SUBMISSIONS ON BEHALF OF THE PEAK DISTRICT NATIONAL PARK AUTHORITY IN RELATION TO THE MATTERS RAISED IN THE PLANNING INSPECTORATE'S LETTER OF 2ND FEBRUARY 2006

Introduction

1. This document consists of the submissions made on behalf of the Peak District National Park Authority ("the NPA") in relation to the matters raised in the Planning Inspectorate's letter of 2nd February 2006.

2. That letter stated as follows: *"The parties are put on notice that having considered the terms of the enforcement notice, the Inspector, Mr Joyce, would like to hear the parties' views on the nullity or invalidity of the enforcement notice given the vagueness of the requirements and the ability of the mineral planning authority to impose a default scheme at paragraph 5(ii)(b) and (c) of the enforcement notice. In particular, representations are sought on whether the terms of the enforcement notice comply with the statutory requirements of S173(3) and (9) and the impact, if any, of the judgments Kaur v SSE and Greenwich London Borough Council [1990] JPL 814 referred to in our letter of the 13th April 2005, R (Lynes) v West Berkshire District [2002] EWHC 1828, [2003] JPL 1137 and the more recent judgment Payne v NAW and Caerphilly CBC (copy enclosed) on nullity/invalidity of the enforcement notice. This issue will be dealt with as a preliminary matter at the inquiry."*

The statutory framework

3. Section 173 of the Town and Country Planning Act 1990 ("the 1990 Act") prescribes the contents and effect of an enforcement notice.

4. The particular subsections referred to in the Inspectorate's letter of 2nd February 2006 are in the following terms.

Subsection (3)

"An enforcement notice shall specify the steps which the authority require to be taken, or the activities which the authority require to cease, in order to achieve, wholly or partly, any of the following purposes."

The purposes are set out in subsection (4) so it is convenient to set this out also.

Subsection (4)

"Those purposes are -

(a) remedying the breach by making any development comply with the terms (including conditions and limitations) of any planning permission which has been granted in respect of the land, by discontinuing any use of the land or by restoring the land to its condition before the breach took place; or

(b) remedying any injury to amenity which has been caused by the breach."

Subsection (9)

"An enforcement notice shall specify the period at the end of which any steps are required to have been taken or any activities are required to have ceased and may specify different periods for different steps or activities; and, where different periods apply to the different steps or activities, references in this Part to the period for compliance with an enforcement notice, in relation to any step or activity, are to the period at the end of which the step is required to have been taken or the activity is required to have ceased."

Nullity and invalidity

5. It is important to distinguish between nullity and invalidity. The distinction is explained in paragraphs P173.08 and P173.09 of the *Planning Encyclopedia*.

6. If a notice is a nullity it means that there is effectively no notice at all. It is simply without legal effect. There is therefore no way to correct the error by appeal to the Secretary of State. A notice will be a nullity where it is defective on its face.

7. On the other hand, a notice which is invalid can be corrected on appeal by the Secretary of State by virtue of section 176 of the 1990 Act provided that the Secretary of State is satisfied that the correction or variation will not cause injustice to the appellant or the local planning authority. Thus section 176(1) states that "*On an appeal under section 174 the Secretary of State may –*

(a) correct any defect, error or misdescription in the enforcement notice ; or

(b) vary the terms of the enforcement notice,

if he is satisfied that the correction or variation will not cause injustice to the appellant or the local planning authority."

8. If the notice is invalid because of an error which cannot be corrected on appeal because that correction would cause injustice, the Secretary of State will allow the appeal and quash the notice. No question of quashing a notice can arise if the notice is a nullity because there is no effective notice to quash. In such a case the Secretary of State would simply indicate that he proposed to take no further action in relation to the notice.

9. The distinction between nullity and invalidity has never been better put than it was by Upjohn L.J. in the case of *Miller-Mead v Minister of Housing and Local Government [1963] 2 Q.B. 196 at pp 226-227: "Now, I think, is the time to draw the distinction between invalidity and nullity. For example, supposing development without permission is alleged and it is found that no permission is required or that, contrary to the allegation in the notice, it is established that in fact the conditions in the planning permission have been complied with, then the notice may be quashed under section 23(4)(a) [of the Town and Country Planning Act 1947]. The notice is invalid: it is not a nullity because on the face of it it appears to be good and it is only on proof of facts aliunde that the notice is shown to be bad: the notice is invalid and, therefore, it may be quashed. But supposing the notice on the face of it fails to specify some*

