Status: Positive or Neutral Judicial Treatment

*40 R. v Rochdale M.B.C.

Queen's Bench Division (Crown Office List)

7 May 1999

[2000] Env. L.R. 1

(Sullivan J.)

May 7, 1999

Environmental assessment—application for outline planning permission for a business park—Town and Country Planning (Assessment of Environmental Effect) Regulations 1988—provision of environmental information—whether failure to provide sufficient information made any grant of planning permission unlawful

The applicants ("T") were residents living in the vicinity of a site which was the subject of a planning application to develop a business park. The application for this permission was made in "bare outline" as the first step towards the construction of the business park with all detailed matters reserved for further consideration. The permission gave a period of 10 years within which application was to be made for approval of reserved matters. In addition, there was an application for a full planning permission for the construction of a spine road to serve the business park. An environmental statement together with an ecological survey was submitted in support of the applications. The Respondent Council (R.M.B.C.) granted outline planning permission on 6 August 1998 for both applications, subject to numerous conditions, some of which required further details to be submitted which would address the minimisation of certain environmental impacts. In particular, one condition required the preparation of a Framework Document which would show the design and layout of the proposed development with plans for phasing different aspects of the development.

T sought to challenge the grant of planning permission by way of judicial review. There were five grounds:

1. There was a failure to give the particulars required under the Town and Country Planning (Applications) Regulations 1988 ("the Applications Regulations") and so the application for the business park did not satisfy the requirements of section 62 of the Town and Country Planning Act ("the 1990 Act").

2. There was a failure to give the information required under the Town and Country Planning (Assessment of Environmental Effects) Regulations 1988 ("the Assessment Regulations") which implemented E.C. Directive No. 85/377 on the assessment of the *2 effects of certain public and private projects on the environment ("the Directive").

3. R.M.B.C. erred in law in treating the planning permission for the business park as though it secured the use of part of the site for public open space and, therefore, as being in compliance with both the District Plan and the draft Unitary Development Plan.

4. R.M.B.C. failed to consider whether the spine road was appropriately designed to serve the business park as it might be developed under the Framework Document; alternatively, whether the spine road would constrain the development of the business park.

5. A number of conditions imposed on the planning permissions were unlawful because they required things to be done on land which was not under the applicants' control.

Held, in granting the application and quashing the decisions to grant planning permission:

1. It was not necessary in every case to specify the scale, expressed in terms of its floor space, of a proposed building in order to fulfil the requirement to describe the development which was the subject of the application as imposed under reg.3 of the Application Regulations. It was for the local planning authority to decide whether an outline application gave a sufficient description of the proposed development. Regulation 3 imposed a requirement to include the particulars specified in the application form, but only in so far as they were appropriate to the kind of development that was being

proposed. It was in the nature of an outline application that many of the particulars sought would not be available at the outline stage, and hence it would not be appropriate to provide them on the form. In these circumstances, the application under ground 1 failed.

2. The application did not contain any information as to the design, size, or scale of the development. The fact that the environmental assessment was based on the illustrative masterplan and indicative schedule of uses was a tacit acknowledgement that the description of the development in the application was inadequate for the purposes of supplying “environmental information” in accordance with the Assessment Regulations. Once it was decided that a project fell within Sched. 2 of the Assessment Regulations, there was a requirement that the “environmental information” submitted with the application should permit the assessment of the likely impact of the development which was proposed. Whilst R.M.B.C. took into consideration “environmental ***3*** information” about the effects of carrying out a business park development in accord with an illustrative masterplan and an indicative schedule of land uses, that was not the development which was proposed to be carried out in the application for planning permission, nor was it the development for which planning permission was granted; nor was the information sufficient in any event to comply with the requirements of Sched. 3 of the 1988 Assessment Regulations. The council did not have power to grant planning permission for the business park. The application under ground 2 succeeded.

3. R.M.B.C. could not, under the terms of the outline planning permission, insist on the provision of public open space. A fresh application for change of use to those purposes would be required if such space was to be provided. It could not reasonably be concluded that this application complied with the relevant policy of the U.D.P. However, it would be for R.M.B.C. to decide whether the failure of the application to meet all of the criteria of the relevant U.D.P. was contrary to either the District Plan or the emerging U.D.P. To the extent that R.M.B.C. erred in concluding that the application complied with the relevant policy in the U.D.P., the application under ground 3 was successful but that would not necessarily be a reason on its own for quashing the decision.

4. There were policies in the U.D.P. which constrained the flexibility in alignment of the spine road. Consequently, there was nothing before the decision makers which would have suggested that an alternative alignment, or a different positioning of the spine road, might have been desirable or possible. There was therefore no substance in T's arguments and accordingly the application under ground 4 failed.

5. The enforceability of any planning condition had to be considered in the light of the particular facts. The problem with enforceability was a practical one, and it was undesirable to fetter the broad discretion conferred upon decision makers by section 70(1)(a) of the 1990 Act any more than was strictly necessary. Although broad classification of conditions as “positive” or “negative” was a useful indicator, but should not be regarded as determinative without regard to the circumstances of the individual case. So considered, the conditions imposed by R.M.B.C. in the present case were not unenforceable. The application under ground 5 failed.

Given, in particular that the argument on ground 2 had succeeded, the ***4*** court would not exercise its discretion not to quash the decision. The fact that there might well be a strong economic imperative to grant planning permission for major development projects and thereafter to proceed with development at a rapid pace meant that it was all the more important that their likely effects on the environment were properly assessed in accordance with the directive and the Assessment Regulations. The assessment procedure was a fundamental part of the E.C.'s environmental policy and it was essential that it was carried out.

Legislation considered:

Town and Country Planning (Applications) Regulations 1988, regs 2,3.

Town and Country Planning Act 1990, sections 58(1)(b), 62, 70(1)(a).

Town and Country Planning (General Development Procedure) Order 1995, art. 3.

Town and Country Planning (Assessment of Environmental Effects) Regulations 1988, regs

4(2), Sched. 2, Sched. 3.

E.C. Directive No. 85/377 on the assessment of the effects of certain public and private projects on the environment: Arts 1.2, 3, 5.1, 5.2, Annex III.

Legislation referred to:

Town and Country Planning (Applications) Regulations 1988, reg. 4.

Town and Country Planning Act 1990; sections 65(2), 75(2) and (3), 172(2).

Cases considered:

R. v. Newbury D.C. and Newbury and District Agricultural Society, ex p. Chieveley Parish Council [1999] P.L.R. 51.

R. v. North Yorkshire C.C., ex p. Brown and Another [1999] Env. L.R. 623.

W.W.F.-U.K. Ltd and Another v. Secretary of State for Scotland [1999] Env. L.R. 632.

British Airports Authority v. Secretary of State (1979) S.C. 200.

Birnie v. Banff C.C. [1954] S.L.T. 90.

Cases referred to:

Slough B.C. v. Secretary of State [1995] 17 P. & C.R. 560.

Bernard Wheatcroft Ltd v. Secretary of State for the Environment [1980] 43 P. & C.R. 23.

Inverclyde D.C. v. Inverkip Building Co. Ltd [1982] S.L.T. 401.

M. J. Shanley Ltd v. Secretary of State for the Environment and Another [1982] J.P.L. 380.
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Proberun Ltd v. Secretary of State for the Environment and Another [1990] 3 P.L.R. 79.

Mouchell Superannuation Fund Trustees v. Oxfordshire County Court [1992] 1 P.L.R. 97.

Newbury D.C. v. Secretary of State for the Environment [1981] A.C. 578.

Policy considered:

Circular 15/88: paras 42–44.

Circular 11/95: para. 28.

Representation

Mr J. Howell Q.C. and Ms K. Markus appeared on behalf of the applicants.

Mr T. Straker Q.C. and Mr P. Kolvin appeared on behalf of the respondent.

JUDGMENT

This is an application for judicial review of two planning permissions granted by the respondent council on August 6, 1998. The two planning permissions were, firstly, an outline planning permission for:

> "Proposed business park consisting of general and light industry, offices distribution and storage, research and development with associated and complementary retail, leisure, hotel and housing land between Kingsway (A664), motorway M62, Broad Lane (B6194) and the Rochdale/Oldham ailway line."

Secondly, a full planning permission for:

> "Construction of spine road to serve business park including highway connection to Kingsway (A664) and alterations and connection to the north side of Junction 21 of the motorway (M62).
>
> Land between Kingsway, motorway (M62), Broad Lane (B194) and the Rochdale Oldham railway line."

The site of the second planning permission is wholly contained within the 213 hectare site of the planning permission for the business park. That 213 hectares includes land to the south of the M62, the motorway itself and Junction 21. Those areas included in the application to facilitate construction of the spine road. The remainder of the site consists of approximately 170 hectares of generally open land.

There are some dwellings within that 170 hectares. The applicants for judicial review are either resident on, or frequently visit, the site and would be affected by its development as a business park. The site is located between the built-up area of Rochdale to the West/North West and the M62 to the South/South East. The Council has had a long standing policy that it should be developed as a business park—the Kingsway Business Park. There are policies to that effect in both the South Rochdale Local Plan, which was adopted in June 1989, and the Deposit Draft U.D.P., published ***6*** in 1994. It is a strategic employment site, and is intended to attract substantial inward investment for the benefit of Rochdale and the North West region generally.

