of the development permitted; (ii) that in requiring tests to be undertaken to demonstrate that the supply of water was sufficient for the intended after-use, the minister failed to take account of a relevant consideration, namely, his own policies as set out in minerals policy guidance note number 7; (iii) that the Secretary of State misinterpreted and thus did not properly apply policy G4 in the Warwickshire Structure Plan.

Alternatively, the Secretary of State gave no proper or valid reasons for his decision.

The facts are stated in the judgment of Glidewell L.J.

Representation

John Taylor, Q.C. and Sebastian Head for the appellant.
Guy Sankey, Q.C. for the first respondent.
Michael Harrison, Q.C. and Keith Lindblom for the third respondent.
The second respondent did not appear and was not represented.

Glidewell L.J.

On December 11, 1987, the third respondent, Pioneer Aggregates, applied for planning permission for “the extraction and processing of sand and gravel” from 90.5 ha. of land at Wasperton Hill Farm, Wasperton, Warwickshire. On the application form the proposal for the restoration of the land was described as “Agriculture/nature reserve. Progressive restoration using on-site materials.”

The minerals planning authority, Warwickshire County Council (who are the second respondent but took no part in this appeal), refused the ***412** application. The second of three reasons for refusal was that the proposed development “would involve the taking of high-grade agricultural land which could not be restored to its pre-existing condition.”

Pioneer Aggregates appealed against the refusal to the first respondent, the Secretary of State for the Environment. He appointed an inspector, Mr. J. L. S. Whalley, a chartered engineer, to hold an inquiry, which he did on various dates between January 10 and April 4, 1989.

The appellant, Mr. Cadogan, is the tenant farmer of Wasperton Hill Farm. He is a “section 29 party,” *i.e.* he was entitled to notice of the application, to make representations to the planning authority, and to be a party to any subsequent proceedings.

The inspector recommended to the Secretary of State that the appeal should be allowed and permission granted, subject to the imposition of many conditions.

The Secretary of State gave his decision in a letter dated November 13, 1989. He accepted his inspector's recommendation, allowed the appeal, and granted permission, subject to 49 conditions.

By notice of motion dated December 22, 1989, Mr. Cadogan applied under section 245 of the Town and Country Planning Act 1971 to quash the Secretary of State's decision. The application was heard by Mr. David Widdicombe, Q.C., sitting as a deputy High Court judge. On December 21, 1990, he dismissed the application. Mr. Cadogan now appeals to this court.

Before both the judge and this court Mr. Cadogan's challenge to the Secretary of State's decision was, and is, based on two grounds:

1. The Secretary of State had no power to impose condition number xxxvii in relation to the restoration and after-use of the land.

2. The Secretary of State misinterpreted and thus did not properly apply policy G4 in the Warwickshire Structure Plan, a policy with regard to agricultural land.

As an alternative, in relation to both matters, Mr. Taylor, for Mr. Cadogan, submits that the Secretary of State gave no proper or valid reasons for his decisions.

The proposed scheme of development

Since the application was for mineral working, it inevitably contained considerable detail both as to the scheme and the method of working and as to the restoration of the site. Much of this detail was contained in plans and a supporting statement which accompanied and formed part of the application. The proposal was to extract 2.67 million tonnes of sand and gravel over a period of about 11 years. Of the 90.5 ha., part was not to be worked. Of the area which would be worked, approximately 18 ha. was classified in grade 2 of the Minister of Agriculture, Fisheries and Food's soil classification, and approximately 19 ha. in grade 3a. The balance of the land to be worked was of lower soil quality.

The restoration scheme provided that part of the land was to be restored to agricultural use at approximately the same level as the existing land. Inevitably therefore, since the proposal was for a large quantity of material to be excavated and no material imported, a part of the site would eventually be at a lower level, and indeed below the water table. The proposal therefore was for the creation of two lakes, one to the used for recreation ***413*** and the other as a nature reserve. In total it was proposed that, of the 90.5 ha. forming the application site, after restoration 34.5 ha. would be returned to agricultural use, of which approximately 20 ha. would be of grade 2 and. 12 of grade 3a. There would be 35 ha. under water and 21 ha. around the lakes, not in agricultural use. However, in the area to be worked, all the 19 ha. of grade 3a land would be lost to agriculture.

