RE: FORMER FULLERS EARTH WORKS

JOINT REBUTTAL OPINION

Summary

1. The Council takes the view that

(i) The Secretary of State did not determine in 2003 that the existing lawful use of the whole of the application site then before him was B2;

(ii) The Secretary of State had no jurisdiction formally and finally to determine that issue on a section 77 application: this can only be done via an application for a Certificate of Lawful Use (s.191) or on an enforcement notice appeal (s.177(1)(c));

(iii) Nor does an issue estoppel arise. (1) the appellants do not contend that a cause of action estoppel arises (see paragraph 40 of their

Opinion). They do not, however, draw attention to the view of the majority of the Court of Appeal in Porter (1996) (pp 7,10) that an issue estoppel can only arise where the original decision was capable of amounting to a cause of action estoppel. (2) even if the present Inspector were ultimately to take the view that the position in respect of (i) is not clear, then no issue estoppel can arise where there is uncertainty, as the authorities to which the appellant refers expressly confirm.[1]

Introduction

2. By decision letter dated 1st August 2003 the Secretary of State refused to grant planning permission, pursuant to section 77 of the Town and Country Planning Act 1990 (as amended) ("the 1990 Act"), for the partial demolition, refurbishment and extension of existing buildings with ancillary access and external works to form 3,186 sq m of B1 floorspace and 19 "live/work" units. The decision was in the Council's favour. Only the unsuccessful appellant could have appealed.

3. The focus of the inquiry, axiomatically, was whether planning permission should be granted for that development.

The Secretary of State's decision

4. The issue as to whether planning permission should be granted for the proposed development entailed consideration of planning policies and other material planning considerations. Because the site is in the Green Belt one of a number of

1 - e.g. Watts v Secretary of State for the Environment and South Oxfordshire District Council (1991) 62 P.& C.R. 366, 386; R (Exmouth Marina Ltd) v First Secretary of State [2004] EWHC 3166 (Admin) (paragraph 8)

sub-issues arose: whether there were any very special circumstances that outweighed the harm caused by the reason of inappropriateness .

5. One of the issues which arose in connection with the "very special circumstances" argument was whether a 'fallback' position existed.

6. The Inspector first made a general statement that when considering the lawful use "regard should be had to what constitutes the planning unit": **IR 427**.

7. In considering the lawful use, the planning inspector therefore addressed his mind to the planning unit at **IR 432** and commented that after the new adit at Under Sow Hill opened and its mineral was processed at the Works, which according to the evidence before him was in 1969,[2] *"the works have formed a distinct planning unit in its own right processing the mineral brought in from the new adit at Under Sow Hill, which was at some distance from the works. This physical separation is important.*

8. At **IR 433** the inspector referred to and did not dispute the *'recognition given by the planning officer of the then local planning authority in 1985 that the works had formed a separate planning unit for some time.*' The 1985 letter that the Inspector was referring to is reproduced at Mr Harwood's Appendix AJH11 and discussed in Mr Harwood's proof of evidence at paragraph 3.15. That correspondence resulted from pre-application discussions in which the Pioneer Group (well-known of course and experienced mineral operators) had sought to "find out [from the Council] exactly what the planning situation is …" , specifically as to whether a planning application was required for a proposed

[2] CD39, p.3

concrete batching plant. The red line of the plan for the proposals extended beyond the buildings and hardstandings into what has since been labelled as Area E by the Council. The Council's response to Pioneer's query was that

> *"the site which you have outlined in red on your plan appears to extend outside the planning unit of the Fullers Earth Works.*"

No application appears thereafter to have been submitted.

The Inspector's reference to a "separate planning unit" clearly therefore did not include Area E.

9. Moreover, at **IR 434** The Inspector stated that *"the various adits and working of the adjacent mine … were the subject of a series of planning permissions in the 1970s for various reclamation schemes. These schemes have been implemented."* The 1970s permissions included land within Area E but not Area A. The use of land for the deposit of waste materials pursuant to that permission was a material change in the use of the land. (The appellant's point, if correct, that the 1970s permission was not implemented lawfully would not change this fact – i.e. that a material change of use occurred.) The Inspector makes no observation that there was any B2 use of the "adjacent land" thereafter which land he distinguishes from "the works". His focus thereafter in **IR 435** was expressly on the buildings and hardstandings alone.

