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ROYAL COURTS OF JUSTICE

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Minister for Housing and Construction
Department of the Environment
2 Marsham Street
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4 September 1984

Dear Ian.

OPENCAST COAL SITE AT SPRINGHILL, STAFFORDSHIRE

I refer to your letter of 29 August in which you ask for advice on one of the conditions in the directions given under Section 2 of the Opencast Coal Act 1958 ("the 1958 Act") on the grant of an authorisation given under Section 1 of that Act.

Five questions were asked in the Case enclosed with your letter; I will take each question in turn.

Question (a) asked whether the Secretary of State has power to vary the terms of the conditions in a planning permission deemed to be granted by virtue of a direction given under Section 2 of the 1958 Act by giving a direction under Section 49(4) of that Act. In my opinion, it is doubtful whether the Secretary of State has power do to so.

Section 2(1) of the 1958 Act provides that upon granting an authorisation the Secretary of State may give directions that planning permission be deemed to be granted. The effect of the opening words, "Upon granting an authorisation", is that the only circumstances in which the Secretary of State has power to give directions is upon granting an authorisation.

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Section 49(4) provides that any power conferred by the Act to make an order or give any directions shall include power, subject to the like provisions and conditions, to vary or revoke the order or directions by subsequent order or subsequent directions, as the case may be. Thus, by virtue of this sub-section, any power to make an order or give directions includes the power to vary or revoke the order. However, since the power contained in Section 2(1) can be exercised only upon granting an authorisation, the power, as extended by Section 49(4), can be exercised only in those circumstances.

I have considered carefully the arguments put forward by the Department of Energy. However, I do not agree that Section 2 directions would have been expressly excluded from the scope of Section 49(4) had Parliament intended that a deemed planning permission could be revoked or modified only by an order made under Section 21 of the Town and Country Planning Act 1947. The draftsmen may well have considered that no express exclusion was necessary because the power contained in Section 2(1) can be exercised only on granting an authorisation under Section 1. Sub-sections (5) and (6) do not, in my view, support their argument. Sub-section (5) is included to restrict the scope of sub-section (4) in relation to compulsory rights orders; sub-section (4), as thus restricted, will continue to apply to compulsory rights orders. Sub-section (6) was needed because Section 15(4) requires the Secretary of State to revoke an order made under Section 15 in the circumstances specified in sub-section (4) and he does not have to comply with the provisions and conditions that applied when he made the order.

I have noted the extract from the Notes of Clauses. However, if it was intended that Section 49(4) should enable directions under Section 2 to be varied or revoked, it is doubtful whether

the Act gave effect to the intention.

It is suggested that there may be some significance in the use of "directions" rather than "direction" in Section 2(1) of the 1958 Act. The plural form is used because, as stated in the Oxford Dictionary, when direction has the meaning of what to do or or an order it is usually in the plural.

I find support for my doubts that Section 49(4) can be used in the circumstances suggested in the fact that there is no procedure in the 1958 Act for varying or revoking directions under Section 2(1). The directions are given on the granting of an authorisation and the First Schedule provides a detailed procedure including advertising the application, what is to happen if objections are made and for the holding of a public inquiry. There is no procedure supplied by the Act for variation or revocation of directions by the giving of new directions and I do not think that it would have been the intention of Parliament to enable directions under Section 2 to be varied or revoked without going through some sort of procedure in view of the words "subject to the like provisions and conditions" in Section 49(4). There are no like provisions and conditions that can be applied to directions under Section 2, whereas there are for orders made under Sections 4 and 16 and directions given under Section 39.

In addition, directions deeming planning permission to be granted are given under Section 40 of the 1971 Act where an authorisation of a Government Department is given in respect of the development in question. The reason for this is that the same questions will have been considered in connection with granting the authorisation and, therefore, it is unnecessary for there is to be a separate consideration in connection with the planning aspects of the proposed development. It would be an anomoly if directions could be given under Section 49(4) where there had been no related

authorisation in respect of which there had been a proper consideration of the relevant questions.

In view of my answer to question (a), questions (b) and (c) do not arise.

In answer to question (d), in my view it is open to the Secretary of State to determine, pursuant to the provisions of the conditions quoted in paragraph 6 of the Case, that coal may be transported otherwise than by rail without treating the reference of the issue to him as a formal appeal under Section 36 of the 1971 Act. Whilst it is open to the National Coal Board to appeal to the Secretary of State pursuant to Section 36(1) of the 1971 Act, as amended by paragraph 4(2) of Schedule 15 to the Local Government, Planning and Land Act 1980, there is nothing in those provisions that prevent the Board, or the Planning Authority, referring the dispute to the Secretary of State pursuant to the condition contained in the deemed planning permission.

In reply to question (e), I agree that the rules of natural justice apply. De Smith, Judicial Review of Administrative Action (4th Edition) page 201 states that "[in] the absence of clear statutory guidance on the matter, one who is entitled to the protection of the audi alteram partem rule is now prima facie entitled to put his case orally; but in a number of contexts the courts have held natural justice to be satisfied by an opportunity to make written representations to the deciding body, and there are still many contexts where a person will be able to present his case adequately in this way".

In deciding whether the parties are able to present their cases adequately by written representations it is relevant that Parliament has provided in Section 36(4) of the 1971 Act that before determining an appeal under the Section the Secretary of

State shall, if either the applicant or the local planning authority so desire, afford to each of them an opportunity of appearing before, and being heard by, a person appointed by the Secretary of State. Thus since Parliament has enacted that either party should have the opportunity of an oral hearing, the court would probably hold that there was an equivalent right where the reference is made pursuant to a provision in a planning permission.

If there was widespread public objection on planning grounds to the proposal to send coal by road, it would be open to the Secretary of State to hold a local public inquiry even if one was not asked for by the National Coal Board or the local planning authority. However, by analogy with Section 36 which makes no mention of third parties, the rules of natural justice would not seem to require the Secretary of State to hold a local public inquiry in such circumstances.

I am copying this letter to the Prime Minister and to Peter Walker.

Yours Eg. Michael

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