The challenge to the Secretary of State's decision

At the time of the Secretary of State's decision, the statute in force was the Town and Country Planning Act 1971 . Section 245 of the 1971 Act (now replaced by section 288 of the Act of 1990) provided that on an application under that section, if the court were satisfied that the Secretary of State's decision was not within the powers of the Act, or that the interests of the applicant had been substantially prejudiced by a failure to comply with any relevant requirements, the court might quash the decision. The failure to comply with relevant requirements here alleged is the failure to give adequate reasons to which I have referred as a part of Mr. Taylor's submissions. However, his

principal submissions are that in the two respects to which I have referred the Secretary of State's decision was not within the powers of the Act. I therefore turn to consider his grounds in more detail.

Ground 1

Condition xxxvii on the planning permission granted by the Secretary of State came under the heading "Hydrology." It read:

> The development hereby permitted shall not be commenced until the operators have carried out tests to demonstrate and ensure that the supply of water will be sufficient to enable the lakes (illustrated on drawing no. RPS:809:LA1) to be used for their intended afteruse and that restoration and aftercare can be achieved as indicated in [five other conditions]. If the sufficiency of the water supply cannot be demonstrated to the satisfaction of the mineral planning authority then an alternative restoration scheme shall be submitted to and agreed by the mineral planning authority.

It is established law that a condition on a planning permission will not be valid if it alters the extent or indeed the nature of the development permitted. The permission granted by the Secretary of State in his letter specifically said that it was granted "in accordance with the application … dated December 11, 1987 … and the attached plan." It is common ground that it is therefore proper, and indeed necessary, to refer to the documents comprising the application and the application plan in order to decide the scope and nature of the development permitted; see the decision of this court in *Wilson v. West Sussex County Council* . [1]

Mr. Taylor submits that condition xxxvii offends against the first principle to which I have referred above. The suggestion is that if, after Pioneer Aggregates had carried out the tests referred to in the condition, they could not demonstrate that the supply of water would be sufficient to enable the lakes to be restored and used as intended, then the condition left it open for an alternative scheme of restoration to be proposed and ***414** agreed by the county council. Such a scheme might well not be in accordance with the detailed provisions of the application and the accompanying plan, and thus might well alter the extent or nature of the development permitted. In particular, such a scheme of restoration might involve the importation of material from outside the site, which would be wholly contrary to the provisions of the application.

The inspector dealt with this argument in two paragraphs of his decision letter, as follows:

> 229. There was a measure of agreement that the two proposed lakes should be protected from ingress of surface water run-off from adjoining farmland because of the pollution of such water arising from the possible excess use of herbicides, pesticides and nitrate and phosphate fertilisers. But the consequence is that there must be some doubt about the practicability of ensuring the reasonably rapid filling of the lakes and keeping a fairly high level thereafter. Maintenance of adequate summer levels could be difficult. If such problems were to be encountered, the lakes could be topped up by abstraction from the River Avon, although quantity required and licence difficulties might cause difficulties. Alternatively, surface water could be allowed to drain into the lakes, with the attendant risks of algal bloom pollution, eutrophication and chemical contamination. The problem of maintaining water levels in summer would be worsened by the shallow form of the lakes as surface evaporation would be relatively higher.
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> …
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> 231 My reservations under this heading are restricted to some concern that the lakes might prove unsuitable for their eventual intended purposes.

In paragraph 4 of his decision letter, the Secretary of State said:

> On the question of hydrology the Secretary of State is very mindful of the Inspector's observation that the lakes may prove unsuitable for their eventual intended purposes. The Secretary of State takes the view that your clients should arrange for further tests to be carried out to demonstrate and ensure that the supply of water will be sufficient to permit the lakes to serve their intended afteruse. If it cannot be demonstrated to the satisfaction of the mineral planning authority that the water supply will be sufficient to permit the intended afteruse, an alternative restoration scheme shall be prepared and implemented as may be agreed by the mineral planning authority. A condition has accordingly been imposed to this effect.

This condition was of course condition number xxxvii.