10. On any view the Inspector was acknowledging that the adjacent land was;

    (i) separate to "the works"

    (ii) had permission for reclamation works which had been implemented; and

(iii) was viewed by the Council to be part of a separate planing unit to "the works" on the basis of the 1985 correspondence.

10. The Inspector concluded at **IR 435** "*that the buildings and hardstandings on the site enjoy a B2 fallback.*" (this is referred variously as the first fallback scenario or position). If the Inspector had meant to say the whole site enjoyed a B2 fallback, he would surely have said so, or for example to have said, that the buildings, hardstandings, and adjacent land enjoyed a B2 fallback. He did not, and nor did he consider anything other than the buildings and hardstandings in the other two specific fallback scenarios that he identified:

(1) Under the GPDO 235 sq m of B2 building could be changed without planning permission to B8 or and unlimited amount of B2 to B1' (the second fallback position); or

(2) Planning permission could be granted for the re-use of approximately Re-use of 2,000 sq m of buildings for B1 with controlled use of areas of hardstanding in accordance with paragraphs 3.7 to 3.9 of PPG2 (the third fallback position).

11. At **IR 455** headed "preclusion of the fallback position" the Inspector refers to the fact that he has "already concluded" in respect of the B2 use. This is a clear reference to his conclusion on fallback 1 at **IR 435.** The reference to outside plant and other structures is plainly in this context i.e. on the areas of hardstanding which were at that time some 3,457 square metres **[IR 410].**

Secretary of State's decision letter (DL)

12. At **DL 30** the Secretary of State expressed his agreement *"with the Inspector's conclusions in **IR 436** on whether a fallback position exists, for the reasons given in **IR 427-436"**.* At **DL 35** the Secretary of State made express reference to the three fallback positions identified at **IR 435** and agreed that "*these are theoretically available."* (underlining added) The Secretary of State did not go beyond the Inspector's conclusions and identify any new fallback positions or expand on the conclusions reached by the Inspector.

13. At **DL 35** in respect of the first fallback, i.e. "*that the buildings and hardstandings on the site enjoy a B2 fallback.*" the Secretary of State took the view that he had insufficient evidence to assess the likely extent or type of B2 use. He was not there addressing the site as a whole but the buildings and hardstandings; if he were going beyond the Inspector's findings then he would have said so. That was the clear context for his reference that he was "*not satisfied on the basis of the evidence before him that it is likely that the entire site will be used for B2 use under the fallback position."* The first fallback was expressly limited to the buildings and hardstanding. He refers back to **IR 455** which, as set out above, refers to the fallback scenarios considered. The Secretary of State gave "some weight" to the prevention of the first fallback position as a material consideration.

15. The Secretary of State went no further in his "overall conclusion" at **DL 5**9 than to say he had considered the "preclusion of the fallback position – continuing B2" and that he had also considered" "the other fallback positions" (underlining added).

16. Further, he repeated the conclusion in **DL 35 that** "he does not identify the same degree of harms from such use as the Inspector." Again, the reference to the

Inspector's findings clearly demonstrate that the "fallback" the Secretary of State is considering in his conclusion is that identified at **IR 435** and no more. Thus the Secretary of State did not consider that the whole of the then appeal site had a lawful B2 use; only the buildings and hardstandings identified by the Inspector.

Conclusion on the Decision letter

17. If the Council is right in its interpretation of the Secretary of State's decision, that is an end to the matter; there can be no question of an estoppel as to the use of the 2003 site arising. Further, even if the Inspector does not agree with the Council, but were to conclude that the extent of the B2 fallback under consideration was unclear on the face of the DL, that lack of clarity cannot found an estoppel. The cases of Watts (p.386 of report), and R. (Exmouth Marina) (paragraph 8 of report) referred to by the appellant (paragraphs 50 and 54 respectively of Opinion), make precisely this point: see for example criterion (3) "the tribunal must make an unequivocal decision on that matter." (emphasis added) The appellant also concedes that ambiguity prevents an estoppel arising (at paragraph 53 of the Opinion).

Estoppel

19. If however the Inspector accepts the appellant's construction of the Inspector's Report and the 2003 Decision Letter, close attention must be given to the Thrasyvoulou case which is relied on extensively but, with respect, inaccurately by the appellant. In that case both appeals concerned enforcement action where the landowners had successfully appealed enforcement notices only to be served with further notices some time later, despite no change of use having occurred.