period specified by subsection (2) or (3). On the face of it the notice does not comply with the section; it is a nullity and is so much waste paper. No power was given to the justices to quash in such circumstances, for it was quite unnecessary. The notice on its face is bad. Supposing then upon its true construction the notice was hopelessly ambiguous and uncertain, so that the owner or occupier could not tell in what respect it was alleged that he had developed the land without permission or in what respect it was alleged that he failed to comply with a condition or, again, that he could not tell with reasonable certainty what steps he had to take to remedy the alleged breaches. The notice would be bad on its face and a nullity, the justices had no jurisdiction to quash it, for it was unnecessary to give them that power, but this court could, upon application to it, declare that the notice was a nullity. That to my mind is the distinction between invalidity and nullity."

10. More recent authority confirms that the above view of the law remains entirely correct – see, eg, *R (on the application of Lynes and Lynes) v West Berkshire District Council* and *Payne v National Assembly for Wales and Caerphilly Borough Council* as cited in the Inspectorate's letter of 2nd February 2006.

<u>The relationship between section 173 and nullity</u>

11. An enforcement notice will be a nullity if there is a failure to follow a requirement set out in section 173 as it is section 173 which prescribes the content of enforcement notices.

12. In relation to section 173(3) a notice will thus be a nullity if the steps which the authority requires to be taken are set out in so vague or ambiguous a way that there is a failure to discharge the statutory requirement to "specify" them.

13. This question is not to be approached in an unduly technical way because the law has now "progressed … to the point where the pettifogging had stopped, where artificial and nice distinctions understood only by lawyers no longer prevailed, and the Act could be read so that it meant what it said, namely that the Secretary of State might correct any defect or error in the enforcement notice if he was satisfied that the correction could be made without injustice to either party to the planning appeal" per Roch J. in *R v Tower Hamlets London Borough Council ex p P F Ahern (London) Ltd [1989] JPL 757 at p 768* (quoted in *Lynes* at paragraph 46).

14. It is submitted that the threshold which must be crossed before it can be said that the notice has failed to meet the statutory requirement in section 179(3) to specify the steps is well-captured in Upjohn L.J.'s formulation in *Miller-Mead* quoted above, namely, whether the notice in that regard is "hopelessly ambiguous and uncertain".

15. If that threshold is not crossed but there is nevertheless some uncertainty about the steps, that is not then a matter which goes to nullity and is uncertainty which can be cured on appeal by the power under section 176, provided there is no injustice.

16. In relation to section 179(3), a notice will be a nullity if it fails to specify a period at the end of which there has to be compliance with its requirement – *Lynes.*

The ambit of these submissions

17. In relation to this case the only issue which needs to be considered as a preliminary matter is whether the notice is a nullity on its face. If one proceeds beyond the question of whether the notice is a nullity on its face one is necessarily then in the position of considering the facts of the case and the evidence which has been produced.

18. The NPA submits that the notice is not a nullity on its face. The limited nature of this submission is simply a reflection of the fact that it is not necessary for the submission presently to go further.

Detailed submissions on the notice in this case

19. The Inspectorate's letter of 2nd February invites submissions on paragraph 5(ii)(b) and (c) of the notice. For the sake of completeness this submission also deals with paragraphs 5(i) and 5(ii)(a). The NPA submits that there are no other paragraphs of the notice which have the potential to raise the question of nullity.

20. The NPA has (at the inspector's request) previously submitted suggested amendments to the notice by letter to the Inspectorate of 31st October 2005. These submissions primarily consider the unamended notice because, if it was a nullity as issued, there is any event no power to amend it.

Paragraph 5(i)

21. This paragraph requires the recipients of the notice to "cease the winning and working of limestone other than the working of limestone where it is ancillary to the working of fluorspar and barytes."

22. There is an issue between the parties as to whether this paragraph reflects the correct interpretation of the 1952 permission. However, that matter immediately takes one beyond the face of the notice and is not a matter which can go the question of whether the notice is a nullity or not. The matter is part of the merits of the appeals under sections 174(2)(b) and (c). It is not addressed further here.

23. There is no other basis on which paragraph 5(i) could generate an issue as to whether the notice is a nullity. This paragraph of the notice accords with the requirement in section 173(3) of the 1990 Act to specify an activity which the authority requires to cease, namely "the winning and working of limestone other than the working of limestone where it is ancillary to the working of fluorspar and barytes."