The applications for planning permission were made by Wilson Bowden Properties Limited and English Partnerships on February 23, 1998. The application for the Business Park described the proposed development as:

> "Kingsway Business Park consisting of high quality general and light industry, offices, distribution and storage, research and development in use classes B1/B2/B8, associated and complementary uses including retail in use classes A1 and A3, leisure, hotel and housing."

The site area was given and a site plan showing 213 hectares edged in red was provided. The application is stated to be an outline application, and it was indicated that approval was not being sought for any of the reserved matters.

In answer to subsequent questions in the application form relating to such matters as diversion of public rights of way, the felling of trees, the demolition of existing buildings, the type and colour of materials to be used for roofs and walls, the processes to be carried on, plant and machinery to be installed and vehicular traffic flow, it was stated that the application was in outline and that details were not available or were to be subsequently provided or agreed. An estimate was given of the likely employment, a total of 7,800 jobs, and in answer to question 11, as to the total amount of floor space involved in the proposal, it was said:

> "Indicative land use schedule and floor space figures attached."

In addition to the site plan, a master plan accompanied the application. The role of the latter was explained in a letter which accompanied the application, and which stated that:

> "A master plan has been prepared for illustrative purposes which is enclosed for your information and assistance in consultations. This plan aims to demonstrate the general form of development, showing the integration of the access proposals, principal highways alignments, possible patterns of land use, initial proposals for the integration of landscape and open space and adjustments to Rights of Way through the site."

It was clearly stated upon the master plan itself that it was for illustrative purposes only.

So far as floor space is concerned, there was a statement supplementary to section 11 of the planning application form, which said this:

> "The application is in outline only with all matters reserved. However, in order to assist in consideration of the application, assessments have been ***7** made of the likely allocation of uses within the development and associated floor space totals. An indication of these areas are summarised below."

Then under the various use classes, hectarage was given and a gross floor space was given. In the case of the housing, a number of dwellings was given at approximately 60. The total hectarage given for built development was 113.6 hectares and the total gross floor space, 356,880 square metres. The statement added:

> "In addition an area of 32.0 Hectares is set aside for recreational use within the development."

Thus the application was that what is sometimes called a "bare outline", an application to construct a business park, as described above, within the extensive area edged red on the application plan, with all detailed matters reserved for further consideration.

The application for planning permission for the spine road was for:

> "Construction of infrastructure associated with the Kingsway Business Park including highway connection to Kingsway, central spine road and improvements to the north side of Junction 21 of the M62."

Since the application was not for the erection of a building, but for engineering operations, it was a full application. In addition to the site plan and the illustrative master plan there were a series of drawings showing both the horizontal and vertical alignment of the road and the position of proposed roundabouts along its length.

An environmental statement prepared by Environment Resources Management together with an ecological survey was submitted in support of the applications. I will return to the basis on which the Environmental Statement was prepared in due course.

The application for the business park was the subject of a lengthy report to the Environment Committe by Mr Beckwith, the council's Director of Environment. He also prepared a report about the

spine road. It was a brief report because, as he explained:

> "Essentially this application is a first step in the construction of the Kingsway Business Park. The issues of principle are considered in the report on the outline application."

He then noted that the two applications were "essentially interlinked" and recommended that planning permission be granted in both cases subject to numerous conditions. Council members accepted his recommendation.

The planning permission for the business park gives a period of 10 years within which application must be made for approval of reserved ***8*** matters. This extended period is a reflection of the fact that, as explained in the environmental statement, it was envisaged that "it may take in the order of 15 years before the whole site is comprehensively developed."

For present purposes, three conditions are of particular significance. Condition 1.3 states:

> "The development shall be carried out in accordance with the mitigation measures set out in the environmental statement submitted with the application, unless otherwise agreed in writing by the local planning authority and unless otherwise provided for in any other condition attached to this planning permission."

Condition 1.7:

> "No development shall be commenced until a scheme ('the Framework Document') has been submitted to and approved by the local planning authority showing the overall design and layout of the proposed business park, including details of the phasing of development and the timescale of that phasing. The Framework Document shall show details of the type and disposition of development and the provision of structural landscaping within and on the perimeters of the site. The business park shall be constructed in accordance with the approved Framework Document unless the local planning authority consent in writing to a variation or variations."

Condition 1.11:

> "This permission shall be not be construed as giving any approval to the illustrative master plan accompanying the application."

Within condition 7, conditions 7.1 to 7.12 address a number of ecological concerns that were identified in the ecological survey. They are in common form and condition 7.1 will suffice as an illustration of what the council required:

> "No works pursuant to this permission shall be commenced until a scheme for the conservation and enhancement of Stanney Brook Site of Biological Importance and other watercourses through the site has been approved by the local planning authority. Such a scheme shall be completed in accordance with the approved scheme, including timescales."

Condition 1.3 in the spine road permission replicated condition 1.7 in the business park permission. Condition 7 in the spine road permission was in similar form to condition 7 in the business park permission. For example, condition 7.4 says:

> "The highway crossing of the Stanney Brook corridor shall be designed to minimise the impact of the crossing on the corridor to the approval of the local planning authority." ***9***

Against that background Mr Howell Q.C., on behalf of the applicants, challenges the grant of planning permission on five grounds:

1. There was a failure to give the particulars required under the Town and Country Planning

(Applications) Regulations 1988 (“the Applications Regulations”) and so the application for the business park did not satisfy the requirements of section 62 of the Town and Country Planning Act (“the 1990 Act”).

2. There was a failure to give the information required under the Town and Country Planning (Assessment of Environmental Effects) Regulations 1988 (“the Assessment Regulations”) and so the council was not entitled to grant planning permission for the business park.

3. The council erred in law in treating the planning permission for the business park as though it secured the use of part of the site for public open space and, therefore, as being in compliance with both the District Plan and the draft Unitary Development Plan.

4. The council failed to consider whether the spine road was appropriately designed to serve the business park as it might be developed under the Framework Document; alternatively, whether the spine road would constrain the development of the business park.

5. A number of conditions imposed on the planning permissions were unlawful because they required things to be done on land which was not under the applicants' control.

I will deal with each of those grounds in turn.

Section 58(1)(b) of the 1990 Act provides that:

“Planning permission may be granted—

(b) by the local planning authority … on application to the authority in accordance with a development order. ”

By section 62:

“Any application to a local planning authority for planning permission—

(a) shall be made in such manner as may be prescribed by regulations under this Act;

(b) shall include such particulars and be verified by such evidence as may be required by the regulations or by directions given by the local planning authority under them.” ***10**

The regulations are the Applications Regulations, reg. 3 of which states:

“1. Subject to the following provisions of this regulation, an application for planning permission shall—

(a) be made on a form provided by the local planning authority;

(b) include the particulars specified in the form and be accompanied by a plan which identifies the land to which it relates and any other plans and drawings and information necessary to describe the development which is the subject of the application …”.

Sub-paragraph (c) deals with the number of copies required:

“2. In the case of an application for outline planning permission, details need not be given of any proposed reserved matters.”

An “outline planning permission” is defined in reg. 2 as meaning:

> “… planning permission for the erection of a building, subject to condition requiring the subsequent approval of the local planning authority with respect to one or more reserved matters, that is to say—
>
> (a) siting,
>
> (b) design,
>
> (c) external appearance,
>
> (d) means of access,
>
> (e) the landscaping of the site.”

Mr Howell notes that reg. 4 enables the local planning authority to direct an applicant to supply further information, but he points to the mandatory terms of reg. 3. The application shall be made on the local authority's form. Whilst the local authority has a discretion as to what information is requested on the form (there being no nationally prescribed form for making an application for planning permission), once the local planning authority has provided the form, the application for planning permission shall include the particulars specified within it. That requirement he submits, still stands in the case of an application for outline planning permission, save that the applicant is not required to give details of the reserved matters as set out in reg. 2. An application for outline planning permission may only be made for the erection of a building, not for a change of use, and there is no absolute right to have one's application for planning permission to erect a building considered in outline, because art. 3 of the Town and Country Planning (General Development Procedure) Order 1995 (“G.D.P.O.”) provides:

> 1. “ Where an application is made to the local planning authority for outline planning permission, the authority may grant permission subject to a condition specifying reserved matters for the authority's subsequent approval. ***11***
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> 2. Where the authority who are to determine an applicaton for outline planning permission are of the opinion that, in the circumstances of the case, the application ought not to be considered separately from all or any of the reserved matters, they shall within the period of one month beginning with the receipt of the application notify the applicant that they are unable to determine it unless further details are submitted, specifying the further details they require.”

Paragraph 3B-3010 of the Encyclopedia of Planning Law sets out the background to the introduction of the concept of an application for outline planning permission by the 1950 General Development Order. It says:

> “…The process is well explained in Circular 87 of the Ministry of Town and Country Planning, which accompanied the 1950 Order:
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> > 'Since consideration at the approval stage is limited by the terms of the initial permission, it is essential that that permission should not take the form of a blank cheque, and, correspondingly, the authority must be furnished with sufficient information to enable them to form a proper judgment of what is proposed; there can be no question of entertaining propositions which are still in embryo. The application should indicate the character and approximate size of the building to be erected, and the use to which it is to be put, *e.g.* “a three-bedroomed house”, a “two-storied factory for light industrial purposes with an aggregate floorspace of 30/35,000 square feet”.'”