Both appellants were therefore 'vexed twice in the same issue'. The House of Lord held that where statute creates a specific jurisdiction for the determination of any issue which establishes the existence of a legal right then the principle of res judicata applies to give finality to the determination [p.289 per Lord Bridge]. Further, it was held that the resolution in that context of a factual issue is capable of creating an issue estoppel where the finding is not merely incidental or ancillary, but an essential foundation of a decision.

20. The principles established in Thrasyvoulou were specifically in the context of enforcement notices and the specific statutory provisions. They were not intended to be generally applicable to all determinations in a planning context. Moreover, even in respect of enforcement action, the House of Lords made it clear that a decision on a ground (a) appeal under what is now section 174(2) of the 1990 Act, namely as to whether planning permission ought to be granted in respect of the breach of planning control alleged, did not determine a legal right and could not give rise to an estoppel:

> *"In determining whether to allow an appeal on that ground the Secretary of State will decide as a matter of policy and in the exercise of discretion whether planning permission should be granted and in relation to ground (a) no question of legal right arises."* (Lord Bridge, p.287G)

21. This, the House of Lords held, was by contrast with the position in relation to grounds (b) to (e), where determinations as to legal rights are made. Part of Lord Bridge's reasoning appears at p.290F;

Mr. Laws submitted that no distinction could be drawn between a decision on ground (a) of section 88(2) to grant or withhold planning permission for the development the subject of an enforcement notice, and a decision of any issue arising under grounds (b) to (e). If an estoppel arises in one case, he submits, it must equally arise in the other. I cannot accept this submission. A decision to grant planning permission creates, of course, the rights which such a grant confers. <u>But a decision to withhold planning permission resolves no issue of legal right whatever.</u> It is no more than a decision that in existing circumstances and in the light of existing planning policies the development in question is not one which it would be appropriate to permit. Consequently, in my view, <u>such a decision cannot give rise to an estoppel per rem judicatam</u>"

(emphasis added)

22. The same reasoning must apply to the Secretary of State's decision in 2003 because an appeal under section 77 (that planning permission should be granted) raises identical issues to those in an appeal against an enforcement notice under ground (a). As such the Secretary of State lacked the 'specific jurisdiction' [per Lord Bridge, p.289D] to establish, formally and conclusively, the existence of a legal right so as to create an "issue estoppel" and for res judicata to operate.

23. The House of Lords held that it is only

"where the statute has created a specific jurisdiction for the determination of any issue which establishes the existence of a legal right, the principle of res judicata applies to give finality to that determination …" (p.289D)

24. One of the cases cited by Lord Bridge was Wakefield where there was specific jurisdiction to determine an express ground of objection that a highway was repairable by the inhabitants at large rather than by the frontagers. It was there held that the justices had been given the jurisdiction buy Parliament to determine this as a substantive issue rather than as "a medium concludendi" of the liability or non-liability of the objectors.

25. There is no specific jurisdiction conferred on the Secretary of State when determining a section 77 application by the 1990 Act. Such a specific jurisdiction does arise under section 191 of the 1990 Act (certificates of lawfulness of use or development) and under section 177 of the 1990 Act which relates to enforcement appeals.

26. Section 191 provides:

> (1) If any person wishes to ascertain whether—
>
> (a) any existing use of buildings or other land is lawful;
>
> …..
> he may make an application for the purpose to the local planning authority specifying the land and describing the use, operations or other matter
> …..
>
> (6) The lawfulness of any use, operations or other matter for which a certificate is in force under this section shall be conclusively presumed."

Section 177 provides:

"(1) On the determination of an appeal under section 174, the Secretary of State may—

…

(c) determine whether, on the date on which the appeal was made, any existing use of the land was lawful, any operations which had been carried out in, on, over or under the land were lawful or any matter constituting a failure to comply with any condition or limitation subject to which planning permission was granted was lawful and, if so, issue a certificate under section 191."

25. The case of Porter (addressed at para.56 of the Joint Opinion) clarifies matters further. That case concerned compensation payable following a compulsory purchase order and the subsequent issuance of a certificate of "appropriate alternative development" on appeal under section 18 of the Land Compensation Act 1961.

