Wednesbury challenge but would such a *Wednesbury* challenge succeed? The outcome of this case would suggest it would not, as whether the condition should be relaxed would presumably be a question of policy for the local planning authority. Otherwise Simon Brown L.J. would appear to be stating that Patricia Pothecary now has the equivalent of a legitimate expectation that the condition will be retained. Is this heresy? See *R. v. Secretary of State for the Home Department, ex p. Hargreaves* [1997] 1 All E.R. 397.

Haulage operation—Established use certificate for waste transfer station—planning permission for storage of refuse ancillary to use as haulage depot—requirement for licence under section 43 Environmental Protection Act 1990—grant of conditional licence requiring erection of building—application for planning permission to erect requisite building refused—appeal to Secretary of State dismissed—application under section 288 Town and Country Planning Act 1990—approach to "fall-back" position—application dismissed.

P. F. Ahern (London) Limited v. Secretary of State for the Environment and Havering Borough Council (Queen's Bench Division, Mr Lockhart-Mummery Q.C. sitting as a Deputy Judge, June 10, 1997).[8]

P. F. Ahern (London) Limited ("the Company") carried on the business of haulage operators in the waste industry from an area of premises in the northern-most part of the curtilage of 228 Crow Lane, Romford which measures 32 metres by 32 metres ("the Appeal Site"). To the west are recently constructed flats and to the east a largely vacant site save for one residential dwelling.

In 1980 an established use certificate was granted for a waste transfer station at a site broadly approximate with the Appeal Site. In 1982 planning permission was granted again for a substantially similar parcel of land for the continued use of the land for the storage of refuse at a transfer station on the basis that it remained ancillary to the main use of the site as a haulage depot.

The business of the Company involved the transfer of certain classes of waste which now required the holding of a licence under the Environmental Protection Act 1990. The requisite licence was granted on September 27, 1994 subject to various conditions including condition 3 which provided:

> "Waste shall not be received or handled at the facility after 3 years from the date of issue of this licence unless a structure has been erected affording complete cover and enclosure on at least three sides of the waste transfer operation."

An application was submitted to Havering Borough Council ("the Council") for planning permission for the structure. The application was refused on the following ground:

> "The proposed building would consolidate the inappropriate commercial use of 228 Crow Lane which would seriously prejudice the prospects for housing development on both 228 and 218 Crow Lane as envisaged in Policy HSG1. The provision of a substantial industrial building would also have an adverse impact on the character of this mainly residential area and prejudice the development of adjoining land contrary to Policy ENV1."

The Company appealed to the Secretary of State against both condition 5.3 of the waste licence ("Appeal A") and the refusal of planning permission ("Appeal B"). Both appeals were dealt with at the same Inquiry and by the same decision letter. Appeal A was dismissed, the Inspector expressing the view that the enclosure of the waste would ameliorate some of the nuisance caused by the operation and, as such, the condition was justified.

Appeal B was also dismissed. At the Inquiry there was considerable debate in relation to Appeal B as to the "fall-back" position, namely, what the Company could within the terms of planning control and other legislation lawfully carry on upon the site, and the extent to which it might or would do so, in the event that the

[8] *C. George* Q.C., *J. Pereira* (Kenneth Elliott and Rowe, London); *D. Elvin, T. Mould* (the Treasury Solicitor). *J. Findlay, H. Murray* (Legal Department, Havering Borough Council).

appeal was dismissed. Evidence was adduced to the effect that there were two categories of use which could be undertaken: use as a haulage transport yard and use for the transfer or recycling of wastes neither of which required a licence under the Environmental Protection Act 1990. These propositions were both challenged by the Council which argued that there was a "mere possibility" of these alternative uses being undertaken.

The company appealed the Inspector's decision on Appeal B by way of application to the High Court under section 288 of the Town and Country Planning Act 1990. The Company raised four grounds of challenge but the principal issue was the Inspector's approach to the "fall-back" position.

The Company argued that the Inspector failed to make any finding as to whether the fall-back use or uses would be carried on in the alternative. If she had made such a finding she made no comparison between the planning implications of the fall-back uses against the planning implications arising from the proposed development.