In his judgment, the judge said in relation to this part of the case:

> What is meant by the words “an alternative restoration scheme?” Taken literally the words would, as Mr. Whybrow says, cover a totally different restoration scheme, possibly one involving imported filling materials and quite different traffic and environmental considerations to those canvassed at the inquiry. That would be beyond the scope of the application and would deprive interested parties of the opportunity to be heard. I am sure that was not the Secretary of State's intention when he imposed condition xxxvii.
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> In my judgment this court is not obliged to adopt a literal construction ***415** of the condition if it involves an enlargement of the scope of the application for permission and by-passes the consultation proceedings in the Act and regulations. An enlargement of the application would be invalid and could be challenged in this court.

The judge said further:

> In my judgment the words “an alternative restoration scheme” in condition xxxvii should be construed in the context of the application for planning permission, the Inspector's report and the Secretary of State's letter and must be limited to a restoration scheme which does not involve a substantial departure from that which Pioneer submitted and which is shown on plan RPS:809:LA1. That will permit some variation of the scheme if there is a problem of water supply; *e.g.* two smaller lakes or one lake instead of two. But if, because of problems with water supply it proves impossible to produce a scheme within these limits, the condition cannot be fulfilled and Pioneer will have to start again with a fresh application for permission.

Mr. Taylor argues that the judge's reasoning was defective and that he fell into error. I do not agree. Condition xxxvii was what has come to be known as a *Grampian* condition, *i.e.* it provided that the permitted development should not start until the condition had been complied with. The condition is part of a clearly worded permission, which specifically refers to the application and the attached plan. If an alternative restoration scheme were submitted which was not within the ambit of the application and the attached plan, then I agree with the judge that it would not be a scheme which fell within the meaning of condition xxxvii. In particular, as I have made clear, the application specifically said that the scheme of restoration would be carried out “using on-site materials.” It must follow that any scheme of restoration which involved the importation of material from outside the site would be outside the scope of the application and thus of the permission, and would not be a scheme to which the mineral planning authority could validly agree as being within condition xxxvii (even if they so wished).

On this issue I therefore agree with the judge.

Added ground of appeal

Mr. Taylor sought leave to add a ground of appeal in order to raise an argument which had not been raised in the court below. Neither Mr. Sankey for the Secretary of State nor Mr. Harrison for Pioneer Aggregates objected to this addition, and since the argument does not depend upon any new facts we allowed the amendment. The new ground reads as follows:

> That the (Secretary of State) erred in law in that:
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> (i) In granting planning permission in his decision letter of November 13, 1989, where as set out in paragraph 4 of his letter "he was mindful of the Inspector's observation that the lakes may prove unsuitable for their eventual intended purposes" and where he required tests to be undertaken to demonstrate that the supply of water was sufficient for the intended afteruse he failed to take account of a relevant consideration, namely, his own policies as set out in minerals' policy guidance note no. 7 …

***416** It is not necessary to set out the remainder of this ground.

Minerals policy guidance note no. 7 is, as its title suggests, one of a series of documents which contain ministerial guidance to mineral planning authorities when considering the grant of permission for mineral working. This note deals with "The reclamation of mineral workings." Although the ground of appeal refers specifically to seven paragraphs in the note, for the purposes of considering the argument it is sufficient to quote a short phrase from one paragraph, which encapsulates the point. Paragraph 15 contains the phrase "… the applicant needs to demonstrate that the site can be reclaimed satisfactorily." Mr. Taylor's argument is that, if the scheme of restoration proposed may not be practicable, the applicant has failed to demonstrate that the site can be reclaimed satisfactorily. Thus in granting the permission despite this failure, and seeking to deal with it by imposing a condition which requires the applicant to demonstrate later that the site can be reclaimed satisfactorily, the Secretary of State has acted in breach of his own guidance note.

The answer to this submission depends, in my view, on the correctness of the conclusion which I have already expressed about the meaning of condition xxxvii. If I am right in my view that this condition requires that any alternative scheme of restoration which is submitted must be one which complies with the terms of the application and thus of the permission, then it follows that one of three alternative results will follow:

> (a) Pioneer Aggregates, having carried out tests, may be able to demonstrate and ensure that the supply of water will be sufficient to enable the lakes to be used for their intended after-use; or
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> (b) if that cannot be demonstrated, Pioneer Aggregates may submit an alternative scheme of restoration which does comply with the terms of the application and is agreed by the county council.

