

1. BACKDALE QUARRY, LONGSTONE EDGE (MIN.2382JL/BP/DGB)

This report has been brought to a Special Meeting to enable the Authority to consider what action it would want to take in the event of the Planning Inspectorate declaring the enforcement notice issued by the Authority on 23 November 2004 to be a nullity. If the notice is declared a nullity, then the enforcement notice and the accompanying stop notice issued in January 2006 will fall, with potential cost implications for the Authority, and the operator will be able to resume mineral working at Backdale.

A Part B report has been provided relating to legal and financial issues. That report will be considered before this supplementary report to the Part A item. As the item relates to an enforcement issue and legal proceedings, consideration should be given to exclude the public from the meeting during consideration of that report to avoid disclosure of exempt information.

Background

The enforcement notice required “the winning and working of limestone other than the working of limestone where it is ancillary to the working of fluorspar and barytes” to cease at Backdale. Both Bleaklow Industries Limited (Bleaklow) (the landowner) and MMC Mineral Processing Limited (MMC) (the operator) appealed the enforcement notice. A public inquiry to consider the appeals was arranged for September 2005, but the inquiry was subsequently adjourned to 4 April 2006.

At the meeting of the Planning Committee on 20 January 2006 Members of the Committee resolved to issue a stop notice in view of the increased activity at the site to prevent further serious damage to the environment and amenities of the National Park. The stop notice was issued on 25 January 2006 and came into effect on 29 January 2006.

At the pre-inquiry meeting in February 2006, the Planning Inspector referred to the recent judgement of *Payne v National Assembly for Wales and Caerphilly County Borough Council* that appeared to question the validity of the enforcement notice. All parties were asked to provide legal submissions on whether the notice is a nullity. The Inspectorate is expected to make a decision on the question of nullity before resumption of the inquiry.

Purpose of Report

To consider serving a further enforcement notice and a stop notice, subject to consideration of a cost/benefit assessment, in the event of the current enforcement notice being declared a nullity, the serving of a temporary stop notice and to consider making an application to the Courts for a declaration as to the meaning of the 1952 planning permission.

RECOMMENDATION:

That, in the event that the enforcement notice dated 23rd November 2004 is declared to be a nullity, then subject to a financial risk assessment being completed to the satisfaction of the Chief Finance Officer:

- 1. An enforcement notice be issued against the winning and working of limestone from the area at Backdale identified on the plan accompanying the report other than in accord with the 1952 planning permission ref. 1898/9/69.**
- 2. That a stop notice be issued to require the winning and working of limestone at Backdale to cease 3 days from the date of service of the notice in the approximate area hatched black on the attached plan.**
- 3. That a temporary stop notice be served in the same terms as the stop notice, if required.**

4. That an application be made to the High Court seeking a declaration as to the interpretation of the 1952 planning permission.

History

- A 1952 planning permission granted by the Minister of Housing and Local Government allows for the winning and working of fluorspar and barytes, and for the working of lead and any other minerals which are won in the course of working those minerals by turning over old spoil dumps, by opencast working and by underground mining.
- Concern over the scale and extent of limestone extraction and processing was first raised in 1989. After protracted negotiations and discussions and the threat of enforcement action the then operator ceased work at the site in 1998.
- Bleaklow Industries, the owner of the land and the mineral rights, brought in a new minerals operator, MMC Minerals Processing Ltd, who began quarrying at Backdale in July 2003.
- It is the Authority's opinion that limestone is being extracted beyond the scope of the 1952 permission. In August 2004 the Planning Committee resolved to take enforcement action and an enforcement notice was issued on 23 November 2004. This required that the "winning and working of limestone other than the working of limestone where it is ancillary to the working of fluorspar and barytes" should cease. The notice also required that a restoration scheme be submitted.
- Appeals were lodged against the enforcement notice by both the landowner and quarrying company. The Authority had pressed for as early a hearing as possible but the Planning Inspectorate set dates for a public inquiry for 14-16 September 2005. The planning inquiry opened in September 2005. Four parties were represented: the Authority, the landowner, the quarrying company, and joint representation by the Campaign to Protect Rural England and the Save Longstone Edge Group, who object to the quarrying. The Inspector concluded that up to 9 days in total could be required.
- Counsel for the landowner resisted any early dates for resumption of the inquiry because of his lack of availability. The Inspector then fixed the hearing for 7 days commencing 4 April 2006. He also fixed dates of 6 and 7 June 2006 in case additional days were needed.
- Since the inquiry was adjourned the Authority has sought counsel's advice on what action it could take to restrict quarrying pending resolution of the enforcement proceedings. It has also sought financial support from Defra. Confirmation of Defra's support was received on Thursday 12th January 2006.
- As the quarrying company continued to extract stone from Backdale at a very significant rate, causing damage to the landscape that is irreversible, the Authority's Planning Committee at its meeting on 20 January 2006 resolved to serve a stop notice.