The Company submitted that there were three tests which the decision maker had to apply: first, whether there was a fall-back use; second, whether there was a likelihood or real prospect of such use occurring and third, if the answer to the second question was yes, a comparison had to be made between the proposed development and the fall-back use.

Held, dismissing the application:

1. If a fall-back or alternative use is to be undertaken it will, in most cases, be a material consideration to which regard must be had. It was a material consideration in this case. The requirement to have regard to the consideration imported a requirement on the decision maker to have before it sufficient material so that the consideration could be assessed.
2. In the context of fall-back cases there was a need to answer the question: is the proposed development in its implications for impact on the environment, or other relevant planning factors, likely to have implications worse than or broadly similar to any use to which the site would or might be put if the proposed development were refused?
3. The word "might" did not mean a mere possibility which could hardly feature in the balance. For a fall-back suggestion to be relevant, there must be a finding of an actually intended use as opposed to a mere legal or theoretical entitlement.
4. Beyond these general statements, the court should be wary of laying down detailed hoops for the decision maker in his or her broad powers and duties under section 70(2).
5. The Inspector did make a finding that the prospect of the fall-back use, or uses, was actual and not merely theoretical. Further, when read in the light of the background of the Inquiry, there was a comparison between the proposed development and the fall-back position, the former being significantly more prejudicial than the latter to the planning of the area.

The following judgment was given:

The Deputy Judge: This is an application under section 288 of the Town and Country Planning Act 1990 to quash a decision letter of the Secretary of State, the First Respondent, given by his Inspector and dated December 9, 1996.

In that decision letter she dismissed an appeal against the refusal of the Second Respondent, Havering Borough Council, to refuse an outline application for planning permission by the applicant for the erection of a building to enclose existing waste transfer operations at 228 Crow Lane, Romford.

Mr George Q.C., appearing for the Applicant, recognises that the author of the decision letter is a very senior and experienced Inspector. He nonetheless contends that in his words: "The decision is vitiated by omissions and misconceptions".

The case is unusual. The background facts are briefly as follows. The appeal site, which measures about 32 metres by 32 metres, is in the northern-most part of the curtilage of 228 Crow Lane. To the west of the parcel as a whole are recently constructed modern flats at 238 Crow Lane with associated amenity and parking areas. To the east is No. 218 Crow Lane, a property which contains one residential dwelling and is otherwise, as I understand it, largely vacant.

The Applicant carries on a long-standing business of haulage operations in the waste industry. Those operations inevitably have environmental disadvantages but conversely they are a necessary part of life. It has carried on that business at the site for many years. In 1980 an established use certificate was granted for a waste disposal transfer station at a site which broadly approximates to the present appeal site. In 1982 planning permission was granted again for a substantially similar parcel of land for the continued use of the land for storage of refuse at a transfer station on the basis that it remained ancillary to the main use of the site as a haulage depot.

The Applicant's business at the site hitherto currently involves the transfer of certain classes of waste which now require the holding of a licence under the Environmental Protection Act 1990. That licence was granted under section 43(1) of that Act, dated September 27, 1994, subject to numerous conditions of which the relevant one is 5.3 as follows:

> "Waste shall not be received or handled at the facility after 3 years from the date of issue of this licence unless a structure has been erected affording complete cover and enclosure on at least three sides of the waste transfer operation."

Accordingly an application for planning permission for such an enclosure was necessary. It was submitted and refused by the Second Respondent on the following ground:

> "The proposed building would consolidate the inappropriate commercial use of 228 Crow Lane which would seriously prejudice the prospects for housing development on both 228 and 218 Crow Lane as envisaged in Policy HGS1. The provision of a substantial industrial building would also have an adverse impact on the character of this mainly residential area and prejudice the satisfactory development of adjoining land contrary to Policy ENV1."

The Applicant pursued appeals under both sets of legislation, that is to say against condition 5.3 on the waste licence and against the refusal of planning permission. Both appeals were dealt with at the same inquiry and by the same decision letter. The appeal in respect of the licence, appeal A, was dismissed for the reasons set out in the letter. These include the following reasons:

> "44. I am of the view that the present level of the operations cause serious detriment to the amenities of the locality. I accept that the waste regulation authority has a duty to consider the availability of a network of waste transfer facilities, and that such facilities should be located as far as possible to minimise journeys. However, bearing in mind the situation of this site, I consider that the priority should be the protection of the amenities of the locality.
>
> 45. If the operations are to continue on the land, then enclosure of the waste would ameliorate some of the nuisance caused, and I therefore consider that the appeal in respect of condition 5.3 in the waste management licence should not be allowed."