In either of these two events, Pioneer will have demonstrated that the site can be reclaimed satisfactorily, and there will be no conflict with paragraph 15 of the guidance note. The third possibility is:

> (c) that Pioneer can neither demonstrate that the water supply will be sufficient nor produce an alternative scheme which complies with the application. In that case, the county council is not empowered by the permission to, and will not, approve the scheme of restoration proposed, and Pioneer Aggregates, not having complied with condition xxxvii, will not be able to take advantage of the permission to work the minerals. In that case also there will be no conflict with paragraph 15 of the guidance note.

The same proposition is true in relation to other passages in the guidance note, and I would therefore reject this argument.

Structure Plan Policy G4

I find it helpful to start by considering the genesis of policy G4, in so far as it is apparent from the material which was available to the inspector, the deputy judge and this court. As originally approved by Warwickshire County Council, policy G4 began with the words "There will be a presumption against development on the higher grades of agricultural land …" The policy did not specify which of the grades in the MAFF classification could be considered "the higher grades." We have an extract ***417** from the report of the panel which conducted the examination in public into the structure plan, from which it is clear that at the examination MAFF asked that the presumption against development contained in policy G4 should specifically be applied to grades 1, 2 and 3a land. Indeed, at first MAFF were inclined to argue that the presumption should also apply to grade 3B, but during the discussion they.retreated from this position. When the panel made their recommendations to the Secretary of State, they adopted the MAFF's final position, and recommended that policy G4 should include the phrase "there will be a presumption against development on good quality agricultural land, *i.e.* land falling within grades 1, 2 and 3a of the MAFF classification."

By the time the Secretary of State came to approve the structure plan, he had recently published Circular no. 16/87 which sets out his policy relating to "Development involving agricultural land." This Circular replaced the earlier Circular 75/76 , which contained a somewhat more restrictive policy. Paragraph 4 of the circular contains the sentence:

> The best and most versatile land has a special importance and should not be built on unless there is no other site suitable for the particular purpose (advice on the relative quality of agricultural land is given in Annex B).

Annex B contains the following passages:

> 3. Land graded 1 and 2, the highest quality land, has few limitations in agricultural use …
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> 4. Land graded 3 has moderate physical limitations … The grade has three sub-divisions. Grade 3a has comparatively few limitations for agriculture …
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> 6. In many parts of the country where there is no Grade 1 or 2 land, Grade 3a land will represent the best and most versatile available …

When the Secretary of State came to approve the structure plan, he modified the wording of policy G4. He explained his reasons for doing so in the following sentence in his decision letter:

> The Secretary of State has modified policy G4 relating to development involving agricultural land to bring it into conformity with government policy as expressed in DoE circular 16/87 .

The policy as so modified reads:

> G4 Wherever possible derelict land or land of no agricultural value will be used for development. Where agricultural land is used, the best and most versatile land, which in Warwickshire includes grade 3a in addition to grades 1 and 2 of the Ministry of Agriculture, Fisheries and Food

> classification, should not be built on unless there is no other site suitable for the particular purpose.

It is not necessary to set out the last sentence of the policy. It is agreed that the presumption against development in policy G4 applies equally to development by mineral working which causes an irreversible loss of agricultural land as it does to development by building.

At the appeal hearing in 1989, it was contended by Warwickshire County Council and by counsel for Mr. Cadogan that policy G4 specifically includes land of grades 1, 2 and 3a as "the best and most versatile land" throughout Warwickshire, and that the policy therefore is that such land ***418** should not be built upon nor irreversibly lost to agriculture unless there is shown to be no other site suitable for the particular development. The counter argument for Pioneer Aggregates was that policy G4 only included land of grade 3a amongst the best and most versatile category in a locality in which there was no grade 1 or 2 land. Since there was grade 2 land, which would not be lost, on the appeal site, there was no presumption against the loss of the grade 3 land. Alternatively, it was argued that the MAFF had indicated that they were "not aware of any alternative site of lower quality land which could at present be used for sand and gravel working." In his conclusions, the inspector obviously found some difficulty with these opposing arguments. He said:

> 218. Applying the precise terms of structure plan policy G4 to this particular case is not entirely straightforward. It may be reasonable to interpret, as the county council suggested, that the strictures in policy G4 to: "best and most versatile land … should not be built on," could be applied to proposals which irreversibly took land out of agricultural use. I would consider that the lake areas would, in effect, be permanently lost to agriculture … That being so, the question remains as to the appropriateness of including the grade 3a land in the category of the "best and most versatile land."
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> 219. It is fairly clear that in those parts of Warwickshire where there is no grade 1 or 2 land, 3a land may be regarded as amongst the best and most versatile land for the purposes of policy G4 and the terms of circular 16/87. But there is persuasion in the appellant's submission that where there is grade 2 land, as here, circular 16/87 indicates that grade 3a land may be high quality land but would not be amongst the best and most versatile land. There is also some merit, in my view, in the contention that under the terms of policy G4, grade 3a is not always to be included in the best and most versatile category. Accordingly, and as there is intended to be no net loss of grade 2 agricultural quality land, I find there would not be substantial conflict with structure plan policy G4.

The inspector did not go on to consider whether there was any alternative site suitable for sand and gravel extraction of lower agricultural quality.

In his decision letter, the Secretary of State did not specifically refer to this issue at all. It must be taken therefore that, by use of the phrase in that letter "the Secretary of State agrees generally with the inspector's conclusions …," he is to be taken as adopting, and endorsing, the inspector's expression of views.

Mr. Taylor submits, as he did to the judge, that policy G4 clearly means that in Warwickshire, the area covered by the structure plan, the phrase "the best and most versatile land" is specifically defined as including grade 3a land as well as that in grades 1 and 2. It follows that, in order to determine whether the proposed development conflicts with that policy, it was necessary for the inspector to consider whether there was some other suitable alternative site of less agricultural value. He failed to do so and thus failed to have regard to the provisions of the development plan. If the inspector misinterpreted policy G4, this would explain, but not of course justify, his failure. However, in paragraphs 218 and 219 the inspector's reasoning was wholly unclear. Failure to give adequate reasons for a ***419** decision is a failure by the Secretary of State to comply with the relevant requirements to the prejudice of Mr. Cadogan: see *Westminster City Council v. Great Portland Estates* . [2] Thus the decision should be

quashed either because of the failure to have regard to the provisions of the development plan or because of the failure to give adequate reasons on this issue.

The judge dealt with this issue with great thoroughness. After setting out the rival contentions, he said:

> The crucial question in this court is the meaning of paragraph 219 of the inspector's report. My first impression was that Mr. Harrison was probably right and that what the inspector was saying was that he was not going to decide the legal question of the construction of policy G4 but that even if it was strictly construed to cover grade 3a land, whatever the circumstances on the facts there was, in this case, no substantial conflict with the policy. But on further consideration I cannot accept this explanation, attractive though it is. I find paragraph 219 to be thoroughly obscure and at the end of the day I have concluded that there is here a breach of the requirement to give adequate and intelligible reasons.

He continued that paragraph 219 contained:

> … no concluded view on the meaning of policy G4. It only expresses contentions. If he had said, "Even if the policy is to treat grade 3a land in all circumstances as the best and most versatile land, on the facts I find there is no substantial conflict," I could understand it. But he does not say that. Further, even on that interpretation of G4 it is not obvious to me that on the facts there is no substantial conflict. The loss of 18 to 20 ha. of grade 3a would seem to me, prima facie, to be substantial. So I think Mr. Cadogan is entitled to reasons why there was no substantial conflict. Further, as this was one of the main issues at the inquiry I think there is serious prejudice to Mr. Cadogan in the failure here to give adequate or intelligible reasons. So on this ground and for these reasons the decision should be quashed.

Mr. Sankey and Mr. Harrison both dispute the judge's conclusion that the inspector did not give adequate and intelligible reasons. Mr. Harrison submits that, though paragraph 219 of the inspector's report does not expressly say so, it should be read as a conclusion that the inspector did hold that the proper interpretation of policy G4 was that grade 3a land should only be considered as "the best and most versatile" in those parts of Warwickshire in which there was no land of grades 1 or 2. Both he and Mr. Sankey also submit that the inspector clearly concluded that, since there was to be no loss of grade 2 land, whatever the meaning of policy G4, the inspector was right to conclude that there was no conflict with it.