24. Moreover, this paragraph of the notice specifies a period at the end of which the activity is required to cease and thus complies with section 173(9). The period is (for good reason) a short one, being only a day after the notice takes effect, but it is a period nevertheless because a day is undoubtedly a period. This paragraph of the notice does not fall into the trap exposed in *Lynes* where it was held that a notice which specified that compliance should take place immediately the notice took effect did not specify a period for compliance and thus did not comply with section 173(9) with the result that it was a nullity. It is entirely immaterial that the notice in this case refers to "time for compliance" given that the specified time consists of a period.

25. The issue between the parties as to the whether the period specified falls short of what should reasonably be allowed is part of the appeal on the merits under section 174(2)(g).

Paragraph 5(ii)(a)

26. This paragraph requires the submission of a scheme to remedy the breach of planning control.

27. There is no difficulty in law in the specified step being the submission of a scheme. *Kaur* was a case where there was a requirement to reinstate a pitched roof to a design to be agreed with the local planning authority. What was found objectionable about that step was the absence of a mechanism to resolve what should happen if there was

disagreement with the local planning authority. The steps in the present case present no such difficulty. Here, if the NPA do not make a determination on the scheme submitted to them, the appellants can implement their own scheme. If the appellants do not submit a scheme, the NPA can impose a scheme which they can likewise do if they do not agree to the scheme submitted by the appellants. All eventualities are thus covered.

28. In *Murfitt v Secretary of State for the Environment (1980) 40 P & C R 254* the Divisional Court upheld without difficulty a step in an enforcement notice which required land to be restored in accordance with a scheme to be agreed with the local planning authority or in default of such agreement as should be determined by the Secretary of State.

29. The Court had no difficulty in rejecting the argument that the step in question deprived the appellant of a right of appeal. There is always in any event access to the court on a point of law.

30. It cannot be a criticism of paragraph 5(ii)(a) of the notice which could render it a nullity that it does not specify the purpose or purposes which the specified steps are to achieve as it is not a requirement of section 173(3) that such purposes are specified. It is in any event plain that the scheme which is required is one to restore the land to its condition before the breach took place. This must follow from paragraph 5(iii) which requires implementation of "the <u>restoration</u> scheme under 5(ii)(a) or (c) whichever is

applicable" [emphasis added]. The notice thus gives a reasonable degree of certainty about the type of scheme which is required and is not on this account "hopelessly ambiguous and uncertain." It should be noted that the step in question in *Murfitt* was no more than that "the land shall be restored in accordance with a scheme to be agreed with the local planning authority". It should also be noted that paragraph 2.34 of annex 2 of circular 10/97 "Enforcing Planning Control" recognises that it may be legitimate simply to require restoration of the land to its condition before the breach took place, leaving it to the developer to comply in accordance with his or her knowledge of that condition. This disposes of the appellants'contention that the notice is fatally flawed by not describing the extent of the breach.

31. As paragraph 5(ii)(a) of the notice is not a nullity, its wording can, if required, be improved in its clarity by amendment, provided it does not cause injustice. There is no reason why improvement of the clarity of paragraph 5(ii)(a) of the notice as suggested by the NPA on 31st October 2005 would cause any such injustice. On the contrary, it would assist the appellants by telling them more clearly what the scheme should do and what it should include.

32. If (as is the case) it is acceptable for a step in an enforcement notice to require the submission of a scheme, it is no criticism then to say (as effectively do the appellants) that the step is too uncertain because the details of the scheme have not yet been spelled out. The whole point of specifying a scheme is that it is for the scheme to work those details out. If such criticism had been one which would have nullified

specification of a step by way of a scheme, it would have nullified the specified scheme in *Murfitt*. On the contrary, the court there endorsed (at p 257) the submission on behalf of the Secretary of State that the requirement to restore in accordance with a scheme "would give the appellant, and, indeed, the planning authority, the opportunity to consider in detail what was required" [emphasis added].

33. None of the above analysis is undercut by *Payne.* In that case an inspector had found that a step in a notice requiring the submission of details of a scheme of levelling and planting to the local planning authority for approval was unacceptably uncertain and failed to meet the requirement of section 173 that it should specify the steps required to be taken. However, it appears from the report of the case (paragraph 21) that the inspector did not explain why he considered that the step introduced uncertainty other than by way of a footnote reference to *Kaur*. In upholding the inspector's view on this point the judge remarked (paragraph 33) that the inspector had been "clearly influenced by the decision of Sir Frank Layfield in *Kaur.*" It would thus appear that the fatal defect in the step in the *Payne* notice was the absence of any mechanism which provided for what should happen if approval was not forthcoming. There is no such problem in this case – see paragraph 27 above. *Murfitt* does not appear to have been cited to either the inspector or the court.