Mr Howell submits that in order to determine whether the erection of a building is acceptable in principle one needs to know the scale of, or the floor space proposed in, the building which it is proposed to erect. There is no dispute that information as to the proposed floor space is not provided as part of the description of the development in this outline application. Mr Howell submits that it is not a matter which can be reserved for subsequent approval. In support of the latter proposition he cites certain dicta of Pill L.J. in R. v. Newbury D.C. and Newbury and District Agricultural Society, ex p. Chieveley Parish Council [1999] P.L.R. 51.

The Society had made an application for outline planning permission for the erection of two exhibition halls with a total floor space of 5,644 square metres. Siting and means of access were not reserved. The District Council granted outline planning permission subject to conditions reserving (*inter alia*) siting, design and external appearance of the buildings, and the means of access thereto. The planning permission also stated that:

> "… the … council hereby grants planning permission for the proposal provided that the proposal is carried out strictly in accordance with the submitted application and plans and the above conditions."

Pill L.J. identified the issues which arose in that case on page 55. The second issue was: ***12**

> "Was the outline permission a nullity and/or unlawful in purporting to reserve matters particularised in the application in breach of the provisions of the Town and Country Planning Act 1990 …"?

Pill L.J. added at the foot of page 55:

> "In the course of submissions on those issues, other questions arose. The most important of them was whether the scale or quantum of development was a reserved matter within the meaning of that term in the legislation."

In answer to those questions Pill L.J. said at page 59:

> "I agree with the judge that condition was unlawful. Upon the wording of art. 1, there was no power to reserve matters of which details had been given in the outline application. I do not accept the submission that the details should be treated as withdrawn. I am not able to treat this requirement as a technicality which can be ignored, even though, at any rate with respect to 'means of access', there is no complaint of substance about the detail as such. The procedure whereby application may be made for outline permission is a valuable one in that, subject to the power of the local planning authority under art. 7 to decline to consider an outline application in the absence of detail, and the power to require more detail, it enables the principle of development and land use to be established without the need to investigate detailed matters at that stage. If the planning authority wish to determine the scale of development at that stage, they may impose conditions, for example as to the number of houses per hectare in a residential development, or the permitted floor space of a building.
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> Because of its value, it is important that the correct procedure be followed. If the applicant wants reserved matters such as siting and means of access to be decided at that stage, he may apply accordingly. The procedure has value only in so far as the provisons of art. 1 are followed. It was important to be clear as to what has been applied for and what has and has not been granted. Whether, in this case, the outline permission should be quashed for this defect remains for further consideration. I only add that I am not doubting the legality of the practice of including details 'for illustrative purposes only' with an outline application as contemplated in Circular 11/95.
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> Before leaving issue 2, I should comment upon the judge's finding, supported by Mr Purchas, that the scale or quantum of development, in this case the gross floor space, is a reserved matter. I do not accept that conclusion. Gross floor space cannot in my view be brought within the words

> of 'siting' or 'design' as submitted by Mr Purchas, especially when those words are read with the works 'external appearance', 'means of access' and 'landscaping of the site'. None of these words is appropriate to govern the scale of development in the statutory context. If a planning authority wishes to limit, at the outline stage, the scale of development, it can do so by an appropriate condition. An outline application which ***13*** specifies the floor area, as this one does, commits those concerned to a development on that scale, subject to minimal changes and to such adjustments as can reasonably be attributed to siting, design and external appearance. I do not read Stuart-Smith L.J. as having said more than that in Slough B.C. v. Secretary of State [1995] 17 P. & C.R. 560 when he said that 'it is possible when detailed application is considered that the size of the development can properly be reduced having regard to such reserved matters as siting, design and external appearance of the buildings, access and landscaping'. While I agree with the conclusion of Carnwath J. on issues 1 and 2, I consider wrong his conclusion that, as a result, floor space is still to be determined. Floor space could not be treated as a reserved matter."

The 1990 Act, section 62, says that an application for planning permission, which includes an application for outline planning permission, shall include the particulars required by the regulations; the Applications Regulations in turn require that the application shall include the particulars specified in the form, and any other information necessary to describe the development. Thus, it is essential that the application describes the proposed development. If that is done by the particulars specified in the application form, well and good. If not, other information has to be supplied.

Mr Howell submits that not merely are the particulars specified on the form not provided, for example floor space figures and the extent of each use are not specified in answer to question 11 on the application form, but in the absence of such information the application does not describe the proposed development. In order to know what development is proposed the local planning authority needs to know its scale in terms of floor space, because scale is bound to effect the impact of the development on the landscape, the amount of land left available for landscaping and such matters as traffic and employment generation. In short, one needs to know the scale of a proposed building before one can decide whether or not it is acceptable in principle. If an outline application is made for B1 or B8 development, without specifying the amount of floor space involved, the resultant planning permission will, in reality, be saying no more than "B1 or B8 development is acceptable in principle on this site". But that is tantamount to seeking permission for a change of use to B1 or B8 or planning permission for a change of use cannot be granted in outline.

Mr Howell says that it is no answer to say that conditions can be imposed on the grant of outline planning permission, either limiting the amount of floor space or reserving that matter for consideration at the detailed stage. For conditions to be imposed on the grant of planning permission, there has to be a valid application for permission, that is to say, one which describes the development and contains the particulars in the ***14*** application form; and conditions must not alter the substance of that which was applied for: see Bernard Wheatcroft Ltd v. Secretary of State for the Environment [1980] 43 P. & C.R. 233 at 241. In any event, save in respect of certain of the uses (see conditions 1.4, 1.5 and 1.10 in the business park planning permission) no such conditions were imposed to limit the scale of the proposed buildings in the present case.

Whilst I accept the proposition that by virtue of reg. 3 of the Applications Regulations an application for planning permission must describe the development which is the subject of the application. I do not accept that it is necessary in every case to specify the scale (expressed in terms of its floor space) of a proposed building in order to fulfil that requirement.

In many cases it will be essential to specify the floor space so that, for example, matters such as retail or traffic impact or impact on landscape or townscape can properly be assessd. In other cases the scale of the proposed building (in terms of its floor space) may be of little consequence for planning purposes. What may be of importance will be the extent to which the building complies with certain design parameters—as to height, siting or external appearance. The local planning authority may take the view that provided such parameters are met, the resulting floor space can be left to the architect's ingenuity. Circular 87 advised that a planning permission should not take the form of a blank cheque. Although the Circular has long since been repealed, the advice contained therein is, in general terms, still sound. I stress the words "in general terms". There is a spectrum. At one end of the spectrum, for exmple in Conservation Areas, a great deal of detail will be required; but I can also envisage cases where under the present Development Plan-led system, land has been allocated for a particular land use, and where the local planning authority might be prepared to sign a planning permission for the

erection of buildings for that use which was close to, if not amounting to, a “blank cheque”. For example, for the erection of dwellings, or for buildings for B1 or B8 purposes, on land allocated for such purposes in the Development Plan.

Such a planning permission is not simply a planning permission for a change of use to residential or to B1 or B8 purposes (for which an outline application could not be made). It permits the erection of buildings for such purposes upon the site in question. Once erected, those buildings may then be used for the specified purpose or for the purpose for which they have been designed: see section 75(2) and (3) of the 1990 Act. The likely characteristics of that type of building may be sufficiently well known to enable the local planning authority to assess the acceptability in principle of permitting such buildings on the site without information as to the proposed floor space.

It is for the local planning authority to decide whether an outline ***15*** application for, for example, the erection of a dwelling is a sufficient description of the proposed development given the characteristics of the particular application site and the authority's ability to impose conditions addressing any particular matters of concern, for example, preventing the construction of a dwelling over a certain height.

I would be relucant to place local planning authorities in a legal straightjacket, of having to insist on floor space figures in every case, particularly in view of the fact that it may be impractical to determine the amount of floor space that would be acceptable on a particular site until the detailed work on reserved matters relating to design, external appearance, siting and landscaping has been carried out. Requiring floor space figures in the outline application might commit the local planning authority to too much development; alternatively, it might unduly constrain the development potential of a site in the light of detailed study at the reserved matters stage.

I do not read Pill L.J.'s judgment in Chieveley as suggesting that it is necessary to specify the proposed floor space in every outline application. In that case the proposed floor space had been specified in the application, so the local planning authority in granting planning permission had committed themselves to development on that scale. Whilst Pill L.J. stated that floor space was not one of the reserved matters as defined in reg. 2 of the Applications Regulations, he made it clear that a local planning authority could limit the amount of floor space by imposing an appropriate condition at the outline stage if it wished to do so: see page 60 of the judgment. Thus, it is clear that Pill L.J., with whom Hobhouse L.J. (as he then was) and Judge L.J. agreed, envisaged that an outline application could be made for the erection of a building without specifying a proposed floor space, and if the local planning authority was concerned to limit the amount of floor space that could come forward in any subsequent submission of reserved matters, it could impose an appropriate condition. There is no bar to the imposition of further conditions on an outline planning permission in addition to the standard reserved matters conditions: see Inverclyde D.C. v. Inverkip Building Co. Ltd [1982] S.L.T. 401.

If the amount of floor space is specified in an application, the imposition of a condition significantly reducing that floor space may well fall foul of the Wheatcroft principle, but if the applicant for planning permission is content to leave the amount of floor space at large in his application, it is difficult to see how the imposition of a condition of the kind referred to by Pill L.J. would alter the substance of that which was proposed.

Thus, for the purposes of reg. 3 of the Applications Regulations, I am satisfied that the application form did describe the development which was the subject of the application. It was or the local planning authority to ***16*** decide whether or not that description was adequate. It was entitled to conclude that it was, notwithstanding the lack of information as to the scale of the proposed development.