26. The passages from Thrasyvoulou outlined above were cited with approval by Stuart-Smith LJ in the Court of Appeal in Porter - a case which cannot properly be characterised as an 'exception' to the Thrasyvoulou case because it applies and follows Lord Bridge's speech.

27. It was common ground in Porter that four matters have to be established if there is to be an issue estoppel;

1. The issue in question must have been decided by a court or tribunal of competent jurisdiction…

2. That the issue must be one which arises between parties who are parties to the decision.
3. That the issue must have been decided finally and must be of a type to which an issue estoppel can apply.
4. The issue in respect of which the estoppel is said to operate must be the same as that previously decided. These propositions derive from Carl Zeiss Stiftung v. Rayner & Keeler Ltd. [1967] 1 AC 853

28. The Appellant in Porter argued that:

> "*even if the decision itself that planning permissions would have been granted up to the green route does not create an estoppel per rem judicatam for the reasons given by Lord Bridge, findings of fact made by the Inspector and adopted by the Secretary of State which were a necessary part of the reasoning which led to the grant of the certificate nevertheless can give rise to an issue estoppel."* (p.6)

29. Stuart-Smith LJ with whom Thorpe LJ agreed (Peter Gibson LJ dissenting on the point) found against the appellant in an important part of the judgment to which the Opinion makes no reference:

> *"If Lord Bridge had thought that even though a decision whether or not to grant planning permission was not one to which estoppel per rem judicatam could apply, it was possible for an issue estoppel to arise in relation to some finding of fact made by the Secretary of State and necessary to his decision, I*

find it very surprising that he did not say so. It seems to be implicit in his judgment that he thought no such thing. In fact as Diplock L.J. made clear in the passage I have cited from Thoday v. Thoday , estoppel per rem judicatam embraces both cause of action estoppel and issue estoppel. Since Lord Bridge cited this passage, it seems to me clear that in holding that a decision on ground (a) of s.88(2) cannot give rise to estoppel per rem judicatam, he must be taken to have included in this issue estoppel." (emphasis added)

30. Thorpe LJ agreed that:

"Although the speech of Lord Bridge does not expressly state that issue estoppel cannot underlie a decision to which estoppel per rem judicatam cannot apply, I share the view of my lord, Lord Justice Stuart-Smith, that that is the effect of his judgment by implication. Thus I accept Mr Barnes submissions on both issues and agree that this appeal should be allowed." (p.10)

31. Accordingly, because the decision on a section 77 appeal is not one to which estoppel per rem judicatam can apply, there can be no issue estoppel either.

32. Both Thrasyvoulou, and Porter addressed the distinction between issues raised as part of a decision concerning the grant of planning permission as opposed to appeals under those grounds capable of establishing legal rights. In particular at pp 7-8 of the Porter decision Stuart-Smith LJ observed the following;

> *There is I think an additional reason why a decision of the Secretary of State whether to grant planning permission, whether on an appeal from an enforcement notice or original refusal by the Local Authority, cannot give rise to estoppel per rem judicatam, either in the form of cause of action or issue estoppel, and that is because it lacks the necessary element of finality. It is well established that a judgment pending trial, such as whether or not to grant an interlocutory injunction, cannot give rise to an estoppel of either sort, because it lacks this element of finality. As Lord Bridge pointed out in Thrasyvoulou a refusal of planning permission does not finally determine the matter; a fresh application can be made. Moreover, although a grant of planning permission can create rights and if acted upon cannot be revoked, if it is allowed to lapse determines nothing."*
>
> (emphasis added)

33. Undoubtedly then, the fact that Thrasyvoulou concerned an enforcement context where the specific jurisdiction had existed and was exercised on a previous occasion is not just a relevant distinction in this case as the appellant asserts at para.45 of the Opinion, it is a distinction that is fatal to the appellant's arguments on this issue.

34. Porter is clear that a refusal of planning permission does not finally determine the matter, and the appellant has never before been put to the trouble of proving its lawful rights over the site.

35. The appellant also relies on Williamson v. Mid Suffolk District Council [2006] EWLands LCA 73 2001 in support of its contention for a wider application of the res judicata principle. In that matter, the Secretary of State confirmed a discontinuance order under s.102 at the 1990 Act. The effect was to amend the conditions of a 1989 planning permission relating to the use of Mr Williamson's airfield to include more stringent conditions reflecting those attached to later planning permissions following the expansion of the airfield on to additional land.