Representations

In response to a request for information to be taken into account in a cost/benefit assessment for a stop notice, letters have been received from Bremners, the solicitors acting for Bleaklow and from Marrons, the solicitors acting for MMC.

The letter from Marrons dated 21 March 2006 notes the intention to take an item to the Committee on 24 March 2006 to consider the issue of serving a further enforcement notice and stop notice in the event of the existing notice being declared a nullity. It states that resources are

currently being directed towards preparing for the imminent inquiry and to progress discussions with officers over the working of Deep Rake. As the existing notice has not as yet been declared a nullity there is reluctance to divert resources towards making observations on the cost/benefit analysis.

Marrons consider the cost/benefit analysis contained in the previous Committee report to be patently deficient. No comparative assessment of the likely impact on the environment of other areas being worked instead of Backdale was included.

The letter from Bremners dated 3 March 2006 states:

- The Authority is required to provide a report containing a thorough assessment of the likely consequences of serving a stop notice. Any benefits should be lawfully procured.
- It is unreasonable to require a response to an enforcement and stop notice the terms of which Bleaklow has not seen.
- The scope of the 1952 planning permission needs to be determined before notices can be served.
- The Authority cannot serve a stop notice that does not recognise the lawful rights to operate under the 1952 planning permission.
- The enforcement measures should not stifle the operation of the 1952 planning permission in preference to modification or revocation of the 1952 planning permission. Members should be informed of the relative effects on amenity of the proposed stop notice and the ROMP scheme.
- The Authority should consider the costs of alternative methods of resolving the issue, including seeking a declaration as to the scope of the 1952 planning permission in the High Court. That is, the comparative costs of pursuing the matter to the High Court for a declaration compared with compensatory cost that may arise in the event of the notice being declared invalid.
- The Authority should consider the costs to the public purse if the stop notice and/or any replacement stop notice are declared invalid.
- In the event of the stop notice being invalid Bleaklow will pursue claims for compensation for the purported sterilisation of vein minerals and other minerals that can be extracted under the 1952 permission; the compensation arising from unlawful interference of the lease between Bleaklow and MMC; and for pursuing a stop notice based on an enforcement notice that was contrary to the law.
- The steps being taken to issue a further enforcement/stop notice seeking to remedy the flaws of the existing notice will also have the effect of sterilising an asset, giving rise to the tort of misfeasance and to further claims for compensation.
- The involvement of the Secretary of State (Defra) does not render the misuse of public money any less unlawful in attempting to sterilise a valid planning permission without compensation.
- The Authority recognises its exposure to risk of liability for damages, compensation and costs in respect of the current enforcement notice and stop notice being declared a nullity. These claims will increase if any subsequent attempt to enforce in this way is made in advance of determination of the scope of the 1952 permission.
- The Authority is also at risk in relation to the costs of judicial review proceedings contemplated as a result of the current enforcement/stop notice and any further enforcement/stop notices.