I find the second of these submissions illogical. If, properly interpreted, policy G4 does apply to grade 3a land for the purposes of the appeal, the inspector did not go on to consider the availability of alternative land, and thus did not decide whether there was any conflict with the policy. Furthermore, I agree with the judge that the inspector's reasoning was not clear. I also agree that this was a valid reason for quashing the Secretary of State's decision. However, the judge sensibly thought that he should go on to con ***420** sider the proper interpretation of policy G4, the question which in his, and my, opinion the inspector and thus the Secretary of State had not answered. Obviously, if policy G4, properly interpreted, did not in relation to this site include grade 3a land, there was no conflict with the policy.

After referring to the history of policy G4 and to relevant passages in Circular 16/87 , the judge said:

> Whatever the Secretary of State's intentions, in my judgment the wording of policy G4 differs significantly from the circular. Annex B says that grade 3a will represent the best and most versatile land in parts of the country where there is no grade 1 or 2 land. Policy G4 says that grade 3a is the best and most versatile without any qualification. It is apparent to me that the wording of the modified policy does not accord with the Secretary of State's expressed intention. If that

> was all I think the literal words of the policy should prevail but I have to bear in mind that by section 20(1) of the Act of 1971 the Secretary of State's letter is part of the development plan which includes the structure plan.
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> The county council, in their preface to the structure plan with the written statement, say "His letter of approval forms part of this document" and I think that is correct. It follows that there is a document, the written statement to the structure plan, which contains conflicting provisions: (1) the Secretary of State's statement that policy G4 is intended to be "in conformity with Government policy in Circular 16/87" and (2) the literal words of G4 which are not in conformity with 16/87.
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> In those circumstances, I do not think the court is obliged to adopt a construction which conflicts with the Secretary of State's expressed intention. I think policy G4 should be read consistently with circular 16/87: that is, subject to the qualification that grade 3a land is only the best and most versatile where there is no grade 1 or 2 land. This means that on the facts here there was no conflict with structure plan policy G4.
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> In the exercise of my discretion, therefore, I shall not quash the decision and the application must be dismissed.

Mr. Sankey and Mr. Harrison both argue that on a proper interpretation policy G4 should be read as meaning "the best and most versatile land, which in *some parts of* Warwickshire includes grade 3a in addition to grades 1 and 2 …," or perhaps "in those parts of Warwickshire where there is no land of grades 1 and 2 …"

There are two difficulties with this interpretation, the first a matter of law, the second a matter of the application of the policy. The first objection to this interpretation is that it involves reading words into the policy which are not there. On their face, the words of policy G4 are perfectly clear and intelligible. The relevant sentence defines the expression "the best and most versatile land" for the whole of the structure plan area, *i.e.* Warwickshire, as including both grades 1 and 2 and grade 3a. If the Secretary of State had wanted the policy to contain some such words as those which Mr. Sankey and Mr. Harrison suggest should be read into its meaning, it would have been perfectly simple to include them. The second difficulty is that of knowing, if the policy is to be read as Mr. Sankey and Mr. Harrison submit, whether or not in relation to any particular application grade 3a land ***421** is, or is not, within the meaning of the policy. To what area does the planning authority, called upon to apply the policy, then look? Does the policy apply when there is no grade 1 or 2 land on a particular farm? Suppose there is grade 1 or 2 land immediately adjacent to the farm but not actually included within its boundary, does the policy apply? On the other hand, suppose that on a particular farm, or indeed in a larger area, there is a very small amount of grade 2 land, and a much larger amount of grade 3a. Does the policy then apply or not? Obviously it is desirable that the structure plan should be interpreted in a way which is clear and consistent throughout the area of its operation, the county.

For these reasons, like the judge, I reject the interpretation of policy G4 put forward by Mr. Sankey and Mr. Harrison.

However, having reached this conclusion, the judge proceeded to interpret the policy in the light of what he saw as a conflict with Circular 16/87 . Of course, the judge was correct to direct himself that by section 20(1) of the 1971 Act the development plan was to be taken as including not merely the structure plan but also the Secretary of State's letter of approval of that plan. However, to repeat, the Secretary of State's letter of approval said that he had:

> modified policy G4 … to bring it into conformity with Government Policy as expressed in DoE circular 16/87.

