Inspector's Response to Correspondence Received on 22 January

This note deals with a number of points and questions raised in letters from the Council, Bath Preservation Trust and Harrison Grant, all of which have been copied to the other main and Rule 6 parties, and in a very short email from Ashfords, which has not.

My approach both before and during Inquiries and Hearings is to let all participating know my evolving view on the basis of the information so far available. Advocates generally appear to find this helpful as it enables them to correct through submissions and/or evidence any misunderstandings that I may have developed. My previous response and this one should be read in that light.

Res judicata

The matter of *res judicata* needs to be ruled upon by me before the evidence is heard as it will fundamentally affect the nature of the evidence that is eventually called. I will therefore hear submissions as per my earlier outline programme. That makes it absolutely clear that any Rule 6 party that has a view on this matter will be heard at this point. Harrison Grant has already made it clear that its client will wish to make submissions and if Bath Preservation Trust similarly wishes to they can and should.

My understanding is that there are two parts to this matter. First, is whether this principle applies in this case. On the correspondence available to date, only the appellant thinks so. The Council will tell us why it does not on 23 January and the Rule 6 parties that have so far declared can make submissions on the morning. This is a matter of law and the parties' interpretation of it. As I made absolutely clear in my earlier Response I have no view on this at present; I cannot have since I have heard detailed argument from only one party.

If, and only if, I decide that the principle does apply to this case, the only matter that appears to then be in contention is the extent of the fallback area so the second question is has the Secretary of State (as the decision maker) determined that it is the entire application site before him or only a part of it? I shall rule on the extent of the B2 fallback area if I need to since this too fundamentally affects the nature of the evidence to be called. At this stage this is not a matter for evidence but one for submissions as to how the Secretary of State's decision should be interpreted. This is not, in my view, a matter of law but a matter of reading and interpreting the language used in the Secretary of State's decision in the context of the evidence before him. The Inspector's report to him is clearly a very significant part of that evidence and for anyone not directly involved in that matter is the only source. As it may help all parties my current reading of the decision is this.

As I understand that appeal proposal the bulk of the built development was to be in the area of the existing buildings and hardstandings; unsurprising on a Green Belt site. I therefore believe that Mr Robinson

was focussing on the fallback use of the area that would be developed. In para 427 and 428 he talks in general principles and in 429 introduces the concept of 'the works'. This concept continues through to 433 where he appears to conclude that the works have a lawful B2 use. However, in 434 some doubt is introduced (in my reading) because in placing the works adjacent to a mine, he may also place those mine workings beyond the site which must, in context, mean the application site. This depends how the phrase '…to the north-east of the site…' is read. If it means the north-east part of the site then it would be within the site. If it means north-east of the site it would be beyond its boundary; either is possible in my view. Nevertheless, the opening to 435 seems beyond question and the final sentence of 436 refers to the prospect of the B2 use continuing **on** the site (my emphasis). I am well aware that the Secretary of State accepted these paragraphs without reservation (DL 30). However, where the Secretary of State offers his view about the entire site being used for B2 under the fallback he refers not to these paragraphs but to 455 and 456. In 455 Mr Robinson refers to the prospect of B2 use **of** the site. A subtle difference perhaps and maybe not even intentional but that is the paragraph drawn upon.

Advocates are asked to deal with both questions (principle of *res judicata* applying and area covered by B2 fallback) in their submissions on this matter. I would also like advocates to address at least the first 3 points on which I requested their assistance in my earlier Response. One of the reasons for asking is that, unless I have missed it, the Secretary of State does not use the word 'lawful' at all in his decision, only fallback; there may be no practical difference but I would welcome views.