It is to be noted that in respect of those uses within the description of the business park, which the council was concerned to ensure should be restricted to a small scale, either floor space or other limitations were imposed: see conditions 1.4, 1.5 and 1.6 which deal with retail, food and drink, and leisure uses respectively. Condition 1.10 limits the hectarage of B8 uses to 30.8 hectares, a substantial reduction on the illustrative figures of 45.4 hectares, for reasons which are explained in the Director's report.

Whilst reg.3 of the Applications Regulations is expressed in mandatory terms, an application for planning permission “shall” include the particulars specified in the form provided by the local planning authority, I do not accept that failure to include one or more of those particulars means that the

application is invalid, so that the local planning authority is unable to grant planning permission even if it wishes to do so. The mandatory terms of reg. 3 are addressed to a practical problem and are intended to ensure that the local planning authority is able to require that certain particulars are provided as part of the application for planning permission. It would be an unduly literal reading of reg. 3 to construe it so as to require an applicant to provide particulars merely because a question was asked on a local planning authority's form, a form which will have been prepared for a very wide range of applications for planning permission, if the local planning authority itself did not require those particulars in the circumstances of the applicants' case.

Moreover, reg. 3 of the Applications Regulations enables an applicant to apply for outline planning permission. If all matters are reserved, it will not be possible to answer many of the subsequent questions on this local planning authority's application form: how many trees would be felled; how many existing buildings demolished, and so forth. The fact that certain particulars requested in the form cannot be provided if an application is made for a “bare” outline planning permission does not mean that such an application may not lawfully be made. Such an approach would ascribe too great a significance to the precise terms of the application form, and negate the right which is expressly conferred by reg. 3 to apply for an outline planning permission. Adopting a purposive, rather than a literal, interpretation of reg. 3, an application for planning permission must include the particulars specified in the form, but only in so far as they are appropriate to the kind of development that is being proposed. It is in the nature of an outline application that many of the particulars sought will not be available at the outline stage, and hence it will not be appropriate to provide them on the form.

In the case of these two applications, all the questions asked in the ***17*** application form were answered, in the case of the business park to the effect that details would be provided at a later stage. It was for the local planning authority to decide whether or not they were satisfied with such answers. Subject to ground 2 of Mr Howell's challenge (to which I will now turn), the local planning authority were entitled to be satisfied with the description of the development in these applications forms. I, therefore, conclude that the grant of planning permissions for the business park was not in breach of section 62 or reg 3 of the applications regulations, and ground 1 fails.

It is common ground that the business park application was one to which reg. 4 of the assessment regulations applied. Regulation 4 applies to any Sched. 1 or Sched. 2 application as defined in reg. 2. Ignoring exempt development, which is not relevant for present purposes, a Sched. 1 application is an application to carry out development of any description mentioned in Sched. 1. A Sched. 2 application is an application for planning permission for the carrying out of development of any description mentioned in Sched. 2 “which would be likely to have significant effects on the environment by virtue of factors such as its nature, size or location”.

The “Descriptions of Development” in Sched. 2 are expressed in broad terms: “Development for any of the following purposes.” A number of broad purposes are set out in 11 categories. They include, under category 10:

> “Infrastructure projects.
>
> (a) an industrial estate development project.”

Regulation 4(2) provides that:

> “The local planning authority … shall not grant planning permission pursuant to an application to which this regulation applies unless they have first taken the environmental information into consideration [and state in their decision that they have done so].”

By art. 2, “environmental information” means:

> “…the environmental statement prepared by the applicant or appellant …, any representations made by any body required by these Regulations to be invited to make representations or to be consulted and any representations duly made by any other person about the likely environmental effects of the proposed development.”

“Environmental statement” means:

“…such a statement as is described in Sched. 3.” ***18***

Schedule 3 then describes an environmental statement as follows:

1. “An environmental statement comprises a document or series of documents providing, for the purpose of assessing the likely impact upon the environment of the development proposed to be carried out, the information specified in para. 2 (referred to in this Schedule as 'the specified information');

2. The specified information is—

(a) a description of the development proposed, comprising information about the site and design and size or scale of the development;

(b) the data necessary to identify and assess the main effects which that development is likely to have on the environment;

(c) a description of the likely significant effects, direct and indirect, on the environment of the development, explained by reference to its possible impact on—

human beings;

flora;

fauna;

soil;

water;

air;

climate;

the landscape;

the inter-action between any of the foregoing;

material assets;

the cultural heritage.

(d) where significant adverse effects are identified with respect to any of the foregoing, a

> description of the measures envisaged in order to avoid, reduce or remedy those effects; and
>
> (e) a summary in non-technical language of the information specified above."

By para. 3:

> "An environmental statement may include, by way of explanation or amplification of any specified information, further information on any of the following matters—
>
> (a) the physical characteristics of the proposed development, and the land-use requirements during the construction and operational phases."

Thus, the environmental statement must provide the specified information and may provide further information.

As explained in Circular 15/88 the Assessment Regulations implement the requirements of E.C. Directive No. 85/377 on the assessment of the effects of certain public and private projects on the environment ("the directive") ***19**

The recitals to the directive refer to the need to take effects on the environment into account at the earliest possible stage in all technical planning and decision-making processes, to the need for principles of assessment to be harmonised, for systematic assessment and for certain minimum information to be supplied concerning projects subject to assessment and their effects.

The 9th recital states:

> "Whereas development consent for public and private projects which are likely to have significant effects on the environment should be granted only after prior assessment of the likely significant environmental effects of these projects has been carried out; whereas this assessment must be conducted on the basis of the appropriate information supplied by the developer, which may be supplemented by the authorities and by the people who may be concerned by the project in question."

Article 1.2 defines the "project" as:

> "… the execution of construction works or of other installations or schemes …"

It also defines what is meant by "development consent". There is no dispute in the present case that the relevant development consent for the business park is the outline planning permission to which I have referred.

Article 3 provides that:

> "The environmental impact assessment will identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with Arts 4 to 11, the direct and indirect effects of a project on the following factors …"

Then the factors which are to be found in para. 2(c) of Sched. 3 to the Assessment Regulations are set out.

Article 5.1 provides:

> "In the case of projects which, pursuant to Art. 4, must be subjected to an environmental impact assessment in accordance with Arts 5 to 10, Member States shall adopt the necessary measures to ensure that the developer supplies in an appropriate form the information specified in Annex III inasmuch as:
>
> > (a) the Member States consider that the information is relevant to a given stage of the consent procedure and to the specific characteristics of a particular project or type of project and of the environmental features likely to be affected…."

Article 5.2:

> "The information to be provided by the developer in accordance with para. 1 shall include at least: ***20**
>
> > — a description of the project comprising information on the site, design and size of project,
> >
> > — a description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects,
> >
> > — the data required to identify and assess the main effects which the project is likely to have on the environment,
> >
> > — a non-technical summary of the information mentioned in indents 1 to 3."

Art. 6 makes provision for public consultation. Annex III lists the information referred to in Art. 5.1. It includes, as the first item:

> "Description of the project, including in particular:
>
> > — a description of the physical characteristics of the whole project and the land-use requirements during the construction and operational phases …"

Thus, the information to be provided by the developer must include the information listed in Art. 5.2, which includes a description of the project, comprising information of its site, design and size; other information in Sched. 3 may also be required if it is relevant to the particular characteristics of the project in question.

The directive has been amended by Directive 97/11. The latter is not directly relevant for present purposes, but the first recital contains a convenient summary of the aims and importance of the earlier directive. It:

> "… aims at providing the competent authorities with relevant information to enable them to take a decision on a specific project in full knowledge of the project's likely significant impact on the environment; … the assessment procedure is a fundamental instrument of environmental policy as defined in Art. 130 of the Treaty "

In R. v. North Yorkshire C.C., ex p. Brown and Another [1999] 1 All E.R. 969, Lord Hoffmann (with

whom the remainder of their Lordships agreed) said at page 971G:

> "… This directive was adopted to protect the environment throughout the E.U. by requiring member states to ensure that planning decisions likely to have a significant environmental effect were taken only after a proper assessment of what those effects were likely to be. It requires that before the grant of development consent for specified kinds of project, Member States should ensure that an environmental impact assessment is undertaken."

At page 974H he said:

> "… The purpose of the directive, as I have said is to ensure that planning decisions which may affect the environment are made on the basis of full information." ***21**

It will be remembered that environmental information includes not merely the environmental statement prepared by the applicants for planning permission, but also only representations made by others about the likely environmental effects of the proposed development. In order to implement the requirements of art. 6 of the Directive, Art. 8 of the G.D.P.O. provides that an application for planning permission for development within Sched. 2 of the Assessment Regulations must be publicised by site notices and local advertisements.