He did not say that he had incorporated part of circular 16/87 into policy G4, nor that policy G4 must be read subject to circular 16/87 as the judge concluded. The Secretary of State clearly did not think that there was a

conflict between the policy as he modified it and circular 16/87 . On the contrary, he expressly said that his modification was intended to bring the structure plan policy into conformity with national Government policy, as expressed in the circular. Moreover, policy G4 does conform with the provisions of circular 16/87 provided that paragraph 6 of Annex B of the circular is not read as meaning that grade 3a land can only be considered amongst the best and most versatile land available where there is no grade 1 or 2 land. The circular expresses general Government policy. It is in my view sufficiently wide to enable each structure plan authority, subject to the Secretary of State's confirmation or otherwise, to define what in its area is the “best and most versatile land.” In some counties grade 3a will be included, in others it will not. No doubt to an extent this will depend upon the percentage of land in the county which is of higher grades. In Warwickshire, after the modification made by the Secretary of State, grade 3a is included in the category.

I conclude therefore that the judge was wrong to decide that policy G4 must be read as having a meaning which its clear words do not bear, because of an apparent conflict with Circular 16/87 . In my opinion, therefore, the basis upon which the judge exercised his discretion not to quash the Secretary of State's decision was wrong. As I have said, the judge had already decided:

> (1) that the inspector's reasoning in paragraph 219 of his report was inadequate; and
>
> (2) that the literal words of policy G4 mean that grade 3a land is amongst the best and most versatile category in Warwickshire, the structure plan area.

*422 These conclusions should have led the judge to quash the decision.

If the Secretary of State's decision is quashed, this does not of course mean that the appeal to him by Pioneer Aggregates must necessarily be dismissed. Pioneer Aggregates may be able to show that there is no other site suitable for the extraction of sand and gravel within a reasonable distance. Alternatively, there may be some other reason why the Secretary of State would decide to grant permission despite the wording of the policy. For the reasons I have sought to give, however, I conclude that the Secretary of State's decision was not within the powers of the Act and/or was not in the vital respect based upon adequate reasoning. I would therefore allow the appeal and quash the decision.

Leggatt L.J.

In my judgment the deputy judge was wrong to find that there was a conflict between policy G4 and paragraph 6 of Annex B of circular no. 16/87 . Paragraph 4 of the circular declares that “The best and most versatile land has a special importance and should not be built on unless there is no further site suitable for the particular purpose (advice on the relative quality of agricultural land is given in Annex B).” Policy G4 of the local development plan applies that principle to Warwickshire, stating that:

> Where agricultural land is used, the best and most versatile land, which in Warwickshire includes grade 3a in addition to grades 1 and 2 … should not be built on unless there is no other site suitable for the particular purpose …

Paragraph 6 of Annex B , on the other hand, merely remarks that “In many parts of the country where there is no grade 1 or 2 land, grade 3a land will represent the best and most versatile available.” Granted that in Warwickshire grade 1, 2 and 3a land comprises “the best and most versatile land,” it is obvious that, where there is no grade 1 or 2 land, the only land available which is properly described as “the best and most versatile land” will be grade 3a land. Such land, as policy G4 and the circular both underscore, “should not be built on unless there is no other site suitable for the particular purpose.”

The Secretary of State merely accepted the inspector's conclusions, and so did not consider either the proper interpretation of policy G4 or whether there was any other site available. The Secretary of State's decision was therefore defective. In the absence of conflict between policy G4 and the circular the deputy judge should not have

refrained from quashing the decision. I accordingly agree that the appeal should be allowed, although for the reasons given by Glidewell L.J. I also agree the other grounds of appeal should be rejected.

Sir Thomas Bingham M.R.

I have had the opportunity of reading in draft the judgment of Glidewell L.J., with which I am in complete agreement.

Representation

Solicitors— Herbert Smith ; the Treasury Solicitor ; Dennis Faulkner & Alsop , Northampton.

Appeal allowed with costs. Leave to appeal to the House of Lords refused. ***423**

Footnotes

1 *[1963] 2 Q.B. 764* , especially Willmer L.J. at p. 776 and Diplock L.J. at p. 782.

2 *[1985] A.C. 661* , Lord Scarman at p. 673.