No appeal was made to this Court in respect of the dismissal of that appeal. I therefore turn to what was known as appeal B, the planning appeal, in respect of which the application to this Court is made.

At the inquiry there was considerable debate as to what has become known as the "fall-back position", that is to say what the Applicant could, within the terms of planning control and other legislation,

lawfully carry on upon the site, and the extent to which it might, or would do so, in the event that the appeal were dismissed. On this topic the Applicant led through the evidence of Mr Scott, evidence specifically dealing with this position. An extract from his evidence is contained at pages 102–104 of the bundle. In short he gave evidence to the effect that there were two categories of use which could be undertaken. These were use as a haulage transport yard and use for the transfer or recycling of wastes of categories which do not require a licence under the Environmental Protection Act. He gave evidence as to the extent of the activity which could be carried on. His conclusion was in these terms:

> "These uses would be similar to the existing industrial use being made of the site and I cannot foresee the Appeal Site becoming under-utilised. In these circumstances it is also very unlikely that the Site would become available for housing."

I have before me evidence that at the inquiry there was challenge, by way of cross-examination from the Council, as to these propositions. There was challenge as to whether the haulage use would actually be carried on. There was challenge as to whether the recycling operations were realistic, and there was challenge whether such uses would be more valuable than the alternative provision of housing. Upon the basis of these challenges it was submitted, on behalf of the Council, in closing submissions at the inquiry, that there was a "mere possibility" of these alternative uses being undertaken.

In order to analyse the grounds of challenge taken across a wide field by Mr George it is necessary to set out, at some considerable length, the main parts of the Inspector's conclusions. These are as follows:

> "46. From my inspection of the site and its surroundings, and the representations made, I consider that the main issue is whether the environmental benefits of enclosing the waste transfer activities would outweigh the effect of the building on the locality and on the Council's intention that Nos 228 and 218 Crow Lane should be developed for housing.
>
> ...
>
> 48. Much of the area around Crow Lane including the appeal site was designated as Green Belt in 1957, with a specific allocation as market gardens. In 1973 the Council recognised the difficulty of achieving appropriate uses in some parts of the Green Belt, by adopting a non-statutory policy which allowed Nos 128 to 158 Crow Lane to be developed for commercial uses, and Nos 218 to 228 to be developed for residential purposes. This left Nos 178 to 208 Crow Lane in the Green Belt as being for public open space. These policy intentions were formalised by policies GRB1 (the Green Belt boundary) and GRB25 (the Crow Lane area of the Dagenham Corridor) in the UDP.
>
> ...
>
> 50. The UDP contains other policies relevant to the appeal proposal: STR23 (increasing the supply of housing in the Borough), ENV1 (location, design and layout of development), ENV10 (reducing bad neighbour effects of nonresidential uses), ENV16 (protecting the Green Belt from proposals in the urban area), EMP9 (changes of use of industrial/commercial premises), HSG1 (use of available sites for housing), HSG2 (sites identified for housing on the Proposals Map), and MWD13 (waste recovery and recycling operations).
>
> 51. The local planning authority's policy MWD13 in the UDP supports the enclosure of waste processing and treatment facilities. I consider that the appeal proposal would be contrary to this policy because of conflict with the environmental policies, the adverse effect on local residents, the inadequate connections to the primary road network, and the significant airborne pollution. Neither is the transport of waste a good neighbour for residential development and the appellants

and the local planning authority have discussed relocating both the waste transfer operations and the haulage depot from Crow Lane to another site. The Council refused to support a move of the activities at 228 Crow Lane to a site at Gerpins Lane, in the Green Belt.

...