Consideration of taking enforcement action

Concerns have been expressed by a number of parties, both in the past and recently, over the quantity of limestone being extracted and removed from Backdale, and whether this activity was in accord with the terms and conditions of the 1952 ministerial planning permission ref. 1898/9/69 that is attached to the land.

The 1952 planning permission grants planning permission for:

“the winning and working of fluorspar and barytes and for the working of lead and any other minerals which are won in the course of working these minerals by turning over old spoil dumps, by opencast working and by underground mining within the areas shown outlined in black excluding the area cross-hatched on the attached plan...” The permission was subject to 6 conditions.

The application and the permission make it clear that what was to be worked lawfully were the minerals named in the permission, namely fluorspar and barytes and lead and “other minerals won in the course of working the named minerals.” The permission is not therefore for limestone extraction except where it is won in the course of working the other minerals.

Information has been sought from the operator and the landowner, through the serving of Planning Contravention Notices over the extent of the operations and the quantity and type of mineral extracted, stored and sold from the site between July 2003 and December 2005. Advice and assistance has also been provided by counsel and via a geo-technical consultant.

The geo-technical consultant’s advice is that considerably more limestone has been removed than is necessary to work the amount of fluorspar and/or barytes recovered. The consultant estimates that high volumes of limestone and relatively low volumes of fluorspar have been extracted. He also considers that the site has been worked to recover limestone with fluorspar as a by-product contrary to the wording of the 1952 permission. As a result it is considered that there has been a breach of planning control.

Where there has been a breach of planning control a local planning authority must consider whether it is expedient to take enforcement action having regard to the provisions of the development plan and to any other material considerations.

Policy GS1 of the Structure Plan states that all development will be controlled so that the valued characteristics of the National Park can be conserved and enhanced. Policy M2 goes on to specify that all proposals for mineral extraction will be strictly controlled and that all proposals should be in the public interest and that no reasonable alternative source site or means of production less damaging to the national park is available. Policy M3 advises that major development will not be permitted other than in exceptional circumstances in which the Authority is convinced that it is essential to meet a national need that overrides the national policy to protect the national park.

As the development has been carried out in breach of planning control it has not been subject to strict controls. The development being undertaken is considered to be major development. There is considered to be no national need for the mineral (limestone) to be worked from this area that overrides the national need to protect the National Park. Alternative sources and means of production are available. Consequently it is not considered to be in the public interest to allow the development to take place.

Policy C2 advises that development that would not respect, would adversely affect, or would lead to undesirable changes in the landscape or the valued characteristics of the area would not normally be permitted. Policies M7 and LM1 require that for mineral extraction proposals the applicant must show the methods of operation will minimise the impacts on the valued characteristics of the National Park.

The development being carried out is not in accord with the conditions of the 1952 planning permission. The operator or landowner has not provided any evidence to show that the method of operation used minimises the impact on the National Park. The operation is resulting in undesirable changes in the landscape. The area is crossed by footpaths and an un-surfaced county road and is visible from many public vantage points. The development is considered to be generating levels of noise and disturbance, including the effects of lorry traffic, which adversely affects the valued characteristics of the area and the quiet enjoyment of the area by local residents or visitors. There is concern over the effect of the development on the stability of

adjoining land. There is also concern over the effects of the development on ecological and archaeological interests and the water environment. Overall the development is considered to have a damaging effect on the valued characteristics of the National Park.

It is not considered that there are any material considerations that would outweigh the harm to the valued characteristics of the National Park.

Consideration of serving a stop notice

If a further enforcement notice is served it will not take effect if the recipients of the notice appeal. Given the history of this matter it is highly likely that there will be an appeal and that the notice will not take effect for a considerable period of time.

S183 Town and Country Planning Act 1990 provides that a local planning authority may serve a stop notice where they consider it expedient that any relevant activity should cease before the expiry of the period for compliance with an enforcement notice.