Against that legislative background Mr Howell submits that no application for planning permission to which reg. 4 of the Assessment Regulations applies may be granted unless the applicant includes a description of the development proposed, which must comprise, at the minimum information as to the "design and size or scale of the project", as well as the data necessary to identify the main effects which that development is likely to have on the environment. Without information as to the scale of the development, the siting, design, external appearance, means of access and landscaping, it will not be possible to assess what effect the proposed development will have on the environment. What has to be assessed is the development which is proposed to be constructed, not some abstract concept or illustration of what might be constructed. It follows that an application for outline planning permission may not be made if the development falls within Sched. 2 or 3 of the Assessment Regulations. The environmental assessment conducted by E.R.M. in the present case was based on the illustrative masterplan, and the indications given as to floor space, as was explained in paras 2.8 and 2.9 of the environmental statement:

> "A proposed masterplan for the site layout has been adopted by the planning applicants for the development of the business park …"

The purposes of the masterplan is then set out:

> "Consequently, the masterplan has been used in the E.S.A., allowing assumptions to be made on where certain uses of the park may be located within the business park.
>
> The principal proposed land uses within the site, and which comply with the South Rochdale Local Plan and emerging Rochdale U.D.P. allocations, are. "

Then the indicative figures provided are set out. Mr Purnell, the Technical Director at E.R.M., responsible for preparing the environmental statement, confirms in his affidavit that:

> "… in preparing the E.S. regard was had to the submitted masterplan and consideration given as to what would be the impact of the proposed development in accordance with the masterplan. … From the masterplan, ***22** reasonable assumptions could be made on where certain uses of the development may be located."

He goes on to say:

> "The master plan provides an illustrative scheme that shows a way the site could be developed

> pursuant to a consent. However, it also serves to illustrate or show the environmental importance of a development permitted on the site. By this, I mean it does in fact serve to illustrate the environmental effects of the type of development described in the language of the consent on the land."

A similar approach was adopted towards the preparation of the ecological survey.

Mr Beckwith's report to members made it clear that alternative detailed forms of development had not been considered in the environmental statement. Mr Howell submits that the fact that a masterplan and indicative floor space figures had to be used demonstrates that the description in the application for planning permission of the development proposed to be constructed was inadequate for the purposes of Sched. 3. The likely environmental effects of the illustrative proposals were assessed, but those proposals were not incorporated in the application and were not, therefore, the development which was proposed to be constructed.

As I have mentioned when setting out the terms of the planning permission for the business park, condition 1.11 said:

> "This permission shall not be construed as giving any approval to the illustrative masterplan accompanying that application."

The reason given for that was:

> "The plan is submitted for illustrative purposes and gives insufficient detail on which to determine the layout of the site."

The reason given for the imposition of condition 1.7 which required the submission and approval of a Framework Document which was to show the overall design and layout, including details of the type and disposition of development and provision of structural landscaping was:

> "To ensure that a satisfactory form and quality of development is achieved for this strategically important site."

Thus, Mr Howell submits, not only is the outline planning permission not tied to the illustrative masterplan which described a form of development which was subject to environmental assessment and whose effects on the environment were described in the environmental statement, it expressly envisages that a different layout and disposition of uses will emerge in due course when the Framework Document is provided. The ***23** need for preparation of a Framework Document reinforces his argument that the description of the development in the application for planning permission was insufficient for the purposes of Sched. 3. The decision to grant planning permission has to be taken in "full knowledge" of the project's likely significant effects on the environment. It is not sufficient that full knowledge will be obtainable at some later stage. By then it will be too late to go back on the principle of development having been granted by the outline planning permission, and the public will not have the same statutory right to be consulted and so to contribute to the environmental information which must be considered by the local planning authority before planning permission is granted. Article 5.1(a) of the directive envisaged that Member States might wish to make provision for consideration of environmental information at different stages, but the Assessment Regulations do not make such provision. The specified information must be provided prior to the grant of planning permission and that applies whether the application is for full or for outline planning permission. Where significant adverse effects on the environment are identified an environmental statement must include a description of the measures envisaged to avoid, reduce or remedy them. It is important that such mitigation measures are described in the environmental statement so that consultees are able to comment upon their adequacy. Their comments will then form part of the environmental information which the local planning authority is obliged to consider. Mr Howell points to the manner in which the ecological impacts identified in the survey area dealt with in condition 7: schemes are to be prepared, surveys are to be carried out and the approval of the local planning authority is to be sought. For example, condition 7.10 requires a scheme for the recreation of a marshy habitat to be submitted for

approval, but there is no indication as to where the habitat may be recreated within this very large site. He submitted that these conditions reflect the fact that the environmental statement does not describe the proposed mitigation measures. It says that mitigation measures will be proposed, but the planning permission then provides that they will be described at a later stage. This, however, enables the information to be provided in a piecemeal fashion and at different times, thus frustrating the object of the directive that there should be a comprehensive and systematic assessment of all the significant environment effects of a proposed development project, including the mitigation proposed, at the earliest possible stage.

So far as the spine road is concerned, Mr Howell concedes that it was a full application and so there was a description of the highway development proposed to be carried out, but the council erroneously adopted the same approach to mitigation measures as it did in the planning permission for the business park. He refers to conditions 7.1 to 7.10 in the planning ***24*** permission for the spine road. It's not in dispute that the spine road was interlinked with and formed the first step in the business park proposal. Schedule 3 required an environmental statement in respect of that, overall, proposal. If the environmental statement for the business park was not in accord with Sched. 3, and so planning permission could not lawfully have been granted for the business park, then the planning permission for the spine road could not stand on its own.

Mr Straker Q.C., for the respondent council, pointed to the wide-range of developments described in Scheds 1 and 2 to the Assessment Regulations and to the fact that the different kinds of development are described therein in very general terms. Hence, he submitted, a very general description of the development proposed to be carried out should suffice for the purposes of Sched. 3. He points to para. 3 under which further information as to the physical characteristics of the development may, not must, be given.

The approach urged by Mr Howell makes it very difficult, if not entirely impractical, to seek planning permission for the development of large schemes. The outline application procedure is particularly valuable for such schemes, which may evolve over many years. It is the large schemes which are likely to require environmental assessment. Although the G.D.P.O. refers both to outline applications and to applications requiring environmental assessment, it does not preclude an outline application being made for a Sched. 2 project; nor do either the assessment or the Applications Regulations.

In issuing guidance on the Assessment Regulations in Circular 15/88 the Secretary of State assumed that outline applications could be made for projects requiring environmental assessment. Paragraph 42 of Circular 15/88 says:

> “The preparation of an environmental statement is bound to require the developer to work out his proposals in some detail; otherwise any thorough appraisal of likely effects will be impossible. It will be for the planning authority to judge how much information is required in the particular case. The information given in the environmental statement will have an important bearing on whether matters may be reserved in an outline planning permission. Where the information states or implies a particular treatment of any matter, it will not be appropriate to reserve that matter in the planning permission.”

Mr Straker also pointed to paras 43 and 44:

> 43. “There is no statutory provision as the form of an environmental statement. The requirement is to provide the information specified in Sched. 3 to the Regulations, which reflects arts 3 and 5 of, and Annex III, to the directive. It will be for the local planning authority to decide whether the information provided by the developer is sufficient to ***25*** enable it to determine the planning application. The authority will be able to use its powers to call for further information and supporting evidence under reg. 21 and under art. 5 of the General Development Order.
>
> 44. It will not be open to the local planning authority to take the view that a planning application is invalid because an inadequate environmental statement has been supplied or because the application has not provided further information when required to do so under Regulation 21 or under Article 5 of the General Development Order. In that event, if further information cannot be obtained from the developer, it will be for the local planning authority to decide whether to refuse permission. If so, or if the local planning authority fail to give a decision on the application within the 16 week period, the developer will have the normal right of appeal to the Secretary of State.”

The Assessment Regulations provide a mechanism for the collation of, and consultation upon, environmental information. That information does not have to be contained within the application for planning permission itself.

It is sufficient for the purposes of Sched. 3 if one has illustrative information, that is to say information as to how the project, for which approval is sought in principle, might be carried out. He points to art. 3 in the directive, which recognises that individual cases will vary, and submits that in the case of development, such as the proposed business park, information is bound to be illustrative. As with a traffic impact assessment, one will be modelling likely impacts.

It is for the local planning authority to decide whether they are satisfied with such information, and they are entitled to be satisfied if they consider that conditions can be imposed upon the grant of permission which will ensure that the eventual environmental impact will not be significantly different from that which has been assessed on an illustrative basis. Here, the council was satisfied that it had such control. He points to conditions 1.3 and 1.7, and by way of illustration to condition 7 dealing with ecology.

In his affidavit Mr Beckwith said that, in his view, the conditions give the council “a high degree of control over content of development”. The council had “total control over the siting, design and scale of the development amongst other things”. He also expressed the view that “it is not appropriate at this stage to try to guess the details of a development which will evolve over a decade”. He considered that the material submitted enable the environmental effects of development to be assessed whether or not the ultimate scheme followed the layout shown on the illustrative masterplan. Through the Framework Document the council had retained tight control over the development, and in his professional view sufficient information had been given to enable all reasonably likely environmental impacts of the scheme to be appraised. ***26**

Mr Straker also pointed to para. 12 of Mr Purnell's affidavit to which I have referred. He submitted that the applicants for judicial review were, in reality, seeking certainty as to the environmental consequences of the proposed development and that such certainty could not be achieved. He referred to the observations of Lord Nimmo Smith in W.W.F.—U.K. Ltd and Another v. Secretary of State for Scotland [1998] T.L.R. 716 at 78:

> “There could never be an absolute guarantee about what would happen in the future, and the most that could be expected of a planning authority was to identify the foreseeable potential risks and to put in place a legally enforceable framework with a view to preventing them from materialising.”

That, says Mr Starker, is what the council has done here. Instead of incorporating the masterplan into the description of development for which planning permission was granted, the council imposed controls by way of conditions to ensure that the environmental impact would not be significantly different from that which was assessed in the environmental statement. Having summarised the rival submissions, I now set out my conclusions on this issue.