55. The 1989 planning application supporting statement acknowledged that the existing open waste transfer area on 228 Crow Lane was directly open to view from 238 Crow Lane, the railway line and from the site entrance. However, to enclose the activities would not remove the disadvantages of the current use; it would only ameliorate them. The proposed enclosure building would not affect the noise and disturbance caused by vehicles entering 228 Crow Lane and making their way towards the waste transfer area during the day, when the lorries stored overnight for the haulage use are away. Indeed, the location of the access into the building, and the need to accommodate the turning movements of the articulated bunker, would bring that noise and disturbance closer to the western boundary of the site than at present, as well as requiring those vehicles to manoeuvre adjoining the eastern boundary, potentially affecting the use of amenity areas for any future residential use of 218 Crow Lane as intended in the UDP policies.

56. If the present waste transfer activities cannot continue, the appellants say that the land at 228 Crow Lane could be used entirely for a transport yard and to accommodate further heavy goods vehicles. Alternatively, the land could be used for storing and handling those types of waste which do not need a licence under the Waste Management Regulations 1994, such as waste paper or cardboard, waste textiles, glass, steel cans, aluminium cans and foil, and food or drink cartons. Therefore dismissal of this appeal would not mean that waste and haulage activities on the land would cease.

...

58. The UDP reiterates the need for more housing land beyond that identified by the authority as available in the Plan. Policy EMP9 intends commercial sites which become available for redevelopment to be used for housing in accordance with policy HSG1. It is part of the strategy in the UDP to increase the supply of housing in the Borough as stated in policies STR23 and HSG1. The intended use of the land in Crow Lane has been residential for more than 20 years, and housing has been built to the west of the present appeal site as a direct consequence of the policy first introduced in 1973. Were this site known to be available now for housing, I consider that it would be identified under policy HSG2.

...

61. I accept that the erection of an enclosure building would be likely to result in some reduction in the noise currently emitted by the loader moving the waste materials, and that made by delivery and collection vehicles once inside the building. However, this latter effect would be likely to be counteracted by the restrictions the building would place on the movements of larger delivery vehicles, and the articulated 'bulker' which calls regularly to remove waste materials.

62. The appeal proposal would introduce a large commercial building onto land for which the intended use is residential, and which is close to the Green Belt. The width of the site would only permit a very limited amount of landscaping which would be unlikely, even in the longer term, to conceal the building or the activities on the land. The enclosure building would perpetuate and consolidate the use of the site contrary to the longstanding policies for the area, which were

confirmed in 1993 by the adoption of the UDP. In addition, it would not achieve a significant improvement in the overall noise disturbance generated by the activities on the land sufficient to justify a proposal contrary to policies in the UDP and therefore to the intentions of section 54A in the Town and Country Planning Act 1990.

63. My colleague in his decision letter on the appeals in 1991 said that the essential service provided by the appellants did not mean that it would be right to permit the expansion, intensification or consolidation of the use if it is inherently unsuitable for its setting. I share that view. However well managed, sites for waste transfer operations need to be carefully located in areas where their environmental impact can be contained to an acceptable level. That is not possible on a site of this size in a residential area.

...

DECISIONS

65. I have considered all the other matters raised, including the variations to the licence conditions suggested by the parties, the environmental measures suggested by the appellants, a temporary planning permission, conditions which could be attached to a planning permission, the application for a recycling use at Warwick Lane/Gerpins Lane landfill site, and alternative uses to which the site could be put. However, these do not outweigh the considerations which have led me to my decisions."

Accordingly she dismissed appeal B.

Mr George mounts four main grounds of challenge.

Ground 1

This challenge relates to the adequacy of the Inspector's conclusions and her reasoning in relation to the "fall-back position". It is contended, in essence, that she made no finding as to whether the fall-back use or uses would be carried on in the alternative. If she had made such a finding she made no comparison between the planning implications of the fall-back uses against the planning implications arising from the proposed development.

There have been made decisions of this Court over the last two decades on this topic. The cases are assembled in Mr George's skeleton argument. The principal cases are *Small Pressure Castings Limited v. Secretary of State for the Environment (No. 1)* (1972) 223 E.G. 1099, *Snowden v. The Secretary of State for the Environment* [1980] J.P.L. 749, *Burge v. The Secretary of State for the Environment* [1988] J.P.L. 497, *New Forest District Council v. Secretary of State for the Envrionment* (1996) 71 P. & C.R. 189, and *Brentwood Borough Council v. Secretary of State* [1996] 72 P. & C.R. 61.