36. Mr Williamson sought compensation and an argument arose as to whether he would still have had the benefit of the 1989 permission (but for the order) if the 1991 permission ceased or was abandoned . He submitted that the necessary implication of the confirmation of the Order was the the 1989 permission was unfettered as a stand alone permission - why else would the conditions be required? He argued that the compensating authority were estopped from contending otherwise.

37. The Lands Tribunal agreed, obiter, with this argument. The modification to condition 4 of the 1989 permission could only have been "expedient" (the specific statutory requirement/jurisdiction under s.102) if the Minister had considered that otherwise it was unfettered by the 1991 permission (paragraph 46). The facts and statutory provisions are, of course, very different and the decision is plainly distinguishable. Unlike the instant case, the decision of whether to confirm a discontinuance order necessarily resolves issues of legal rights because specific jurisdiction is granted by s.102 of the 1990 Act to interfere with them. If there are no legal rights over the land then the issue of an Order does not arise in the first

place and so the analogy drawn by the appellant at paragraph 48 of the Joint Opinion is flawed. In addition, the tribunal's attention was not drawn to the Porter case.

38. We turn now to the other cases raised in the Joint Opinion.

39. In R. (on the application of Reprotech (Pebsham Ltd) v. East Sussex CC [2003] 1 WLR 348 the County Council resolved to grant conditional permission pursuant to section 73 for development without complying with a condition previously imposed, No permission was ever issued. In subsequent years it was argued that the resolution amounted to a determination pursuant to the then s.64 of the 1971 Act (now s.192) that the use of the existing waste treatment plant for the generation of electricity would not amount to a material change of use.

40. It was held that a determination pursuant to s.64 was

> *27. ... a juridical act, giving rise to legal consequences by virtue of the provisions of the statute. The nature of the required act must therefore be ascertained from the terms of the statute, including any requirements prescribed by subordinate legislation such as the General Development Order. Whatever might be the meaning of the resolution, if it was not a determination within the meaning of the Act, it did not have the statutory consequences.*
>
> *28. A reading of the legislation discloses the following features of a determination. First, it is made in response to an application which provides the planning authority with details of the proposed use and existing use of the land. Secondly, it is entered*

in the planning register to give the public the opportunity to make representations to the planning authority or the Secretary of State. Thirdly, it requires the district authority to be given the opportunity to make representations. Fourthly, it requires that the Secretary of State have the opportunity to call in the application for his own determination. Fifthly, the determination must be communicated to the applicant in writing and notified to the district authority."

41. The importance of seeking a formal determination in accordance with the statutory provisions laid down by Parliament is thus underlined by Reprotech. The importance of the statutory provisions/context cannot be over-emphasised. Reprotech does not cast doubt on Thrasyvoulou, indeed it is consistent with it. Res judicata requires a formal determination pursuant to a specific jurisdiction. Reprotech made it clear that no other forms of estoppel (by convention, by representation etc) have any place in planning/public law. As Moore-Bick J made clear in Stancliffe Stone Co Ltd v. Peak District national Park Authority [2005] Env.L.R. 4 at [34] (referred to by the appellant at para.57);

I do not think that a parallel can be drawn between res judicata and other forms of estoppel. As Lord Bridge pointed out at p.289, the rationale which underlies the doctrine of res judicata is fundamentally different from that which underlies estoppel by representation, or, for that matter, estoppel by convention.

42. Applying the decision in Reprotech to the present facts; the 1990 Act does not give powers to the Secretary of State on a section 77 application/call-in (or on a s.78 appeal) to make the sort of determination the Appellant seeks to imply from the Secretary of State's Decision Letter. Secondly a section 191 application gives members of the public a right to make representations on the application/the past use. It may be particularly noted in this regard that the Inspector's report draws attention to the fact that third parties were not aware that a fallback might even exist and/or was relevant to the section 77 inquiry.

43. It was further held that even the High Court itself had no jurisdiction to make a declaration that the generation of electricity would amount to a material change of use.

