Inspector's Response to Ashfords' Letter dated 18 January 2013

This note responds to a letter dated 18 January sent to the Planning Inspectorate on behalf of the appellant. I have asked that this and the Ashfords' letter be sent to the Council, which I believe already has a copy, and the Rule 6 parties who do not.

Although the *res judicata* point has only been raised by the appellant as a late appendix to the evidence of a witness in the form of a leading and junior counsels' joint opinion, the substance of the point taken was clearly identified in the appellant's pre-Inquiry statement. Moreover, by email dated 16 January the Council confirmed that it had already given consideration to the issue and the nature of the Council's evidence to the Inquiry implies that it sees no merit in the argument. Indeed, it says as much in the email, subject only to the views of its counsel which are being sought I now understood at a conference on 21 January. The Council's considered view should be sent to the Planning Inspectorate not later than 17:00 on Wednesday 23 January so that it may be sent to and considered by me and the other parties to the Inquiry.

The remainder of this response to the direct points raised by Ashfords assumes that the Council maintains its current position. However if, on reflection, it agrees with the appellant's position this should be communicated to all parties as soon as possible.

Having now read what I consider to be all of the relevant documents that have been submitted in connection with these appeals, I agree with Ashfords that this is a matter that needs to be resolved before the evidence is heard. It seems to me that most of the Council's evidence will not need to be taken if the appellant's case on *res judicata* is correct. Of the alternatives put forward by Ashfords I propose to follow the second. I shall now explain briefly why.

Turning first to question 1, there is in my view no need for the Secretary of State to seek an opinion from the court about the meaning of a decision that he himself has taken. Moreover, I do not find any ambiguity at all in the Secretary of State's decision.

At DL 35 he very clearly contemplated the likelihood of the entire application site (in context, the only reasonable construction of the word 'site' throughout his decision) being used for B2 use under the fallback position. The use of the word 'likely' must imply some element of possibility. If he had concluded that only part of the site had a fallback use for B2 he could not have rationally considered the possibility of that use over the entire site since such use on parts would not be a fallback position.

It is in my view certainly arguable that this is not a conclusion that flows naturally from what Mr Robinson's report says. However, that does not matter. First, Mr Robinson is, by way of his report, simply providing further information to enable the Secretary of State to make a decision. That decision stands on its own and in any event did not follow Mr

Robinson's recommendation. Second, if anyone felt that the Secretary of State had misdirected himself that could have been pursued elsewhere within the appropriate time limits.

Turning to the second question, I can clearly form no view at this time since I have no information from the Council as to why it holds the view that, currently, it says it does. I would however note that it is not clear to me from the evidence what previously unknown material, apart from perhaps CD 32, has come to light to warrant a re-examination of the Secretary of State's decision. I note also that much of this is anyway subject to dispute between the expert witnesses. Moreover, even if it might have led to a different conclusion in the material part of Mr Robinson's report had it been available to him, given what I say above, it cannot be at all certain that the Secretary of State would have come to a different view.

In any event, as I have already indicated in an email dated 16 January there is an issue with Notice No 1 which could lead to it being quashed. In these circumstances it would seem to be unnecessary to trouble the court with the second question. I set out below my reasoning on this matter.

The parties might wish to read a judgement of David Elvin QC sitting as a Deputy High Court Judge in a permission hearing seeking to challenge an enforcement appeal decision of mine ***(The Queen otao East Sussex CC v SSCLG and 2 others [*2009] EWHC 3841 (Admin).** While I appreciate that this is not binding at all being only from a permission hearing, he sets out in para 2 why he went into the detail that he did. Para 20 of his judgement deals with the point that Notice No 1 gives rise to (the use of the word 'including' in a mixed use allegation) and his other comments are also pertinent since the Council's intentions here are also to, in effect, under-enforce. In those circumstances s173(11) will apply once the requirements of the notice are complied with and unconditional planning permission will be granted for all the uses not required to cease. It is clearly imperative that all of those uses are identified.

It is therefore incumbent upon the Council to state clearly all the components of the mixed use alleged otherwise the recipient of the notice cannot reasonably be expected to identify the grounds on which an appeal might be made and/or the evidence that might need to be adduced. Particularly troubling in this case is the bund that is required to be demolished even though it is not mentioned in the allegation unless, of course, it is subsumed within the term 'storage'. However, this would not seem consistent with the evidence of the Council. This suggests that this is a permanent feature probably constructed from waste material. At 2.17 Mr Herbert implies this is an operational development although there is no evidence of the appropriate exemption having been sought or obtained from the Environment Agency. Meanwhile at 6.35 Mr Harwood seems to suggest that this is in fact a waste disposal (tipping) operation which would be a material change in the use of the land not included in the allegation at all.