The Notices

This is an Inquiry into appeals against 3 enforcement notices issued by the Council. It is my duty, irrespective of whether a point has been raised by the parties, to ensure that the notices are right and meet the *Miller-Mead* tests. The power of correction and variation conferred by s176(1) is wide-ranging and subject only to there being no injustice to either party in the event of it being used. That was the reason for raising the concerns about Notice No 1 and I will hear any submissions on this as per my previous outline programme. There is no point in proceeding with an Inquiry into a notice that is defective and incapable of correction. While I am encouraged by the Council's view that the necessary changes can be achieved, the appellant has still to comment and I can therefore form no view at this point.

The Council has raised some points arising from my earlier Response which I am happy to deal with as best I can. Turning first to the bund, I readily agree that I may have misunderstood Mr Harwood's 6.35. Nevertheless, Mr Herbert is clear that it has been constructed from inert waste (2.17) and Mr Harwood says that it was substantially complete by 2006 (4.41). The Council would therefore appear unable to allege unauthorised operational development since, on its own evidence, the bund had been there well over 4 years when the notice was issued. However, where waste is concerned, 'storage' to one person is 'tipping' to

another. This would be a material change in the use of the land and subject to the 10 year rule. If that is the case, it should be included in the mixed use alleged. I am well aware of the cases cited but the key word is 'integral' to the alleged unauthorised change of use. In saying all this I am of course also aware of the appellant's position that the alleged bund is not a bund at all (Mr Kendrick 8.93).

Turning to requirement 5 (ii), I am also aware of the *Mansi* principle with *Duguid* and *Cord* also being relevant. This really flows from the inadequately described breach of planning control. If this stated clearly all the uses (both lawful and the alleged unauthorised uses) within Area A as set out in Circular 10/97, 2.10 and 2.11, the requirement could similarly be drafted to require the unauthorised uses, and only those, to cease. The lawful uses and any uses ancillary to those would therefore be preserved.

These appeals are proceeding only on the legal grounds and the onus is on the appellant to prove the case made. Parties are reminded of paragraph 8.15 of Circular 10/97 which, unlike PPG18, was not replaced by the National Planning Policy Framework. If I have understood the Council's letter correctly it has indicated that it may wish to reconsider its position with regard to Notices Nos 2 and 3 in the light of the evidence now available from the appellant. Perhaps this could be confirmed on Tuesday?

Revised Inquiry programme

I am grateful for the confirmation that all matters remain in dispute and that most parties wish to make submissions. That will clearly extend the amount of time taken on Tuesday and I therefore propose to proceed as follows. As will be seen, the adjournment requested by the Council will, in practice, occur.

1. Shortened formal opening of the Inquiry taking appearances but not witnesses as this may alter.
2. Hear submissions on both aspects of the *res judicata* point taking the 'application' point first from all before moving on to the 'extent' point.
3. Hear submissions on the form of Notice No 1 and any corrections and/or variations that may be agreed or proposed as appropriate. Since s176(1) limits the issue of injustice to the appellant and the local planning authority I do not expect to hear submissions from the Rule 6 parties on this.
4. Adjourn to consider the submissions and write my rulings on those matters that I need to. I would expect to adjourn on Tuesday.
5. Resume 10:00 Friday 1 February. I will need to reflect carefully on the submissions made and explain my reasoning clearly. Therefore I intend to allow two days. I will hand out my ruling at 10:00 or earlier if <u>everyone</u> is represented and allow a period for parties to consider it. As stated in my earlier Response I see no merit in any further submissions since it is unlikely that my ruling will be acceptable to all parties. The purpose of resuming with all parties

present is so that we can then agree how to take the Inquiry forward. During the period for consideration after receiving the ruling parties are asked to resolve as appropriate: whether any appeal or notice is to be withdrawn; which witnesses may either not now need to be called or may be able to give much abbreviated evidence; which additional witnesses may need to be called; whether applications for costs are likely to be made and by whom against whom. We can then agree the number of Inquiry days required when we resume. We can also agree a date for the final submission of any new evidence if any additional witness is to be called. Parties are therefore requested to come with a clear view of their availability over the next few months.

Brian Cook
Inspector
23 January 2013