44. The Editors of the Encyclopaedia of Planning observe:

> *"Whereas, previously, issues relating to the validity and scope of an existing planning permission were outside the range of the former s.64, they are squarely within the scope of its successor, s.192. Now there is a comprehensive statutory code that is capable of addressing all the issues that prior to 1991 could be addressed only through an enforcement notice or by proceedings for a declaration.*

45. So, if the appellants wish to have the issue formally determined they must either seek a certificate of lawfulness (ironically, they made an application in 2006 but, it appears, withdrew the application upon seeing an unfavourable draft officer's

report); alternatively, the present Inspector in this enforcement notice appeal has the jurisdiction pursuant to section 177.

46. The case of R. (Wandsworth LBC) v. Secretary of State for Transport Local Government and The Regions and 02 UK Ltd [2004] 1 P. & C.R. 32 cited by the appellant, and again, inappropriately referred to as an exception to Thrasyvoulou followed Reprotech and dealt with estoppel by representation, that the appellant accepts is irrelevant to their res judicata point (para.59).

47. As to Keevil, the key passage is paragraph 24 in the judgment of Dobbs J. In that case, Mr and Mrs Keevil appealed the decision of a planning inspector in dismissing their appeal against an enforcement notice relating to the stationing of two residential caravans on their land. Prior to the notice, the Council had issued a certificate of lawful use for the stationing of those caravans, but failed to identify the precise smaller parcel land where that might lawfully be done, and thereafter a Caravan Site Licence was granted in respect of all of Mr and Mrs Keevil's land. A site licence could only have been granted if there was a permission or CLU in respect of the land and so the Keevils argued that an issue estoppel rose in relation to the area of land to be included in the CLU.

48. The Inspector rejected the argument distinguishing the facts from those in Thrasyvolou and the High Court agreed;

> *24 In my judgment...The situations were not comparable. The decision which formally determined the legal position was the certificate of lawful use, which was in fact limited to the land edged*

in red on the most likely plan 001A. The decision to grant the licence was made based on an erroneous understanding of the legal position and was granted without robust investigation by the Council officer concerned. It is quite clear that the inspector found that proper checks and balances should have operated when they did not (paragraph 64). It is to be noted, however, that the plan that was sent by the claimants in application for the licence showed where it was intended to site the caravans, but in referring to the certificate, the claimants, having not obtained the plan which should have been attached to the certificate, did not submit it with the application. It can be seen, therefore, how there was room for error. As was conceded by Mr Wadsley today, a reasonable inference to be drawn by anyone reading the documentation and not checking the plan was that the certificate covered the area that the claimants proposed to site their caravans.

49. As the appellant has correctly accepted, where the determination was made on an erroneous basis then it cannot found an estoppel. That would be the case for example, (<u>if</u> it were relevant) if the Secretary of State had taken the Inspector at **IR 435** to be referring to the whole of the application site when he was clearly limiting his findings to the buildings and hardstandings only.

Previous advice from Counsel

50. Although not strictly relevant to the present matter, since the Appellant seeks to rely on previous advice received by the Council to make its point these are considered briefly below. These are therefore considered briefly below.

Peter Towler Counsel Opinion 23rd December 2003

51. He had represented the Council at the 2002 inquiry (which closed on 11th October 2002). 13 months later he was asked to advise (paragraph 1) whether certain activities which had taken place since the Secretary of State's decision of 1st August 2003 were lawful or whether enforcement action could be taken. His view was that:

(1) the Council had accepted that the existing buildings and hardstanding had an existing B2 use.

(2) he noted that the Secretary of State had agreed with "the Inspector's conclusions on the fallback position" (he refers, in error, to paragraph 436 of the report; his quotation is from 435.)

(3) He refers to references to the site where the context suggests the whole site (paragraph 5) though without the analysis above, but he nevertheless expressed his view that "the Council has a reasonable case for asserting that the lawful use is confined to the existing buildings and then extant hardstanding."

(4) He went on to advise against enforcement action because of the uncertainty and because of permitted development rights.

52. What is particularly striking is that he understood the case he had spent 11 days advancing was that the buildings and hardstanding had an existing B2 use.

Peter Towler Further Opinion 5th May 2003

53. He refers, in a very brief Opinion (6 paras) to "further passages in the Statement of Common Ground which were not before me when I advised previously." (paragraph 4) The SOCG refers to agreement that the"existing use of the site is industrial processing which falls within B2."