From these cases Mr George drew three propositions for tests which it is necessary, in his submission, for the decision-maker to apply: first, whether there is a fall-back use, that is to say whether there is a lawful ability to undertake such a use; second, whether there is a likelihood or real prospect of such use occurring. Third, if the answer to the second question is "yes" a comparison must be made between the proposed development and the fall-back use. One might possibly comment that in this area, relating to development control, as elsewhere in planning law, there is a tendency for the minutiae of these cases to detract from the deliberately simple and broad terms of section 70(2) of the 1990 Act. This comment occurred to me when Mr George suggested that the Court of Appeal may soon have to decide whether, in relation to test 2, the criterion was a "possibility" or "likelihood/probability" of the fall-back use being undertaken. Under section 70(2) the decision-maker must have regard to all material

considerations. If a fall-back or alternative use is to be undertaken it will, in most cases, be a material consideration to which regard must be had. It was so in this case.

The requirement to have regard to the consideration imports a requirement on the decision-maker to have before it sufficient material so that the consideration can be assessed. In the context of fall-back cases this all reduces to the need to ask and answer the question: is the proposed development in its implications for impact on the environment, or other relevant planning factors, likely to have implications worse than, or broadly similar to, any use to which the site would or might be put if the proposed development were refused? By "might" I do not mean a mere theoretical possibility which could hardly feature in the balance (see, especially, the Brentwood case). For a fall-back suggestion to be relevant there must be a finding of an actually intended use as opposed to a mere legal or theoretical entitlement. Beyond these general statements, which are ones of simple common sense, I suggest that the Court should be wary of laying down detailed hoops for the decision-maker in his, or her, broad powers and duties under section 70(2), especially bearing in mind that there will doubtless be many other factors relevant to the eventual decision.

In the present case it is Mr George's second and third tests which are particularly relevant. (I observe in relation to test 1 that the Second Respondent would take a point as to the present lawfulness of the haulage use. Nothing in this judgment is to be taken as either support or detraction from that proposition whose resolution is not relevant to my decision.)

Therefore, did the Inspector ask and answer the relevant question? As a preface to my findings on this matter, I understand the real hurt of this decision letter to lie in paragraphs 62 and 63. Taking the latter first, she refers to a previous decision, relating in part to No. 228 Crow Lane, of an Inspector in relation to enforcement notices in 1991. He was concerned that there should not be permission for the expansion, intensification or consolidation of the use if it is inherently unsuitable for its setting. The present Inspector shared that view. At paragraph 62, which I have set out above, she places particular emphasis on the fact that the enclosure building would perpetuate and consolidate the use of the site, contrary to the long-standing policies for the area.

Turning to Mr George's second test, the question for the Court is whether the Inspector made a finding as to the prospect of the fall-back use, or uses, actually being undertaken, as opposed to the mere theoretical entitlement to do so. The resolution of this question centres mainly on the last sentence of paragraph 56—"Therefore, dismissal of this appeal would not mean that waste and haulage activities on the land would cease". In my judgment, construing the decision letter as a whole, this is not a record of the applicant's evidence at the inquiry but a finding of fact by the Inspector in acceptance of the main thrust of that evidence.

My conclusion on this point is not shaken by her use of the phrase "could be put" in paragraph 65. She is there dealing, as had the evidence before her, with the two alternative uses which might be undertaken. The phrase "could" in my judgment is consistent with a finding that it was likely that some commercial use would be undertaken, though which of the two alternatives is not being decided. I therefore find that the Inspector did make a finding that the prospect of the alternative or fall-back use, or uses, was actual and not merely theoretical.

Turning to test 3, the question arises as to whether the Inspector made a comparison between the planning implications of the proposed development and the planning implications of the fall-back uses. At paragraph 55 of the decision she deals with certain implications of the current use and the implications of enclosing part of the site. She finds that enclosure would ameliorate some aspects of the current use. However, there were other significant disadvantages, namely significant adverse effects in

relation to the existing residential uses to the west and in relation to the prospects for residential use on the land to the east at No. 218 Crow Lane. In paragraph 56 she deals with the fall-back positions. One must remember that thereafter the decision proceeds upon two assumptions: first, that a fall-back use might well happen if the appeal is dismissed. Second, that since appeal A has been dismissed and she proposes to dismiss appeal B, the only resulting commercial uses would be those dealt with in relation to the fall-back position.

