

The Planning Inspectorate

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Your Ref:

Our Ref: APP/M9496/C/05/2000734
APP/M9496/C/05/2000744

Date: 30 March 2006

Dear Mr Tippett

Town and Country Planning Act 1990
Appeals by Bleaklow Industries Limited and MMC Mineral Processing Ltd.
Site at Hassop Avenue, Hassop, Bakewell, DE45 1NS

Further to the Inspectorate's letters of 2 February inviting the appeal parties to comment on the validity of the enforcement notice issued by the NPA in this case, having regard in particular to recent case law in the unreported case of *Payne v NAW and Caerphilly CBC*, and the conclusion which has been reached on that preliminary issue as conveyed to the parties in Mrs Barlow's e-mail of 28 March, this letter is to confirm and explain the basis of the conclusion that the Secretary has reached on the matter.

As you already know, having now carefully considered the detailed submissions on the preliminary legal issue raised, the Secretary of State has reached the conclusion that the purported enforcement notice in this case is indeed a nullity. As such there is no enforcement notice capable of correction and no appeals under section 174 to be determined. Accordingly the Secretary of State can take no further action in the matter and the inquiry due to resume on 4 April has accordingly been cancelled. The Authority are requested to bring this cancellation to the notice of interested third parties.

First, it seems to the Secretary of State that the notice is insufficiently clear and unambiguous on its face such as to allow the recipients to tell with reasonable certainty what steps have to be taken to remedy the alleged breach of planning control. The view is taken that, in order to determine the issue in light of the various authorities cited by the parties, the question to be asked is whether the notice at the time it was issued sufficiently tells the recipients on its face what they have to do to remedy the alleged breach of planning control.

What the notice in this case does is to require a scheme (for the restoration of the land) to be submitted for subsequent approval by the Authority with a default mechanism should the Authority fail to approve the scheme within a specified period of time, or a scheme is not submitted or is submitted but refused.

While the requirement to submit a scheme is clear in itself, it is evident that the alleged breach will not be remedied by the submission of a scheme alone, whether approved or otherwise. The breach would only be remedied by the execution of whatever works are set out in the scheme to be submitted by, or imposed on the companies concerned and which, until the scheme is submitted or imposed, are entirely unknown. It is only once a scheme has been submitted or imposed that the recipients of the notice can tell with any reasonable certainty what they have to do to remedy the alleged breach. However, it is not then the notice which is specifying the steps required to be taken, but the scheme required to be submitted. In these circumstances it is concluded that the notice fails to comply with the mandatory requirement in section 173(3) of the 1990 Act, to specify the steps which the Authority require to be taken.

The authority's counter argument relying on *Kaur* and *Murfitt* cases has been carefully considered. However, the Court in the *Murfitt* case did not appear to have had the Court of Appeal's earlier decision in *Miller-Mead* drawn to its attention, perhaps because the *Murfitt* case was not argued on the basis that the notice was a nullity. The Court was neither asked to, nor did it consider whether a requirement in an enforcement notice to submit a scheme was sufficiently clear and unambiguous as to allow the recipient to know from within its four corners what he was required to do to comply.

In *Kaur*, the Court plainly recognised that the formulation of a notice containing a requirement to submit a scheme left uncertainty, but there was no suggestion that had there been a mechanism for the resolution of any disagreement over the contents of the scheme, the Court would have found the notice in that case to be good.

Secondly, the view is also taken that the notice is defective in failing to specify the period of time at the end of which the works set out in the scheme, agreed or imposed, are to be done. Section 173(9) requires every notice to specify the period at the end of which any steps are required to have been taken; and it is considered that this notice does not do so in relation to the execution of the scheme which has first to be submitted. It is not considered sufficient to say that the scheme will provide for when these works are to be done, because the period is not then specified in the enforcement notice, but in a subsequent document. It would therefore be impossible for any recipient of the notice to know from the face of the notice when it is served, what period at the end of which it was required to take any steps to remedy the breach.

Those are the Secretary of State primary reasons for the conclusion he has reached: that the notice is a nullity for failure to comply with the mandatory requirements of both subsections (3) and (9) in section 173 of the 1990 Act.

However, that view is reinforced by the apparent unfairness that may arise if a scheme were to be imposed in exercise of the default power the Authority have written into it, because it denies the recipient the opportunity to plead grounds (f) or (g) in section 174(2) of the Act, against either imposed requirements which might exceed what was necessary to remedy the breach or an inadequate period for compliance. Had the notice itself specified the steps and the compliance period within its four corners, the appellants would have had a statutory right of appeal in respect of them, which is denied them by the purported notice in this case.

Given that the conclusion that the notice is a nullity means that, in the Secretary of State's view, there is no notice, the Authority are requested to ensure that any record of its existence is removed from the enforcement register kept under section 188.

Yours sincerely



Lorna Biggins

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