In view of the underlying objective of the directive, which is implemented by the Assessment Regulations—to ensure that projects which are likely to have significant effects on the environment should be granted development consent only after prior assessment of the likely significant environmental effects has been carried out—it is not surprising that the descriptions of those developments which fall within Scheds 1 and 2 are expressed in general terms. Such descriptions are intended to forestall any argument that environmental assessment is not required in what might otherwise be borderline cases. It does not follow that a similarly generalised description of the development proposed to be carried out will suffice for the purposes of Sched. 3, once it has been established that a project does fall within Sched. 1 or Sched. 2.

Earlier in this judgment I referred to a purposive approach to reg. 3 of the Applications Regulations. Applying a similar approach to Sched. 3 to the Assessment Regulations, the specified information contained in an environmental statement is provided for the purpose of assessing the likely impact upon the environment of the development proposed to be carried out. It is, therefore, not surprising that the first item of specified information in para. 2 is:

> “… a description of the development proposed, comprising information about the site and design

and size or scale of the development."

Without such a description, the likely impact of the proposed development upon the environment could not begin to be assessed, and the underlining purpose of providing the information in the environmental ***27*** statement would be frustrated. One is not seeking certainty as to the environmental effects of the project, which would be unattainable, one is merely seeking the specified information which will enable the likely significant effects to be assessed. Whilst it is for the local planning authority to judge the adequacy of the specified information, and any further information provided under para. 3 of Sched. 3, information which is capable of meeting the requirement for specified information in para. 2 must be provided.

In deciding whether the information provided about a proposed development does amount to "a description of the development proposed, comprising information about the site, design and size or scale of the development", regard must be had not merely to the underlying purpose of providing the information (to which I have referred above), but also to the remaining items of specified information which are set out in para. 2. Thus, the description of the proposed development must be sufficient to enable the main effects which that development is likely to have on the environment to be identified and assessed, to enable the likely significant effects on such matters as flora, fauna, water, air and the landscape to be described, and to enable mitigation measures to be described where significant adverse effects are identified.

Whilst a bare outline application is permissible on a purposive approach to reg. 3 of the Applications Regulations, an environmental statement based upon such an application could not begin to comply with the requirements of Sched. 3 to the Assessment Regulations, whether one adopts a literal or a purposive approach to para. 2(a) of Sched. 3. I would not wish to go as far as Mr Howell and say that it is not possible to make any application for outline planning permission for a development which falls within Sched. 1 or Sched. 2. An outline application with only one or two matters reserved for later approval might enable the environmental statement to provide a sufficient description of the development proposed to be carried out. I would not dissent from the approach suggested in para. 42 of Circular 15/88, subject to the proviso that the description in the outline application of the development proposed to be carried out must be such as to enable the environmental statement to comply with the requirements of para. 2(a) of Sched. 3.

I have set out above the description of the development for which outline planning permission is sought, and granted in the present case. The application does not contain any information as to the design, size, or scale of the development. The fact that the environmental assessment was based on the illustrative masterplan and indicative schedule of uses is a tacit acknowledgment that the description of the development in the application was inadequate for the purposes of Sched. 3. I can understand the advantages of an illustrative masterplan in an ordinary outline application ***28*** for a business park, but once it is decided that such a project falls within Sched. 2, Sched. 3 requires the environmental statement to assess the likely impact of the development which is proposed to be carried out, not the impact of a development which might or might not be carried out depending upon whether subsequent submissions for approval of reserved matters are or are not in accordance with an illustrative masterplan.

I realise that compliance with the requirements of Sched. 3 presents particular problems for projects such as a business park, which are demand-led and which may be expected to evolve over many years. Promoters of "urban development projects" may face similar difficulties. For such schemes the outline application procedure is particularly valuable.

Most of the other descriptions of development listed in Scheds 1 and 2 are either industrial projects for particular processes which will have had to have been defined in great detail at the outset, or they are engineering operations such as the construction of roads or railways where the outline application procedure would not be available in any event. Such proposals have to be the subject of detailed applications under the Planning Act and/or the Transport and Works Act, even though they may be very large in scale. The fact remains that industrial estate development projects and urban development projects were listed in Annex III to the directive, which is now transposed into the descriptions of development in Sched. 2 to the Assessment Regulations.

Notwithstanding the difficulties of describing the design, size or scale of such a project, the Members of the E.C. concluded that if it was likely to have significant effects on the environment, development consent should not be granted until a prior assessment of those effects had been carried out. In so far

as such an assessment requires a greater degree of particularity in the description of the development that is proposed to be carried out, greater particularity must be provided. Thus, applications for such projects have been placed in a legal straightjacket. The reason for this is explained in Directive 97/11: the environmental assessment procedure is a “fundamental instrument” of the E.C.'s environmental policy.

Article 5.1 of the directive envisages that Member States may wish to make procedural arrangements for environmental information to be provided on a staged basis. That has not been done in the Assessment Regulations. By reg. 4(2) the local planning authoriy may not grant planning permission unless they have first taken the environmental information into account. A necessary part of that environmental information is the environmental statement which must contain the specified information whether or not the application is in outline. It is no answer to say that some of the specified information will be provided in due course at ***29*** the reserved matters stage. This, no doubt, reflects the role of an outline planning permission under the 1990 Act. Once outline planning permission has been granted, the principle of the development is established. Even if significant adverse impacts are identified at the reserved matters stage, and it is then realised that mitigation measures will be inadequate, the local planning authority is powerless to prevent the development from proceeding.

Mr Straker laid emphasis upon the fact that the local planning authority felt that, in imposing conditions it had ensured that adequate powers would be available to it at the reserved matters stage. That, in my view, is no answer. At the reserved matters stage there are not the same statutory requirements for publicity and consultation. The environmental statement does not stand alone. Representations made by consultees are an important part of the environmental information which must be considered by the local planning authority before granting planning permission. Moreover, it is clear from the comprehensive list of likely significant effects in paras 2(c) of Sched. 3, and the reference to mitigation measures in para. 2(d), that it is intended that in accordance with the objectives of the directive, the information contained in the environmental statement should be both comprehensive and systematic, so that a decision to grant planning permission is taken “in full knowledge” of the project's likely significant effects on the environment. If consideration of some of the environmental impacts and mitigation measures is effectively postponed until the reserved matters stage, the decision to grant planning permission would have been taken with only a partial rather than a “full knowledge” of the likely significant effects of the project. That is not to suggest that full knowledge requires an environmental statement to contain every conceivable scrap of environmental information about a particular project. The directive and the Assessment Regulations require likely significant effects to be assessed. It will be for the local planning planning authority to decide whether a particular effect is significant, but a decision to defer a description of a likely significant adverse effect and any measures to avoid, reduce or remedy it, to a later stage would not be in accordance with the terms of Sched. 3, would conflict with the public's right to make an input into the environmental information and would, therefore, conflict with the underlying purpose of the directive.

That is, in effect, what has happened in the present case. There may well be scope for argument in some cases, as to the extent to which details of mitigation measures may be left for subsequent approval. I do not suggest that an environmental statement must contain every detail, provided the mitigation measures are described. In the present case, because there is no description of the development proposed to be carried out, nor any description of its design, size, or scale, it is not possible to describe the ***30*** proposed mitigation measures. The conditions in the outline planning permission effectively require that descriptions shall be given in due course when the design, scale and size of the development to be constructed is known.

Condition 1.3 does not answer the problem. It ties the mitigation measures to the environmental statement (unless otherwise agreed), but those measures were a response to the environmental impacts of development in accordance with the illustrative masterplan. Recognising, as I do, the utility of the outline application procedure for projects such as this, I would not wish to rule out the adoption of a masterplan approach, provided the masterplan was tied, for example by the imposition of condition, to the description of the development permitted. If illustrative floor space or hectarage figures are given, it may be appropriate for an environmental assessment to assess the impact of a range of possible figures before describing the likely significant effects. Conditions may then be imposed to ensure that any permitted development keeps within those ranges.

The fundamental difficulty in the present case is that the environmental statement describes the environmental effects of a business park development carried out in accordance with the illustrative

masterplan and the indicative schedule of land uses, but the outline planning permission was not tied in any way to either of those documents. Conditions 1.7 and 1.11 dispensed with the masterplan and replaced it with the Framework Document to be submitted and approved in due course. The reason given for the imposition of condition 1.11 explains that the masterplan was submitted for illustrative purposes only and that it gave insufficient detail on which to determine the layout of the site. If it was inadequate for that purpose, it is difficult to see how it could have been an adequate description for the purposes of para. 2(a) of Sched. 3 to the Assessment Regulations. The indicative hectarage and gross floor space figures for various uses are not specified in the planning permission. Moreover, in at least one respect, that of B8 development, the hectarage has been substantially altered by condition 1.10. That is bound to have a knock-on effect as to the hectarages available for other types of building. It is not at all clear how conditions 1.4 to 1.6 relate to the schedule of uses assessed in the environmental statement. Since there is no figure in the planning permission for either the overall hectarage of built development or the overall floor space, it is impossible to ascertain the scale or the size of the development. The amount of B1 and B2 development and the number of houses proposed to be erected are left wholly at large.

In summary, whilst the council took into consideration “environmental information” about the effects of carrying out a business park development in accord with an illustrative masterplan and an indicative schedule ***31*** of land uses, that was not the development which was proposed to be carried out in the application for planning permission, nor was it the development for which planning permission was granted; nor was the information sufficient in any event to comply with the requirements of Sched. 3: see, for example, paragraph 2(d), as to mitigation measures. It follows that the council did not have power to grant planning permission for the business park: see reg. 4(2) of the Assessments Regulations, and I therefore accept ground 2 of Mr Howell's challenge.

