



LEGAL

Planning & Enforcement. Solved





How to make your notice fool proof

Izindi Visagie- Ivy Legal

Jean Russell- Planning Inspectorate

Why do we issue ENs

- Because it “appears” that there has been a breach of planning control

And

- It is expedient to issue a notice having regard to the provisions of the development plan and to any other material considerations (s172(1))

Important to get the EN right

- It is a legal document which may be the basis of a prosecution further down the line
- It sets out the LPA's view of what has been done wrong and how to put it right
- If appealed on ground (a), the allegation sets the terms of the deemed planning application

Consequences of getting it wrong

- Quashed notice
- Harm continues/breach becomes immune
- Appellant remains in state of uncertainty
- Delays
- Potential costs award
- Failed prosecution
- Ombudsman

Miller-Mead test

“does the notice tell [the person on whom it is served] fairly what he has done wrong and what he must do to remedy it?”

Nullity & Invalidity

Nullity

- If it is so defective on its face that it is without legal effect
- Usually missing some vital element...
- Or hopelessly ambiguous and uncertain.

Contrast invalidity

- Where the EN is incapable of being corrected without causing injustice under s176(1)(a).

Nullity

- *Beg v Luton BC* [2017] EWHC 3435 (Admin): Whether LPA had the required delegations in place when the EN was issued is not ground for treating an EN as a nullity. The point could be pursued either through submissions that the EN is invalid or by application for judicial review.
- *Oates v SSCLG v Canterbury CC* [2018] EWCA Civ 2229 – Whether a defect renders the EN null must be viewed in context: the importance or otherwise of that part of the EN; whether the defect is bound up with the remainder of that section; whether the EN would be valid in the absence of the defect. It is open to an Inspector to conclude that, while part of the relevant section of the EN is uncertain, the EN as a whole complied with the statutory requirements and the offending part could be deleted.

Requirements of a notice

Mansi doctrine

- The express requirements of an enforcement notice should not be drafted in such a way as to abrogate pre-existing rights, including but not limited to existing use rights.

However,

- A MCU notice may lawfully require removal of integral operational development.
- *Murfitt, Somak, Bowring* [2013], [2015], *Makanjuola*
- [*Kestrel Hydro v Secretary of State for Communities and Local Government* \[2016\] EWCA Civ 784](#)

The Inspector's powers

- S176(1)(a)- Power to correct any defect, error or misdescription in the notice
- S176(1)(b)- Power to vary the terms of the notice – even if there is no appeal on ground (f) or (g)
- As long as there is no injustice to the appellant or the LPA
- Key is injustice.

Except:

- If notice is null, there is no notice and there is nothing to correct or vary ('so much waste paper')

Service

- Owner, occupier and
- *S172(2)(b): on any other person having an interest in the land, being an interest which, in the opinion of the authority, is materially affected by the notice.*
- **APP/V2635/C/17/3183252** Notice served on owner, not her partner or 'occupier'. Quashed on ground (e)
- S176(5): Where it would otherwise be a ground for determining an appeal under section 174 in favour of the appellant that a person required to be served with a copy of the EN was not served, the Secretary of State may disregard that fact if neither the appellant nor that person has been substantially prejudiced by the failure to serve him.

Service – s329

- Personal delivery
- Leaving it at usual or last known abode or address given for service
- Prepaid registered letter/recorded delivery at usual or last known abode or address given for service
- Where an address for service using electronic communications has been given, to that address
- In case of incorporated company, to the SECRETARY or clerk at their registered or principal office or sending it prepaid letter/recorded delivery
- *Newham v Miah* [2016] EWHC 1043 (Admin)
- *Newham v Ahmed & Ahmed* [2016] EWHC 679 (Admin)- s233(2)

Local Government Act

Common problems

- Missing an essential component of the notice
- Alleging MCU but not stating what the use is, i.e. 'stationing of caravan'
- Confusing MCU and buildings, especially caravans, storage containers etc.
- Confusing BOC and development without PP
- Alleging MCU and not correctly identifying all of the components

Common problems (2)

- Confusing incidental and primary uses
- Not investigating the MCU properly before issuing the notice, e.g. is the building used as flats or C4 or sui generis HMO?
- Reference to/reliance on incorrect immunity period
- Requirements of the notice not matching the allegation (unless it is intentionally different)
- Requiring that development is altered to be PD- GPDO does not grant retrospective PD. If it wasn't PD when built, it can never be PD. Requiring to modify in accordance with PD rights, is not 'remedying the breach' and there is also a risk that the works required may not be clear.
- Requirements for "schemes"
- Requirements worded as "conditions"

Common problems (3)

- When development is not in accordance with PP, in order to remedy the breach, the requirements should be 'remove OR alter to comply with the terms and conditions of the PP'.
 - 'Remove' element is in case the PP lapses.
 - 'Alteration' is minimum required to remedy breach.
 - 'Terms and conditions' is for future enforceability.
- Specify the steps to achieve the purpose
- Be clear about the purpose of the notice, i.e. remedy the breach or remedy injury to amenity (s173(4)(a) or (b))
- Never seek an improvement- can only ever go back to what existed before and cannot require previous use to resume



Subscribe to our ENFORCE newsletter via our website

www.ivylegal.co.uk