In relation to the comparison of impacts, Mr Elvin for the First Respondent relied, in essence, on paragraphs 60 to 63. As to paragraph 60, I have some difficulty in accepting Mr Elvin's submissions. The position was that the fall-back uses would themselves tend to constrain residential development of No. 218. I am not satisfied, in relation to this paragraph, that there is a sufficiently clear comparison here being made between the proposed development on the one hand and the fall-back position on the other hand.

But when one comes to paragraphs 62 and 63, the position is, in my judgment, different. If the appeal is dismissed some open uses will carry on, but without the feature or characteristics of intensification, consolidation and perpetuation. If the appeal is allowed that consolidation, etc. will occur. It will in her assessment clearly have more undesirable results than the fall-back. That is to say, there would, compared with the fall-back position, be a use which is not only inherently unsuitable in this residential area, but which will be perpetuated by the building. The planning authority's objectives of residential development in the area are far more likely to be deferred or frustrated if this undesirable commercial use is consolidated by the construction of the building.

Accordingly, I find that in these passages the effect of the Inspector's conclusions, when read in the light of the background of the inquiry, is a comparison between the proposed development and the fall-back; the former being significantly more prejudicial than the latter to the planning of the area. I therefore reject Mr George's main challenge mounted under Ground 1.

There is also a reasons challenge under Ground 1. On the view I have taken as to the Inspector's approach to the assessment of the fall-back arguments, I find that I am not in doubt and, certainly not in substantial doubt, as to her reasons. These were, in summary, essentially that the proposed building would, whether compared with the present use or the fall-back use, undesirably consolidate an inherently unsuitable use in this area. I therefore likewise reject the reasons challenge under Ground 1.

Ground 2

Under this ground Mr George mounts five specific challenges to the manner in which the Inspector has dealt with, and applied, various policies of the Second Respondent's Statutory Development Plan, the UDP.

The first sub-ground relates to policy MWD13. It is here submitted that she has misinterpreted the effect of this policy which, in Mr George's submissions, either solely or essentially relates to a *de novo* application for a waste transfer station. Policy MWD13 provides, so far as relevant:

> "THE COUNCIL RECOGNISES THE VALUE OF WASTE RECOVERY AND RECYCLING OPERATIONS IN REDUCING THE NEED FOR WASTE DISPOSAL FACILITIES. HOWEVER, PERMISSION WILL ONLY BE GRANTED FOR WASTE RECYCLING, WASTE TRANSFER STATIONS, OR OTHER WASTE PROCESSING AND TREATMENT FACILITIES, WHERE ALL THE FOLLOWING CRITERIA ARE MET."

Those criteria are then set out.

I reject Mr George's contentions under this ground. It seems to me inherently improbable that this policy only relates to *de novo* or initial construction and not to enlargements, extensions and so forth. He seemed to accept the weakness of his position when I put to him the unlikelihood that the policy was not intended to relate, for example, to extensions, possibly quite significant extensions. In my judgment "Waste transfer stations" relates both to *de novo* applications and applications relating to part of existing transfer stations. Alternatively "other waste processing and treatment facilities" are apt to include development such as here proposed. As to compliance, the Inspector finds that whilst enclosure will assist in relation to the noise of activities within the enclosure, that would be counteracted by impacts outside, both to the west and to the east. She was fully entitled to find breach of this policy.

Mr George referred to the proof of the Second Respondent's planning officer which appeared to share the same construction as contended for by Mr George. I do not find this comment material. The Inspector was entitled, and, indeed, bound, to make her own judgment as to the application of this policy, one which she, in my judgment, correctly made.

Sub-grounds (2) and (3) under this second main ground were run together at the hearing and correctly so. Two errors are alleged: first that policy GRB25 is not applicable to the appeal site and did not formalise the planning authority's previous "policy intentions" that No. 228 be developed for residential purposes; second, that she referred to the "intended use" of the appeal site for residential, whereas on a proper construction of policies HSG1 and ENP9 there was no such policy.

The answers to those propositions are briefly as follows. Her reference to policy GRB25 in paragraph 28 of the letter is in the context of a brief planning policy history of the area only. Her use of the word "formalised" is appropriate when, as appears from the text to policy GRB25, the Green Belt boundary was adjusted to the exclusion of the appeal site expressly against the history of the policy intention to secure residential redevelopment of the area. The Inspector was quite clear, in my judgment, that GRB25 did not of itself apply to the appeal site.

