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Date:	22 January 2013
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Dear Mr Agala

Re: Fullers Earth Planning Appeal

We write following our email of Friday 18 January 2013.

We have now received the Inspector's Note. We must respond as follows:

But for our request for an adjournment (please see below), we would respectfully agree with the decision that there be a hearing on the preliminary issue. We note the Inspector's provisional view as to the interpretation of the Secretary of State's 2003 decision letter which has of course had to be reached without the benefit of seeing the Council's submissions. The Council does not accept any of the arguments put forward in respect of the "res judicata" point and will strongly resist the submission. The Council does not therefore intend to withdraw the notices on that basis.

The Council does not, respectfully, agree that the substance of the point was set out in the Appellant's pre-inquiry statement. Nowhere does it state or imply that the Council is <u>precluded</u> as a matter of law from arguing that the whole site does not benefit from a B2 use. This was not suggested, moreover, in the 2010 High Court proceedings brought by the appellant in respect of the decision to issue previous enforcement notices, nor in their 2006 application for a CLEUD. This is striking, particularly given that the same Counsel who appeared in the High Court have provided their written Opinion, and we look forward to the opportunity to address the Inspector on this issue.

Before proceeding to respond further to the Inspector's Response, we would mention that we have now had an opportunity to discuss the proofs of evidence received with Counsel.

Although this will understandably not be a matter which could be appreciated by the Inspector on the face of the papers (and he would naturally normally leave such issues to be raised by the parties if appropriate), we are very concerned as to the considerable quantity of new evidence that has been presented in the appellants' proofs of evidence which has not been disclosed to the Council previously, will not have been seen by third parties either, and to which we have inadequate time in which to respond. The Inspector will already be aware of the unusual shortening of the timetable in respect of exchange of evidence in this appeal. This fact underlines the importance of parties not springing surprises. This is procedurally unfair and unacceptable and, as set out below, we have no option but to request an adjournment (we must also reserve our position as to costs).

Expert Photographic Evidence

In the appellants' rule 6 statement the following is stated:

"Evidence will be given in terms of commentary upon aerial photographs of the site that the local planning authority have produced."

The Council had some 10 photographs which appeared to be clear on their face; and these have been almost exclusively referred to in its reports to committee (referred to in the Council's rule 6 and in relevant correspondence in the autumn). The Appellant now produces 23 photographs in total and produces specialist technical evidence on all those photographs rather than "commentary". Because of the issues now raised for the first time in Ms Cox's evidence, particularly relating to 2002, the Council will need to take expert evidence. An adjournment is therefore plainly necessary as a matter of fairness.

If the Rule 6 statement had properly set out the case and referred to all the documents (including photographs) the Council would have been able to see those documents when deciding what experts to call and what evidence needed to be addressed.

Mr Branch's evidence

The appellant seeks to link Mr Branch's company's use of the site (around 10 years before the issue of the notices) with Area E, via that technical evidence. It has never been claimed before that the features shown on photographic evidence held by the Council is to that effect. The Council needs time to be able to make proper investigation of the claim and the supporting documentation. The 2002 inspector (paragraph 11) referred to a "small aggregate reprocessing business being carried out close to the north-eastern side of the buildings". There was no suggestion that such use was taking place on Area E i.e. beyond the then security fencing referred to by the appellants' landscape witness in his 2002 evidence (see Mr Harwood's

appendix AJH7) or that it was in any way associated with the tracks much further to the north-east as now asserted.

Uses referred to in Enforcement notices 2 and 3

The evidence provided in the proofs has not been given in responses to Planning Contravention etc Notices. The Council needs time to be able to make proper investigation of the evidence now given.
The Council does not wish to expend public money on a case if the evidence now presented is accurate; on the other hand it needs time to be able properly to assess the accuracy of the evidence and to be able to test it effectively.
In normal circumstances the Council would have been notified (1) that a fundamental res judicata/legal point was being taken much earlier than exchange of proofs and (2) would have been notified in the Rule 6 statement of the documentary evidence to which reference would be made. The 3 days set down for the inquiry would never have been considered adequate if we had been informed of (1) and (2) above. Whilst we have no objection in principle to having a preliminary issue determined first, we are concerned that we have not had a proper opportunity to assess the late and new evidence, exacerbated further by having to deal also with the detail of the res judicata point. Nor do we wish the preliminary issue to be heard if it were to be found in due course to be unnecessary.