These issues may not be insurmountable. However, it seems to me that the allegation in Notice No 1 must be corrected to include and accurately describe all the elements of the mixed use alleged and/or the extent of the land subject of the notice altered. I would also add that requirements (i) and (ii) are clearly open to interpretation. What constitutes a B2 use and what is or is not ancillary to such a use is very much a matter of judgement and at the heart of these appeals.

It will therefore be for the parties to agree, first, what changes should be made and, second, if s176(1) can be used to do so. Obviously there must be no injustice to either party as a result if this power is to be exercised. Alternatively, if the notice cannot be corrected using s176(1), it may have to be quashed; my conclusion in East Sussex.

In passing on this point I would also mention that, having read the Council's evidence, I fail to see the purpose of Notice Nos 2 and 3. Both areas are entirely within the Notice No 1 area and the use complained of is essentially storage. This is part of the mixed use alleged in Notice No 1. While I appreciate that both are in the area that the Council considers not to benefit from the B2 use, the use alleged is not (in the Council's view) B2 anyway. I mention this only because the parties may wish to consider a 'tidying-up' process when reviewing Notice No 1, possibly to include a new, all encompassing, notice No 1 and the withdrawal of the other 2.

Returning to the *res judicata* matter, my understanding is that my ruling on this will simply determine for the purpose of this Inquiry whether the fallback position applies to the entire appeal site (the appellant's position) or Area A, the buildings and hardstandings only, (the Council's). I would be grateful if advocates could confirm that in their submissions to be made on the first morning and also assist me then with the following:
1. I understand from the evidence that the fallback position derives from the view that by 31 December 1963 the whole of the land considered by the Secretary of State was immune from enforcement. Is this status the same as if its lawfulness had been established by way of an application under s191?
2. What status does the Secretary of State's decision give to the land given that the application before him was not one made under s191?
3. If the determination had arisen from a s191 application the lawfulness would have been declared as applying at the application date. What is the equivalent date in this case? Is it 31/12/1963, 1/8/2003 or some other date?
4. If it is 1/8/2003 does that mean that a ground (d) appeal in respect of any use determined as a matter of fact and degree to be other than B2 must fail (the thinking being that the Secretary of State had determined the use of the site then to be B2 so at the date of the notice 10 years could not have passed)?
5. Thinking about s57(4) and the *Fairstate Ltd* judgement what is the effect of any uses on the land that are not B2 since the date determined as the appropriate one in question 3 above?

I will therefore proceed as follows:
*By 17:00 on Wednesday 23 January the Council will provide its considered view on the *res judicata* point.
*I do **not** wish to receive a further bundle of authorities from the appellant or anyone else in advance of the Inquiry for the simple reason that other commitments between now and the start of the Inquiry will not permit me to read them.
*After opening the Inquiry I will hear submissions from the main parties and any other Rule 6 party who has a view on the points raised in Ashfords' letter. Any authorities that are **vital** to the submissions can be put in then. I will then hear what the main parties have to say about the drafting of Notice No 1.
*I will then adjourn-hopefully about lunchtime-and consider my position.
*The Inquiry will then resume and I will hand out my written determination on the *res judicata* point and the form of Notice No 1 if required. I would hope this can be first thing on Wednesday but much depends on the progress made on Tuesday and the amount of additional material that advocates choose to submit. I do not intend to then take any further submissions on this since it seems to me that the aggrieved party (assuming the Council maintains its current stance and that there will therefore be one) will have the option to seek a judicial review having considered the outcome of the appeals. If still necessary I would also then issue my 'Inspector's Inquiry note' on the issues about which I am unclear. If I have found for the appellant on the *res judicata* point we may be able to proceed straightaway as it seems to me that the issues are very straightforward (in essence, do the uses complained of fall within B2 and, if not, is the change a **material** change-not something that seems to have been given much consideration. All of this falls within ground (c), with the ground (d) case being self evident). If I find for the Council the issues are still relatively straightforward but we will have to deal with a lot more evidence to resolve the area over which the B2 use runs which may affect the assessment of the uses in Area E. It may then be necessary to adjourn for a short period while advocates prepare to present and cross examine that evidence but I will take views.
*Either way and particularly as there is now to be an application for costs by the appellant, there seems to me to be absolutely no prospect of completing this Inquiry in the 4 days now allocated so it would help greatly if advocates' clerks could come up with some dates when we can resume. However, contrary to the view expressed in Ashfords' letter I see no reason why we should not hear evidence on at least Thursday and part of Friday and see no justification for not sitting then.

Brian Cook
Inspector
20 January 2013