

18 January 2013

Mr O Agala
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Dear Mr Agala

**ENFORCEMENT APPEALS BY GAZELLE PROPERTIES LIMITED - SITE AT THE FORMER FULLERS EARTH SITE, FOSSEWAY, COOMBE HAY, BATH
PINS REFS: APP/F0114/C/12/2179426, 2179431 AND 2179435**

The Inspector will now have noted that both the Council and Interested Parties are seeking to rely very heavily on a challenge the Secretary of State's previous findings as to the extent of the lawful B2 use of the site.

We consider that (a) it is not lawful to canvass this issue again and (b) it will not be possible for the inquiry to conclude within the four days allocated, given the scope of the issues to be covered. It is therefore apparent that a great deal of evidence and inquiry time will be necessitated by revisiting this issue. A consequence of the additional inquiry time is a real risk of the costs to our client escalating considerably and therefore there is an urgent need to address whether what we consider to be an unlawful and irrelevant exercise can be obviated.

As set out in the joint opinion of Mr Elvin QC and Mr Goodman (appendix L to Mr Kendrick's evidence) at paragraphs 63-4:

"The mischief which *res judicata* seeks to address is apparent [in this case]. The principle applies in this instance so as to prohibit, as a matter of law, the visitation of the issue of the lawful use right again.

Consequently, the Appellant at the enforcement appeal should not be put to the necessity of re-proving this issue: the enforcement notices must be amended or quashed so as not to traduce the lawful use right enjoyed over the whole site."

It is our position that the Council's attempt to revisit the extent of the B2 use is unlawful and unreasonable. According to its email to the Inspectorate, the Council is apparently yet to take legal advice from its barrister on the point, albeit it states in its letter to the Inspectorate that it has considered the *res judicata* issue previously (we have not seen any document demonstrating this). As previously confirmed, these matters will be likely to form the basis of a costs application by the 11733567.1

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Appellant. Despite a further reminder from us yesterday afternoon we are yet to hear from the Council in response to our suggestions as to how to deal with the *res judicata* issue (despite the Council's direct response to the Inspectorate).

In order to give effect to the purpose of the *res judicata* principle, we believe that it is incumbent on the Secretary of State to prevent this issue being revisited, with all the attendant costs implications. This issue must therefore be dealt with in advance of the evidence, or the Inspectorate risks denying our client one of the principal benefits of the *res judicata* principle. We respectfully suggest that there are two practical means of doing this:

Special Case for Decision of the High Court

Firstly, section 289(3) of the Town and Country Planning Act 1990 states:

“At any stage of the proceedings on any such appeal as is mentioned in subsection (1) [i.e. proceedings on an appeal under Part VII against an enforcement notice], the Secretary of State may state any question of law arising in the course of the proceedings in the form of a special case for the decision of the High Court.”

The issues involved are matters of law. It is therefore open to the Secretary of State to state questions of law for the High Court. Although this course would cause an initial delay to the inquiry, it would have the benefit of securing an authoritative determination by the Court on a purely legal question in advance of any evidence being called. It would therefore ensure clarity as to the scope of that evidence. In the long run there is a good chance that such a course would obviate the need for High Court legal challenges to any decision of the Inspector (whether in the course of the process, by judicial review of decisions, or ultimately by challenge under section 289 of the Town and Country Planning Act 1990).

I would commend the following questions to be stated for decision of the High Court:

1. Is the Secretary of State's decision of 2003 to be read as establishing that there is an established lawful B2 use extending across the entire site
2. Is the existence of an established B2 use across the entire site now *res judicata*?

Preliminary Issue for Inspector

Alternatively, the Inspector may consider the issue for himself in advance and pursuant to any oral submissions (if there is any disagreement) on the first day of the inquiry. In that event, we would prepare a bundle of legal authorities which we would wish to file with the Inspector in advance. We would wish for a written determination of the Inspector's decision in that event.

If the Inspector's determination went against us, we shall seek judicial review of that determination (we can say this with certainty since it is a purely legal point on which we would say the Inspector's decision was erroneous). If it goes with us, then the Interested Parties or the Council may wish to challenge that decision. The Council may at least, in these circumstances, wish to reconsider its position with regard to pursuing the enforcement notices, and at the very least whether the notices will require to be amended.

We therefore expect that in that event it would therefore be necessary to adjourn the remaining part of inquiry. Furthermore, as the Inspector appears to have implied already (in seeking to ascertain the availability of parties in the week commencing 4 February) it is now clear that the Inquiry could not be concluded in the four days allocated. We see little advantage in proceeding with some, but not all, of the evidence in the circumstances. By our calculations there are at least 8 witnesses whose evidence goes to the question of the lawful use - evidence which we consider to be legally irrelevant and unnecessary.

I would therefore be grateful for an early indication of the Inspector's views as to the procedure to be adopted in relation to resolving the *res judicata* issue.

Yours sincerely

John Bosworth
For Ashfords LLP