As to the use of the expression "intended use", for residential use, this expression is likewise not unreasonable or open to substantial doubt as to its meaning. The Council's long-term objectives reflected in the exclusion of this area from the Green Belt are to see residential redevelopment of this area. Indeed, I was referred to several passages in documents emanating from the Second Respondent (pages 100, 129, and 139 of the bundle) where they themselves took this view. Further the Inspector was entirely clear that the site was not allocated for residential use (see the last sentence of paragraph 58 of the letter). I therefore reject sub-grounds (2) and (3).

Sub-ground (4) alleged a misinterpretation of policy ENV16 since the policy did not, in Mr George's submission, apply because the appeal site does not abut the Green Belt. Policy ENV16 provides:

> "IN DEALING WITH PLANNING APPLICATIONS INVOLVING LAND IN THE URBAN AREA BUT WHICH ABUTS THE GREEN BELT, THE COUNCIL WILL SEEK TO ENSURE THAT PROPOSALS WILL NOT BE DETRIMENTAL TO THE CHARACTER AND VISUAL AMENITY OF THE GREEN BELT."

The decision letter is not clear—and Mr Elvin conceded as much—as to whether the Inspector is finding a breach of this policy. However, this lack of clarity, or lack of reasoning, is certainly not sufficient, in my judgment, in any way to warrant quashing of this decision, since this was clearly not a principal issue at the inquiry, or indeed in her decision. I would, in any event, reject Mr George's complaint as to the scope of the policy for these reasons. First, his attack on her summary of the policy at paragraph 50 is not warranted. This is a brief summary description only. Second, the question of whether a site abuts the Green Belt is for in the Inspector's judgment. The text to the policy refers to

development not being prejudicial to the Green Belt's character and quality. A proposal which is sufficiently on the boundary to be prejudicial to those factors would, in my judgment, be capable of being subject to the policy. After all, the appeal site is separated from the Green Belt by one land parcel only. I therefore reject the challenge on sub-ground (4).

As to sub-ground (5), it is here complained that the Inspector failed to address or reach any conclusion in relation to policy ENV10. This provides:

> "WHERE THE OPPORTUNITY ARISES, THE COUNCIL WILL SEEK TO REDUCE THE 'BAD NEIGHBOUR' EFFECTS OF NON-RESIDENTIAL USES, PARTICULARLY THOSE IN RESIDENTIAL AREAS."

As was agreed at the hearing, this is an aspirational policy and one containing objectives, not strict criteria or tests. In my judgment it is quite clear, reading the decision letter as a whole, that the Inspector found that this policy applied to the whole case related to the "bad neighbour" aspects of the development and the objections to the perpetuation of such. In my judgment it required no specific finding in relation to this policy, the existence and terms of which she was well aware. I would add, in any event, that in paragraph 51 of her decision letter, dealing with policy MWD13, she finds that the development is contrary to this policy upon the basis of conflict with the environmental policies and for other reasons. I believe that this is an apt reference to include policy ENV10.

Mr George had a final summary complaint in relation to the UDP findings and the application of section 54A of the 1990 Act. Reading the decision letter as a whole, it is quite clear, from her detailed findings, that by reason of especially the effects of noise, airborne dust, other impacts on amenity, and traffic movement, the Inspector found the development seriously contrary to the environmental policies and objectives of the UDP. In the circumstances, having set out the relevant policies and borne them in mind, there was no need for her to go through a somewhat sterile exercise of highlighting the particular criteria of those policies which were breached.

Ground 3

In essence this ground is a complaint that the Inspector left out of account the fact that the flats adjoining at No. 238 were erected recently in the knowledge that the adjoining site constituted a lawful licensed waste transfer station. In elaboration of this ground Mr George relied on a noise condition imposed on the permission for that development to protect, to a certain degree, the noise environment within the dwellings. Of course, as was conceded, the noise condition is ineffective to protect external amenity.

I reject this ground. The Inspector was perfectly aware of the fact that the permission and construction of these flats were recent events. She refers to it several times. I find no reason for disqualifying her perfectly proper concern to protect residential amenities in the area, both internal and external to the dwellings, and whenever they had been erected.