Since on the council's own case the two planning permissions are inextricably interlinked, there is no case for a spine road, at least in the form proposed, unless there is to be a business park: see condition 1.3 in the spine road planning permission. It follows that the planning permission for the spine road stands or falls with that for the business park.

That disposes of the main issue in the case and I turn to Mr Howell's remaining arguments.

Having allocated an area to be known as Kingsway Business Park, proposal E7 in the South Rochdale Local Plan states that certain criteria will be “strictly applied” to the development of the site. They include:

> “vi) … the creation of new, and extension of existing, public open space and informal recreation areas, including the extension and improvement of Stanney Brook Park.”

That policy is repeated in policy E.C.6(d) of the Deposit Draft U.D.P. Mr Beckwith's report to the committee dealt with a number of issues raised in consultation by objectors. Responding to an assertion that there would be excessive site coverage, he said:

> “In addition, the supplementary statement on floorspace within [the] application … indicates the total area of land to be developed as 113.6 ha. with an area of 32 ha. to be set aside for recreational use which contradicts the objectors claim that 170 ha. is to be developed. There is no precise information provided on what will be the site coverage. …”

In answer to a claim that the application did not include sufficient detail to enable the council to judge whether it accorded with policy E.C.6(d) in the U.D.P., he said:

> “With regard to criterion (d) it is inappropriate at this outline application stage to formulate detailed proposals.”

The report then contains these passages:

> “ … The objection suggests that areas of Kingsway provide outdoor recreation and that development would include the loss of accessible ***32*** open space. This is not the case as the land is in private ownership and subject to other uses. The only areas with right of public access

> are Stanney Brook Park, and the lanes and footpath network. These would be retained within the scheme. The wider Stanney Brook Corridor is in private ownership and there is no right of access to large parts of it. However, the proposals indicate that this area will be safeguarded and enhanced for public informal recreation and thus increase opportunities for local residents."

In response to another objection, he said:

> " … There would be more than adequate open space retained to meet the needs of adjoining residents (in accordance with the council's standards) and users of the business park."

In the final sentence of his report Mr Beckwith expressed his view that the proposal was in line with the District Plan and the emerging U.D.P. and should be granted conditional planning permission. There is no indication that members dissented from that approach.

Mr Howell submits that the council erred in proceeding on the assumption that 32 hectares would be available for recreational uses and that details of public open space and the recreation areas to be provided in accordance with criterion (d) in policy E.C.6 of the U.D.P., could be dealt with at the detailed stage. The application did not seek planning permission for any change of use to open space or for use for informal recreation, thus no condition was or could have been imposed requiring the land to be set aside for such uses at the detailed stage. A condition requiring that open space be dedicated to public use would have been unlawful in any event: see M. J. Shanley Ltd v. Secretary of State for the Environment and Another (1982) J.P.L. 380. Such an objective could have been secured only by a section 106 obligation. Mr Straker submitted that the council could control any over-intensive proposal at the detail stage through the Framework Document. Nothing in the outline planning permission precluded provision of open space at the detailed stage.

In my judgment, Mr Howell's submissions under this ground are well-founded. I have set out above the description of development for which planning permission was sought. As an outline application, it was an application for the erection of buildings. Whilst landscaping ancillary to the erection of those buildings was included, as a reserved matter, within the application, it did not include any proposals to change the use of any land within the site to open space or for use for informal creation. Had an application for such a change of use been made, it would then have been necessary to devise a mechanism, probably by way of a section 106 obligation, if it was intended that any new or extended areas of open space should be dedicated as public open space in accordance with criterion (d) ***33*** in policy E.C.6 in the U.D.P. The council could not lawfully insist on the provision of any open space or informal recreation areas in the Framework Document, save in so far as landscaping was required for the (unlimited) amount of building which has been permitted on site.

Specifically, the council could not, under the terms of the outline planning permission, insist on the provision of 32 hectares of land for open space for informal recreational purposes. The planning permission permits the erection of buildings, subject to normal constraints of density and landscaping over the whole of the site. If it was desired to provide open space or informal recreational areas on the site (save in so far as such areas might be incorporated in any landscaping around the buildings), a fresh application for change of use to those purposes would be required. There is very often an element of planning judgment as to whether or not a proposed development complies with a development plan policy. It could not reasonably be concluded that this application complied with criterion (d). However, that is but one of a long list of criteria in the policy. The council clearly considered that the remaining criteria within policy E.C.6 were fulfilled. The primary purpose of the policy is, after all, to allocate the land as a business park, not the creation of additional open space. It would be for the council to decide whether the failure of this application to meet one of the criteria in policy E.C.6 meant that the application was contrary to either the District Plan or the emerging U.D.P. To the extent that the council erred in concluding that criterion (d) in policy E.C.6 was met, ground 3 is made out.

Mr Howell submitted that the spine road was designed so as to accommodate a business park laid out as shown on the illustrative masterplan. Having granted planning permission for a business park subject to conditions 1.7 and 1.11, replacing the masterplan with the Framework Document, the council then gave no consideration when granting planning permission for the spine road as to whether it was appropriately designed to accommodate a business park as it might be designed under the Framework Document. By condition 1.3, development of the spine road has to await

submission and approval of the Framework Document, but there is nothing to ensure that the design of the latter will be consistent with the design of the former. Alternatively, he submits, the council failed to take into consideration whether development of the spine road, in accordance with the planning permission, would constrain the appropriate development of the business park.

In my view, there is no substance in either of these arguments. Criteria (i) and (j) policy E.C.6 in the U.D.P. are as follows: ***34**

> i) " … vehicular access to the site to be from the A664 Kingsway and from Junction 21 of the M62 Motorway only. Significant improvements to the geometric layout of M62 Junction 21 will be necessary.
>
> j) … the site to be served by a main distributor road linking the A664 and Junction 21, which should avoid, wherever possible, important natural features and buildings and minimise its impact on surrounding areas."

As Mr Straker rightly submitted, there was a very limited degree of flexibility, if those two criteria were to be met. Whilst the Framework Document submitted in accordance with the planning permission for the business park is not required to conform to the spine road, as permitted, there is no reason why it should not do so, and it is wholly unrealistic to suggest that the line of the spine road and the positions of the roundabouts having been fixed, the Framework Document will not take the spine road planning permission as the basis for the highway infrastructure of the business park. To that extent, the adoption of any alignment for the spine road might be said to "constrain" the future development of the business park. However, I agree with Mr Straker that this is a fanciful argument if advanced as criticism of the planning permission for the spine road. In reality the spine road opens up the land and enables it to be developed as a business park. The adoption of a particularly disadvantageous alignment might have constrained the potential of the site, but there is no suggestion in the representations and objections, as set out Mr Beckwith's report, that the spine road permitted by the council is subject to such a criticism. I have read the passages in Mr Beckwith's report which make it clear that the spine road was to serve the business park which was being proposed in outline. In so far as flexibility in alignment was possible, given the policy constraints that I have mentioned, there was nothing before the members to sugges that an alternative alignment, or a different positioning of the roundbouts, might increase the sites' development potential. It follows that I do not accept ground 4 of Mr Howell's challenge.

It is common ground that the applicants for planning permission do not own all the land within the application sites. There are a large number of other land owners and it is now envisaged that it will be necessary to make a Compulsory Purchase Order under the 1990 Act to assemble the necessary land.

Mr Howell submits that a large number of conditions, for example condition 1.7 and the conditions within condition 7 require things to be done on land not under the applicants' control. They are, therefore, *ultra vires* because they are unenforceable. Altenatively, the council did not consider the issue of enforceability. ***35**

He refers to British Airports Authority v. Secretary of State (1979) S.C. 200, where the Secretary of State had imposed a condition on a planning permission for certain airport improvements, which was intended to control the direction of take off and landing. The Lord President, Lord Emslie, said at page 213:

> "… I am further of opinion that the 'conditions' are not condition within the meaning of the 1972 Act in respect that there are no steps which the appellants could take which would secure the desired result. At best they could merely try to persuade the Civil Aviation Authority to bring about the result … The test must be whether the appellants had the power to compel the Civil Aviation Authority to bring about the desired control of the direction of take off and landing. The answer is that they had no such power and the so called conditions are quite incapable of enforcement."

That decision was approved by the House of Lords in Grampian R.C. and Another v. City of Aberdeen D.C. (1983) 47 P. & C.R. 633, *per* Lord Keith at page 636. Lord Keith went on to say this:

> "… there is a crucial difference between the positive and the negative type of condition in this context, namely that the latter is enforceable while the former is not."