Government advice on the use of stop notices is contained in DOE Circular 10/97. This states that a stop notice's requirements should only prohibit what is essential to safeguard amenity or public safety in the neighbourhood or to prevent serious or irreversible harm in the environment in the surrounding area. It also states that the effect of serving a stop notice will be to halt the breach of control almost immediately and the LPA should therefore ensure that a quick but thorough assessment of the likely consequences of serving a stop notice is available to the Committee or officer who will authorise service of the notice. The assessment should examine the foreseeable costs and benefits likely to result from a stop notice.

Cost/Benefit Assessment

Officers have written to the owners and operators of the quarry to ask for their comments on the effect on their business of a stop notice. Their letters in response are summarised under the heading "Representations". Where these refer to legal issues advice has been given in Part B of the agenda.

Costs

The businesses directly involved in the Backdale site are those of the landowner Bleaklow Industries Ltd (Bleaklow) and the operator MMC Mineral Processing Ltd (MMC). MMC have a mineral lease over the Backdale area.

As the Authority has not received information directly from the companies involved officers have estimated the costs to the businesses from the information available, including information on the companies' websites and registered company accounts.

According to the MMC website the main focus of the company is the production of high specification aggregates and sand used in the making of high strength concrete and road construction materials. MMC was formed in 1998 as a joint venture with Merriman Ltd. The company was primarily involved in processing sands and aggregates for large aggregate producers around the country. MMC have continued with this service and have expanded with the acquisition of substantial reserves of hard rock, sand and gravel, high polished stone value gritstone and now operate on those sites. The MMC group includes three other companies, Bodmin Block (acquired in 2004), Aggregates & Minerals and Cornish Rustic Stone (both acquired in 2005). MMC are able to provide a long-term supply of aggregates and products through the use of Par Docks in Cornwall. Most of the information provided centres around operations in Cornwall. There is no mention of the operations at Backdale on the MMC website. It is unclear how important financially the operations at Backdale are to MMC.

From the company accounts it would appear that whilst MMC has substantial assets, it also has a high level of debt and the company is not profitable. This may be the result of recent company acquisitions. The accounts indicate that there is ongoing support from Merriman Ltd, the 50% shareholder in MMC. Merriman Ltd., which is a profitable company, are acting as guarantor over the debts of MMC.

The Bleaklow website indicates that the company supplies lime mortars and plasters. According to the company accounts for 2004 the company appears to be profitable, although it is owed a substantial sum of money by debtors. Within the accounts there is reference to the freehold transfer of property rights from the original Bleaklow Industries Ltd in 1988 at a directors valuation of £151,000. The original cost of this land was £26,598. According to the accounts the director is not aware of any material change in this valuation, and therefore, the valuation has not been updated. It is unclear from the company accounts how much income is made directly from the rent and royalty payments arising from MMC's activities on the freehold land at Backdale.

The minerals currently being worked (with or without permission) are fluorspar and limestone used for aggregate purposes.

The perception of the Authority's officers and the general public was that output of limestone increased significantly during 2005. Additional crushers were installed on the site, giving the potential to increase the amount of crushed stone available for sale.

According to the information provided by Bleaklow and MMC, between July 2003 and December 2005, a total of 11,500 tonnes of fluorspar was extracted from Backdale. None of the fluorspar extracted since 2003 has been sold from Backdale since the principal vein mineral processing company has declined to accept the material. Between July 2003 and December 2005, a total of 573,963 tonnes of limestone was sold from Backdale.

The Authority has no information on the revenues and costs of operating the site. There is currently no market for the unprocessed fluorspar from this site. The limestone is sold as aggregate. The limestone is worked in comparatively high volumes and processed using mobile plant. Whilst processing costs are likely to be low the product is likely to secure a relatively low price.

As the processing plant is mobile it could be moved from Backdale for use elsewhere. There would be costs associated with the removal, relocation and re-commissioning of the plant. There have been 7 people directly employed at the site including 2 contractors. Some of these could be retained to operate within the part of the site not included in the stop notice, to work the site in accord with the terms of the 1952 planning permission. Some may be re-deployed by the company to work elsewhere. It is possible that some may be made redundant with associated redundancy costs, although the Authority has no evidence that this is the case. Both Bleaklow and MMC have stated that operations could be transferred to other areas within the 1952 planning permission.