If the res judicata point is determined in the appellant's favour

If the res judicata point is determined in the appellant's favour, the Council would, of course, have to consider its position in respect of the notices.

We confirm that we shall in any event provide our response to the res judicata point by 5 pm on Wednesday 23rd January but, as set out above, we request an adjournment of the inquiry so that the new evidence can be investigated properly and appropriate advice taken.

Turning back to the Inspector's Response, we address below the other points raised.

Enforcement notice 1

The inspector expresses concern, in effect, about the inclusion of the words "including the following activities" and expresses the view that he would wish the mixed uses to be specified. The notice can of course be amended without any prejudice to specify the uses already identified in the notice –
"general industrial use (within use class B2), storage and distribution use".
We shall endeavour to agree a form of wording with the appellant for the inspector to consider.

As to the reference to the bund in the steps required to be taken, Mr Harwood's paragraph 4.41 refers to the bund in question. The reference to paragraph 6.35 is not, however, respectfully understood . Mr Harwood is not of the view that the creation of the bund was a waste disposal operation and does not suggest otherwise in that paragraph or elsewhere. For the avoidance of doubt Mr Harwood and Mr Herbert are of the view that the bund is operational development carried out between 2004 and 2006 as part of the material change of use. It is of course open to a local planning authority when issuing a material change of use notice to require operational development carried out as part and parcel of that change of use. As the editors of the Encyclopaedia of Planning note (P173.18):

"The power to require that the land be restored to its condition prior to the making of the change of use allows the authority to require the undoing of any incidental operational development, provided it forms an integral part of the breach of planning control complained of, even though it might not have constituted any breach of planning control had it been carried out as an independent operation: see, e.g. *Burn v Secretary of State for the Environment (1971) 219 E.G. 586*; *Murfitt v Secretary of State for the Environment [1980] J.P.L. 598* (hardcore laid more than four years previously, but an integral part of the making of an unauthorised change of use for the parking of heavy goods vehicles); *Perkins v Secretary of State for the Environment [1981] J.P.L. 755* (operational development had occurred more than four years previously but as part of an unauthorised change in use); *Somak Travel Ltd v Secretary of State for the Environment [1987] J.P.L. 630* (internal spiral staircase, not in itself requiring permission, but an integral component of the unauthorised conversion of the upper floor from residential to office use)."

Thus the bund, as incidental operational development, can properly be required to be removed by the change of use notice. There has been no complaint by the Appellant.

If the Inspector would prefer that the bund is also specified in the matters alleged to constitute the breach of planning control then that operational development can also be included in section 3. We shall endeavour to agree a form of wording with the appellant for the inspector to consider.

The express exemption of ancillary uses in paragraph 5 (ii) accords with the requirement (*Mansi*) not to affect such rights. Parliament defines what a B2 use is but whether a particular activity (to use a neutral term) is B2 inevitably has to be considered on the facts.

Enforcement Notices 2 and 3

The Council notes the Inspector's suggested tidying up (i.e. simply having one enforcement notice) but in the Council's view there are 3 planning units which should be addressed by separate notices. In respect of notice 1 the Council alleges a mixed use (B2 and B8) but in respect of Area A is seeking to respect the extent of the historic use. The Council therefore from the outset considered it clearer to have 3 notices, without any injustice to the appellant. Again there has been no complaint by the Appellant.

Other issues relating to Res judicata

These will be addressed in the legal submissions and/or orally.

Conclusion

We would respectfully suggest the following procedure:

(1) we would request that our application for an adjournment be considered if at all possible this week;

(2) if that is granted, then the inquiry be adjourned to a date to be fixed;

(3) If it be not granted, then the inquiry should proceed to hear the res judicata point.

Yours sincerely

Maggie Horrill
Planning and Environmental Law Manager