In British Railways Board v. Secretary of State for the Environment and others [1993] 3 P.L.R. 125, the House of Lords decided that the British Railways Board were entitled to apply for planning permission on land not owned by them, and that planning permission could be granted in the face of the landowner's opposition. But the condition which related to an access road was in the negative form in that case. Lord Keith said at page 134A:

> "… So the position is essentially that British Rail have applied for planning permission affecting land not in their ownership, a common state of affairs specifically contemplated by the Act. The proposed condition does not relate to land outside the ambit of the permission applied for. Even if it did, the relevant considerations would be the same as those to be applied where an application for planning permission relates to land not in the ownership of the applicant. If the condition is of a negative character and appropriate in the light of sound planning principles the fact that it appears to have no reasonable prospects of being implemented does not mean that the grant of planning permission subject to it would be irrational in the Wednesbury sense so that it would be unlawful to grant it …"

Mr Howell accepts that in two cases the Court of Appeal has stated that a positive condition may be imposed in respect of land not under the applicants' control, provided such land is within the application site: see Proberun Ltd v. Secretary of State for the Environment and Another [1990] 3 P.L.R. 79, *per* Glidewell L.J. at 85, and Mouchell Superannuation Fund Trustees v. Oxfordshire County Court [1992] 1 P.L.R. 97 at 105–106. He submits that those *dicta* were *obiter,* because the conditions related to land outside the application sites and the proposition that he advances was not argued before the court. Mr Howell submits that to be lawful a condition must be enforceable, and it must be enforceable whether it relates to land within or outside the application site. In Birnie v. Banff C.C. [1954] S.L.T. 90 planning permission had been granted for the erection of a house, subject to a condition requiring the construction of an access over land not belonging to the applicant. The access was not constructed, and the local planning authority took enforcement action. It was held that the authority had no power to impose as a condition of a grant of planning permission the carrying-out of works on land other than land under an applicant's control, and the Enforcement Notice was quashed. The Sheriff Substitute observed:

> "It seems to me to be an impossible reading of these relevant subss. [in the Town and Country Planning Act] to say that they empower an authority to impose as a condition the carrying-out of works other than on land under an applicant's control. To provide that the authority may impose a condition regarding any land, and then to add in particular regarding land under an applicant's control, just does not make sense. The assumption of subs. (2) is that the land must be under the applicant's control, and the purpose is to make it clear that it may be land other than the particular plot which is the subject of the application."

I add that subs. (2) referred to by the Sheriff Substitute corresponds with section 72(1)(a) of the 1990 Act.

Mr Straker refers to the broad terms in which the power to impose conditions is conferred by section 70(1)(a):

> "Where an application is made to a local planning authority for planning permission—
>
> (a) … they may grant planning permission, either unconditionally or subject to such conditions as they think fit.

Section 72 is expressed to be without prejudice to the generality of section 70(1). He relies on *Muchell* and upon Proberun, although he concedes that the conditions in those cases required works

outside the application site. The case of Birnie was also concerned with off-site works. He points out that Circular 11/95 envisages that positive conditions may, in some circumstances, be imposed on land within an application site. Under the sub-heading “Ability to enforce” para. 26 of the Annex to the Circular says this:

> “A condition should not be imposed if it cannot be enforced. …”

Then under the sub-heading “Whether compliance is reasonable” para. 28 says: ***37**

> “A condition may raise doubt about whether the person carrying out the development to which it relates can reasonably be expected to comply with it. If not, subsequent enforcement action is likely to fail on the ground that what is required cannot reasonably be enforced. One type of case where this might happen is where a condition is imposed requiring the carrying out of works (*e.g.* construction of means of access) on land within the application site but not, at the time of the grant of planning permission, under the control of the applicant. If the applicant failed to acquire an interest in that land, and carried out the development without complying with the conditions, the local planning authority could enforce the condition only by taking action against the third party who owned the land to which the condition applied, and who had gained no benefit from the development. Such difficulties can usually be avoided by framing the condition so as to require that the development authorised by the permission should not commence until the access has been constructed.”

He submits that the 1990 Act contemplates that Enforcement Notice action may be taken against an owner of land who is not the developer: see section 172(2) of the 1990 Act, and the owner will in any event have been notified of the planning application: see section 65(2) of the Act.

It is implicit in Mr Straker's submission that he accepts the proposition that to be lawful a planning condition must be enforceable. In my view, para. 28 of the Annex to Circular 11/95 is correct in considering enforceability, not on the basis of what is theoretically possible under section 172(2) of the Act, but on the basis of whether the person served with the Enforcement Notice can reasonably be expected to have to comply with it. In the example given in para. 28, it is inconceivable that the landower who had derived no benefit from the development, and might well have vigorously opposed it, would be required to comply with an Enforcement Notice. Requiring him to do so would amount to the expropriation of his land without compensation. A condition which is not reasonably enforceable is not a reasonable condition for the purpose of the Newbury test: see Newbury District Council v. Secretary of State for the Environment [1981] A.C. 578.

It follows that if a condition is not reasonably enforceable, it is no answer to say that requires something to be done within the application site. The need for conditions to be enforceable has to be viewed against the background that applicants are entitled to apply for planning permission on land which is not under their ownership or control, and the mere fact that the landowner objects to the development does not necessarily justify a refusal of planning permission: see the British Railways Board case (above).

It will usually be possible to resolve the problem in the manner described in para. 28 of the Annex to Circular 11/95, that is to say by the ***38** imposition of negative conditions. It does not follow that all positive conditions will necessarily be unenforceable in such cases. In the example given in para. 28, planning permission to construct a building subject to providing a means of access, a positive condition requiring the incorporation of some feature in the building itself might well be enforceable. Unless the applicant gained control of the land, he would not be able to erect the building. If he was in a position to erect the building, he would also be in a position to comply with a positive condition of that kind.

The enforceability of any condition has to be considered in the light of the particular facts. The problem with enforceability is a practical one, and it is undesirable to fetter the broad discretion conferered by section 70(1)(a) any more than is strictly necessary in the light of the principles set out in Newbury. It is true that some of the conditions imposed on the business park permission do not precisely follow the format recommended in para. 28 of Circular 11/95 in the sense they are not straightforward negative conditions: prohibiting the erection of a building until, for example, an access has been provided. The highway conditions are in that form. Other conditions prohibit development until the submission and approval of an overall scheme, the Framework Document, or in condition 7,

until the submission and approval of a series of schemes dealing with particular aspects of environmental mitigation for the enhancement of Stanney Brook Site of Biological Importance, for the recreation of a marshy habitat, etc., and thus do contain a “negative” element. They also contain a positive element, in that the schemes having been approved, development is then to be carried out in accordance with them.

However, it will be noted that the Framework Document will have to show details of phasing, and a number of the conditions (for example, 7.1, 7.9.9 and 7.10) envisage that timetables or timescales will be submitted for carrying out the works proposed in the schemes. Such a flexible approach is entirely appropriate for a scheme of this magnitude and complexity. In practical terms the council would be able to ensure, in particular through the phasing proposals and the Framework Document, that the requirements of the conditions could be enforced, even though the application site includes land which is not under the applicants' control. In addition, there are significant limitations on the amount of floor space that can be developed before the spine road is brought into use. In order to construct the spine road the applicants will have to gain control over a substantial amount of the site. Thus, on its particular facts, the present case is wholly different from the position that prevailed both in the *B.A.A.* case, where *B.A.A.* had no power whatsoever to control the direction of take off or landing, that power being vested in the Civil Aviation Authority, and the Grampian case, which was concerned with off-site road works. I repeat my view that enforceability should be considered in a pragmatic and not in a ****39*** theoretical manner, and should be considered by reference to the terms of the particular conditions, the specific development, and the particular site in question. Broad classification of conditions as “positive” or “negative” is a useful indicator, but should not be regarded as determinative, without regard to the circumstances of the individual case. So considered, the conditions imposed by the council in the present case were not unenforceable.

Overall Conclusion

My overall conclusion is, therefore, that Mr Howell's challenge succeeds on grounds 2 and 3, but fails on the remaining three grounds. The court has a discretion as to whether to grant relief in proceedings for judicial review. Mr Straker did not submit that I should exercise my discretion not to quash these planning permissions if I upheld Mr Howell's submissions. I have nevertheless considered whether I should exercise my discretion not to quash the planning permissions. I might well have done so had Mr Howell succeeded on ground 3 alone. Criterion (d) in Policy E.C.6 is but one aspect of a much broader policy and the council was satisfied that the remainder of the policy objectives were met.

The position is different in respect of ground 2. Regulation 4(2) of the Assessment Regulations is clear: a local planning authority shall not grant planning permission for a Sched. 2 application without first taking the environmental information into account. That information must include an environmental statement. That environmental statement must contain specified information. This environmental statement did not contain such information, for the reasons set out above.

In seeking expedition the council laid emphasis upon the importance of the planning permissions in terms of the economic regeneration, not merely of Rochdale but of the North West region generally. The council's Director of Regeneration, Mr Zuntz, stresses how vital it is that development contracts are signed in 1999, so that funds may be obtained from the E.U.

I bear those arguments very much in mind, but they could be advanced, with greater or lesser force, in respect of most of the descriptions of development that are set out in Sched. 1 or Sched. 2. Such developments will very often be of major significance in economic and/or in employment terms. The fact that there may well be a strong economic imperative to grant planning permission for such projects and thereafter to proceed with development at a rapid pace means that it is all the more important that their likely effects on the environment are properly assessed in accordance with the directive and the Assessment Regulations, and that planning permission is granted “in full knowledge of the project's likely significant ****40*** effect on the environment”. The assessment procedure is a fundamental part of the E.C.'s environmental policy, and it is essential that it is carried out. I realise that that there is a long-standing Development Plan policy for development of this site as a business park, but that does not obviate the need to comply with the requirements of Sched. 3 before planning permission is granted for that purpose.

It follows, that planning permission for the business park must be quashed, and since the granting of the planning permission for the spine road expressly relied on the granting of the planning permission for the business park and was inextricably linked to it by condition 1.3, it too must be quashed.

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