Haulage contractors are used to transport the mineral to markets. The haulage firms could be contracted by the company to transport minerals obtained from other sites. The Authority has no information on existing contracts. However, the operating company could source aggregate materials from elsewhere to meet the contracts. There are a number of operating sites within the immediate locality that could supply similar products to that arising from Backdale. Cost of purchasing from these alternative sites may be higher.

Based on available information an independent valuer estimates that the maximum monthly net profit lost by the landowner and operator combined is likely to be in the region of £70,000. This is a maximum figure and could be mitigated by the different working options referred to above.

If working is prevented at Backdale the operators may move to prominent areas at Wagers Flat or Beacon Rod, also found within the area of the 1952 permission. Working in these areas may

result in significant impacts on the landscape and other valued characteristics of the National Park. As there are no working plans attached to the 1952 planning permission, it is difficult to comment on the extent of the impact that may take place. In the Environment Act 1995 submission only shallow surface working within limited areas was initially identified. However, the submission has no standing since a final determination has still to be made. If MMC and Bleaklow are correct in their interpretation of the 1952 planning permission and based on the activities that have taken place at Backdale then the entire area may be under threat of working. Working could take place until 2042, with quarry faces being visible from extensive areas to the south. If the Authority were to be correct in its interpretation of the 1952 permission then the extent of working would be more limited. The extent of the vein mineral deposits has not been proven. If working occurs, investigations would need to take place to monitor whether unlawful activity may be occurring, with a view to considering whether to take enforcement action. The risk of provoking landscape damage on the southern slopes of Longstone Edge is therefore a further matter to take into consideration.

Benefits

The mineral extraction operations at Backdale have had a significant adverse effect on the landscape and amenities of the locality.

Backdale is situated at the eastern end of Longstone Edge, a prominent ridgeline feature within the National Park. The mineral operations have cut into the southern slope of the ridgeline. Since July 2003, when MMC moved into the site, limestone extraction from the site has accelerated, increasing the extent of the quarry. Operations in 2005 have removed further parts of the hillside, involving the loss of trees. The operations have given rise to a significant number of complaints from members of the public, concerned over the damage to the landscape, the visual impact of the operations and disturbance to local amenities through noise, dust and lorry traffic.

Complaints have been received from residents of Hassop parish over the noise and general disturbance arising from the extraction operations at Backdale. Complainants refer to operations commencing in the early hours of the morning (5:00am) working a 13 hour day, with operations also taking place on Saturdays and Sundays. Residents of Calver village and other villages in the immediate locality are subjected to increased disturbance from lorry traffic associated with the development. A local action group has been established to voice concerns of the local residents about the detrimental impact the mineral operations are having on the environment and amenities of the locality.

The area is located in the heart of the Peak District National Park popular with visitors who are attracted by the designated landscape, wildlife and cultural heritage features. The local villages offer a number of attractions. Bakewell is in close proximity, as is Chatsworth and its associated attractions. The footpath network over Longstone Edge and the surrounding areas are frequently used.

The mineral extraction activities have also affected an un-surfaced county road and a public footpath. During 2005 additional crushers were installed increasing the potential rate of working at the site.

An accelerated rate of working due to limestone extraction will increase the extent of the operations further with consequential impacts on the landscape and visual amenities. There would also be consequential impacts on the level of noise and general disturbance from the operations on local residents and visitors including the detrimental effects arising from additional lorry traffic. Increased levels of working further prejudice the ability to satisfactorily restore the site due to the void of the quarry extending to a greater lateral and vertical extent. Serving a notice would prevent further irreversible damage occurring to the designated landscape and protect the amenities of the area, for local residents and visitors. It is not possible to put a price on the National Park landscape.