Ground 4

It is submitted that the consequences of dismissal of the appeal are draconian and that this was a material consideration which was left out of account by the Inspector, alternatively she was in breach of the requirement to give reasons in relation to this contention. I do not find that Ground 4 is sustainable. Refusal or dismissal of the appeal was obviously seen by the Applicant, as well as others, as a possible outcome of making the application and appeal in the first place. Indeed, it was because of the possibility of refusal that all the evidence and submissions were presented in relation to the fall-back uses which might be undertaken. Further, I find it hard to accept that the Inspector was at any time unaware of the

detrimental consequences to the Applicant resulting from the refusal. I also reject the reasons challenge. Her position is self-evident. The significant amenity objections overrode all other material considerations.

In any event, the dire consequences or hardship to the applicant was apparently not prayed in aid before the Inspector at the inquiry. It does not appear to have been presented as a principal important controversial issue. On this ground also I would reject the reasons challenge under this last ground.

For all those reasons this application fails.

Comment: As Mr Lockhart Mummery Q.C., sitting as a Deputy Judge pointed out, there has now accumulated a considerable jurisprudence on the fall-back principle; in my comment on *New Forest D.C. v. Secretary of State for the Environment* [1996] J.P.L. 935 I referred to some of the unreported cases. Indeed, there are so many fine points being taken that the Deputy Judge is right to point out the danger of the courts laying down too many hoops for the decision maker. In the final analysis the important principle is that it is up to the decision-maker as to what weight he places on the fall-back argument in the context of the particular case.

Having said that, the three propositions put forward by Charles George Q.C. counsel for the applicants (which the Deputy Judge did not expressly approve or disapprove) do succinctly set out the main principles. The only one which is slightly problematic is proposition or test No. 2 which is whether there is "a likelihood or real prospect of such use occurring". As I indicated above, it could be argued that this is rather a tough test and the decision-maker should be able to take into account the fall-back argument even where there was a possibility that it would be taken up as long as the decision-maker did not put perverse weight on the argument. Certainly in the New Forest case, Nigel Macleod Q.C. sitting as a Deputy Judge seems to suggest that a lesser test should apply and that it was not always necessary to show a real likelihood. At the risk of being accused of going into minutiae, it is suggested that it is a point that needs clarifying and that it would actually make the decision-maker's task easier if the law expected them to take into account the fall-back argument where there was possibility of those rights being taken up but equally allowed the decision-maker to place very little weight on that factor.

Local Plan—Green Belt—inquiry held—PPG 2 1995 published—Inspector's report—criteria for appropriate development—modifications to local plan—objections received—further modifications—refusal to hold further inquiry—whether reasons adequate—allegation of substantial prejudice and unfairness upheld.

Drexfine Holdings Ltd v. Cherwell District Council (Queen's Bench Division, Robin Purchas Q.C. sitting as a Deputy Judge, August 29, 1997)[9]

Drexfine Holdings Ltd operate a limestone quarry and cement works on a site of 67·5 hectares. The cement works, which ceased production in 1986, occupied some 6·5 hectares with buildings of 18,050 square metres of floor space, in several cases over 20 metres high, with a chimney 76 metres in height. The site was included in the Green Belt under the Central Oxfordshire Local Plan adopted in 1992 and was acquired by Drexfine in April 1995 from a company called Blue Circle.

A central feature of the case was the change in Government Guidance for development control in the Green Belt following the publication of the revised PPG 2 in January 1995. The former PPG 2 1988 provided that there should be a general presumption against "inappropriate development" within the Green Belt. PPG 2 1995 expands on the meaning of inappropriate development.

The matter concerned redevelopment of the appeal site. To qualify as appropriate development the site had to be identified in an adopted local plan and the redevelopment would have to meet the criteria in Paragraph C4 of Annex C to PPG 2. If the site was not identified in the local plan, and new building, not otherwise comprising appropriate development within the definition, would constitute inappropriate development and would be subject to the general presumption against such development.

Annex C provided, so far as relevant:

[9] *N. Cameron* (Henmans, Oxford); *R. Price Lewis and M. Reed* (Cherwell District Council, Oxfordshire).