

BY EMAIL AND POST

21 January 2013

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FAO Mrs M Horrill

Dear Sirs

Pre-Action Protocol Letter regarding proposed Judicial Review of the failure to review the decision to take planning enforcement action in respect of the Former Fullers Earth Site at Odd Down, Bath

1. We are instructed by Gazelle Properties Limited ('Gazelle') to pursue a claim for judicial review of the failure of Bath and North East Somerset Council ("the Council") to review the decision of the Council dated 9 May 2012 to delegate to officers authority to take enforcement action in respect of the use of the Former Fullers Earth site and adjoining land and the issue of the actual notices, each dated 30 May 2012. This letter comprises our letter in accordance with the protocol of the Administrative Court.

Our Client

2. Gazelle Properties Limited, is the owner of the Former Fullers Earth site and adjoining land ('the Land').

Our Complaint and Proposed Grounds of Challenge
The Facts

3. The Land comprises a site that has a historic general industrial use, and which is presently used for waste processing and other uses falling within the general industrial use class (B2) of the Town and Country Planning Use Classes Order.

The Issues

Failing to take into account a material consideration

4. By virtue of Section 172(1)(b) of the Town and Country Planning Act 1990, the local planning authority may issue an enforcement notice where it appears to them that it is

expedient to issue the notice, having regard to the provisions of the development plan and to any other material considerations.

5. Section 173A of the Town and Country Planning Act empowers a local planning authority to withdraw or amend an enforcement notice after it has been issued, and even after it has taken effect.
6. By virtue of the case of *Gazelle v Bath and North East Somerset Council* [2010] EWHC 3127 the Court accepted that the existence of a power to withdraw an enforcement notice serves to underline the necessity of a continuing discretion being exercised in enforcement proceedings and the implication in the statute of a duty to reconsider enforcement proceedings in the light of any changes of circumstance. In effect this implies a continuing responsibility for the authority to keep under review the expediency of the action it has decided to take.

The Facts

7. On 9 May 2012 the Development Control Committee of the Council ('the Committee') delegated authority to its officers to take enforcement action in respect of the Land. Enforcement notices were duly issued by the Council on 30 May 2012. These notices have now been appealed and a public inquiry is due to open on 29 January 2013 to consider them.
8. Paragraph 7.3 of the report to the Committee referred the members of the Committee to an earlier report to the Committee of January 2012 ('the January Report') for the officer's reasoning as to why there was not a lawful industrial use throughout the Land. The January Report indeed formed Annex A to the May Report.
9. Paragraphs 3.010 to 3.015 of the January Report dealt with the Officer's interpretation of the report of the inspector and the decision of the Secretary of State following the 2002 call-in inquiry. At paragraph 3.015 the Committee were advised that:

'even if the Inspector has (sic) considered that the B2 use should extend to the whole of the application site, decision of the Secretary of State that was given as a result of that call in inquiry came to a different view'
10. The previous decision of the Secretary of State on the extent of the B2 use was clearly a matter of considerable importance to the Committee. Despite strong representations from this firm that the Council's interpretation of the Secretary of State's was incorrect the Committee were not advised that the view set out in the report was in any way incorrect. That is not surprising since the same line of reasoning is now set out in the proof of evidence of Mt Harwood on behalf of the Council.
11. On 21 January 2013 the Inspector appointed to determine the appeals circulated a note to the parties. In that note the Inspector states:

'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.'

This interpretation accords with the view of the Secretary of State's decision letter that we have always maintained was the case, and which in truth is the only possible interpretation open as a matter of law. We have pointed this out to the Council many times. Indeed the Council also accepted this to be the case for many years and in many contexts (we do not rehearse this well known history). The correct interpretation of the Secretary of State's decision is however, fundamentally different from what the Committee were advised when deciding to take enforcement action.

12. It is now apparent that the Committee's decision to delegate authority to bring enforcement proceedings was based upon a fundamental factual error as to the contents of the Secretary of State's decision in 2003. We therefore invite the Council to reconsider the expediency of the service of the enforcement action in line with the interpretation that the Inspector has confirmed is the correct one. This invitation is extended notwithstanding the Council's indication that it does not agree that the extent of the B2 use is a matter which is *res judicata*: irrespective of this point it remains evident that the Committee's authorisation of enforcement action requires to be revisited.

Orders to be Sought

13. We shall be seeking an order declaring unlawful the failure of the Council to reconsider enforcement action.

What you are asked to do

14. We ask you to respond to this letter by close of business on 25 January 2013. We appreciate that this deadline is short, but this is necessary in view of the impending public inquiry into the appeals.
15. We ask that the Council reconsiders its enforcement action in the light of the correct interpretation of the Secretary of State's decision letter
16. We will in all events be seeking our client's costs thrown away in consequence of the Council's misconception of the Secretary of State's decision. This claim is anticipated without prejudice to any aspect of the Appellant's appeal against the enforcement notices.

Prospective Claimant's Legal Advisers and Address for Reply and Service of Court Documents

17. Ashfords Solicitors, Ashford House, Grenadier Road, Exeter EX1 3LH

Interested Parties

18. Waste Recycling @ Bath Limited; Stonecraft Ltd; Maple Scaffolding Limited

Period for Reply

19. Please respond within 3 days, failing which we reserve lodge judicial review proceedings without further notice.

Yours faithfully

Ashfords