Conclusion on Cost/Benefit Assessment

Having considered the costs and benefits of serving a notice, your officers conclude that the benefits of stopping the damage by serving a stop notice outweigh the cost to the operators and owners and to the local economy. Although no information has been provided directly by MMC, the information on their website suggests that the effect on the company will not be hugely significant, and it is officers' view that a large number of employees are unlikely to be affected. Both MMC and Bleaklow will be entitled to claim compensation for financial losses they have suffered in the event that the Authority's actions in serving the stop notice are not supported on appeal. By contrast the damage to the environment of the National Park is irreversible. After the Inspector adjourned the inquiry in September additional crushers were brought on to the site and the working carried on at a significant rate. It is likely to be at least 6 months before a decision is obtained from the Planning Inspectorate, with further delay if there is a High Court challenge. There is therefore scope for substantial further landscape and amenity damage before the matter is finalised. It is your officers' view that it is therefore expedient to serve a stop notice to protect the environment in the meantime. However, Members will need to make their own assessment of the expediency of issuing a stop notice, taking into account the matters set out in this report.

Consideration of a Temporary Stop Notice

A stop notice can only be served when there is an enforcement notice in place. It may be that a new enforcement notice will take time to prepare and Members are therefore asked to consider whether to authorise the issue of a temporary stop notice, which can last for up to 28 days, and can be issued without there being an enforcement notice in place. A temporary stop notice can be served where the local planning authority think that there has been a breach of planning control and that it is expedient that the activity which amounts to a breach is stopped immediately.

Declaration in the High Court on Interpretation of the 1952 Permission

The Authority has previously concluded that the appropriate way of resolving the issue of the interpretation of the 1952 planning permission was through the enforcement route. The planning inquiry is due to re-commence on 4th April and, therefore, if the enforcement notice remains extant, officers' advice is that the Authority should continue with this.

However, if the Planning Inspectorate were to declare the enforcement notice a nullity, officers feel that there would be a benefit in applying to the High Court for a declaration as to the courts' interpretation of the permission. It is therefore recommended that, in that circumstance, an application to the court be made in addition to serving enforcement and stop notices.

Financial Issues

S186 of the Town and Country Planning Act 1990 provides that a local planning authority could be liable to pay compensation in respect of a stop notice if an enforcement notice is quashed, varied or withdrawn or the stop notice is withdrawn. However no compensation is payable in respect of the prohibition in a stop notice of any activity which at any time when the stop notice is in force constitutes or contributes to a breach of planning control. Financial risks will attach to an application to the High Court for a declaration. A report on financial issues is prepared for consideration in Part B of the agenda.

Human Rights aspects including Equal Opportunities, Health and Safety

Article 8 of the European Convention on Human Rights provides that everyone has a right to respect for his private and family life, his home and correspondence.

Article 1 of the First Protocol to the Convention provides for the right of persons to peaceful enjoyment of their possessions.

These are qualified rights and it is necessary to consider whether the action proposed is proportionate. It is a matter of balancing the competing interests of the quarry operators and owners as against those of individuals in the local area personally affected by the quarrying and the community as a whole.

Conclusion

The Authority has to consider whether, if the current enforcement notice is deemed a nullity, it is expedient to issue a further enforcement notice and/or a stop notice to require unauthorised limestone extraction to cease, and/or to seek a declaration in the courts for an interpretation of the 1952 planning permission. The Authority is also asked to consider the issue of a temporary stop notice.

An enforcement notice would cover the approximate area identified on the plan attached to this report. It is proposed that if a stop notice is to be issued it should prevent the winning and working of limestone at the Backdale site, other than in accordance with the Authority's interpretation of the 1952 permission. A plan of the approximate area where limestone extraction would be prohibited is hatched black on the plan attached.

A stop notice must give a minimum of 3 days and maximum of 28 days from service of the notice for compliance. A lesser period may be given if the local planning authority considers that there are special reasons for specifying an earlier date and a statement of reasons is served with the stop notice. In the present case it is felt that 3 days would be appropriate.

List of Background Papers (not previously published)

Letters from Bremners and Marrons