34. There is no *Lynes* difficulty with paragraph 5(ii)(a) of the notice. A 6 month compliance period is specified.

35. The appellants' criticism that the requirement for the submission of a restoration scheme exceeds the requirements of the 1952 permission is misconceived. The submission of a restoration scheme is to cure the breach of the 1952 permission by the winning and working of limestone beyond the scope of that permission. In any event, the question of whether the requirements of the notice are excessive is a matter which goes to the merits of the appeal on ground (f) and is not a matter which bears on the question of whether the notice is a nullity or not.

Paragraph 5(ii)(b)

36. This paragraph deals with the eventuality of non-determination of a submitted scheme by the NPA. It is entirely favourable to the appellants in that it allows the appellants to implement their submitted scheme.

37. There is no potential free-standing complaint in respect of paragraph 5(ii)(b) (by which is meant a complaint which could not equally be levelled against paragraph 5(ii)(a) - and which is dealt with above - or paragraph 5(iii) - which is dealt with below).

Paragraph 5(ii)(c)

38. This paragraph allows the NPA to impose a scheme in default of submission by the appellants or in the case of refusal of a submitted scheme.

39. There is no problem with this paragraph which goes to nullity. *Murfitt* necessarily recognises the principle of imposition of a scheme albeit that, in that case, it was the Secretary of State who had the ultimate power of imposition through his ability to determine a scheme if the parties did not agree it. There is no difference in principle between the Secretary of State imposing a scheme and the planning authority imposing a scheme. In each case there is a mechanism for dealing with lack of agreement or deadlock by the ability to impose.

40. Insofar as there is a difference between the 2 situations, it is simply that, where the Secretary of State determines the scheme, the appellant has the opportunity of putting his case before someone independent of the planning authority. However, if the planning authority refuses a scheme on an unlawful basis the appellant always has the option of recourse to the court for an independent determination of the matter. The imposition of a scheme by the planning authority is not therefore something which allows the planning authority to act in an unlawful manner; it must act rationally and take all material considerations into account, whilst leaving out of account those which are not material. In such circumstances there is no room for the operation of the doctrine of nullity.

41. It follows that this paragraph of the notice could, if necessary, be amended, as suggested by the NPA on 31st October 2005 by incorporating a reference to determination by the Secretary of State. This would not be productive of any injustice to the appellants but would be favourable to them by giving them the additional

safeguard of recourse to the Secretary of State. It should be noted that in paragraph 2.34 of annex B of circular 10/97 it is stated, setting out the Secretary of State's policy, that he should not be invoked as the arbiter of such a scheme in an LPA's enforcement notice, in which, in the absence of any appeal against that notice, he may have had no previous involvement. However, in this case, the Secretary of State will have had previous involvement through the present appeal and the stated policy reason for not invoking the Secretary of State as arbiter does not therefore apply in the circumstances which present themselves here.

Paragraph 5(iii)

42. This requires implementation of the scheme.

43. The only basis on which this paragraph might be criticised is that a period for implementation is not specified. However, that is no doubt explicable on the basis that the scheme itself would necessarily have to deal with the period in which it was to be implemented. There is thus no *Lynes* problem here and no issue of nullity.

44. Therefore, this is again a case where, if necessary, the wording of the notice could be improved by exercise of the section 176 power, eg, in the way suggested by the inspector in his note dated 14/9/05 (by addition of the words "within the time periods set out in the approved or imposed scheme whichever is applicable"). This works no injustice but only adds clarification. The notice should in any event be modified to

impose an obligation on the applicants to implement the scheme in the circumstances set out in paragraph 5(ii)(b) which, as drafted, simply confers an entitlement. This could most easily be done by including a reference to paragraph 5(ii)(b) in paragraph 5(iii). Again this would not produce injustice. The intention of the notice could not sensibly have been that the NPA's failure to determine a submitted scheme involved the consequence that there was no obligation to implement any scheme at all.

45. As a result and for the reasons set out above the Peak District National Park Authority contends that the Enforcement Notice is valid and should not be declared a Nullity.

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