54. It is striking that this was not uppermost in his mind. This is consistent with the fact that the case of the Council at the inquiry was in fact that the buildings and hardstanding had B2 rights which was entirely consistent with fallback position (1) .

55. Mr Towler did not suggest that the issue was res judicata.

Timothy Straker QC Opinion 12th May 2006

56. Mr Straker did not, for the purpose of his Opinion, analyse the inspector's report or the Secretary of State's decision letter in close detail. For example he does not refer to fallback scenario (1) or paragraph 435 of the inspector's report nor to the planning unit and the documents to which the Inspector makes express reference ssuch as the 1985 correspondence, or the reclamation permissions. This is not a criticism (and no criticism of any Counsel is made). It is understood that he did not have these documents before him.

57. Even though he advised against enforcement action as "inexpedient" Mr Straker QC did not state that the issue was res judicata.

Gary Grant of counsel Opinion 15th December 2006 (AJH13)

58. This Opinion was written in relation to the 2006 CLEUD application (the application was subsequently withdrawn).

59. He expressed the view (para 8) that the view set out in the draft report of the planning officer that B2 use across the application site had not been established *"was clearly a reasonable conclusion on the material provided"*. He also expressed the view that "t*he better view is that the inspector ... was carefully limiting the findings he could make in respect of the fall back position."* (para 12) (see para 17(5) too).

60. He did not take the view that the matter was res judicata (para 14).

Gary Grant Opinion dated 11th August 2008

61. Counsel weighed the pros and cons of enforcement action and advised that in the absence of a negotiated solution it was probably expedient to take enforcement action against the area not now considered to be subject to a lawful fall back.

Other points raised in the Opinion of David Elvin QC and Alex Goodman of counsel

62. For completeness:

Paras 4 and 5 –contrary to the factual assertions, the Council has considered res judicata before as Mr Lewis' email to the case officer at PINS dated 16th January 2013 confirms. No explanation was provided by the appellant as to why this

point was not raised in the Statement of Case of September 2012 nor why the point was not raised before 7th January 2013. It appears that the Opinion had been prepared some time in advance of 7th January (and only signed on that day) – Mr Kendrick's evidence refers to both the opinion and the legal issue.

Para 9 – the recent change alleged – this can be traced back, for example, to the report to committee dated 5th January 2012. The minutes disclose that Counsel's advice had been taken into account. It can be traced further back to 2006, as evidenced by Counsel's then Opinion (Mr Grant) and the draft report to committee re the CLEUD. See, further, e.g. the 2009 report to committee which preceded the first enforcement action.

Para 12 – the Opinion makes no reference to the specified terms of the fallback scenarios or positions. The "face of the letter" clearly includes "the fallback positions" referred to in paragraph 35.

Para 15/19 – outside storage – the use of the extensive hardstanding areas (on which the appellant placed considerable emphasis in 2002 (IR 74 – some 3457 (sq metres) has been addressed above.[3]

As to the extent of the B2 use both the Inspector and the Secretary of State considered that to be the buildings and their hardstandings. This is consistent with the fallback positions considered, it is also entirely consistent with views expressed by the Inspector as to the planning unit.

Para 16 the incorrect assumption in the Council's view is that of the appellant that the Secretary of State in paragraph 59 was referring to the site as a whole as opposed to the fallback positions as defined and previously referred to by both

the Inspector and Secretary of State. It is axiomatic that the decision letter is to be read as a whole. The Inspector and Secretary of State took the view that the use of the entirety of the buildings and hardstanding for B2 use (fallback position 1) would not be likely to occur.

Para 17 – the dichotomy is incorrect. There was a B2 use of the buildings and hardstanding but in the Secretary of State's view the entire extent of those buildings and hardstandings would not be used.

Para 20 – the SOCG is not entirely clear: the existing use of the site may be said to be B2 even though the existing use of only part of the site is B2 and Part E for example has a nil use.

Para 21 The Inspector identified his fallback positions and the planning unit having heard the evidence and the Secretary of State considered the recommendations in that light.

Para 25 the Appellant omits reference to the withdrawn CLEU officer report. The appellant refers to an "unexplained change of position" and yet recognises that the report of 5th January 2012 provides the rationale.

Para 26 – the purpose of this paragraph appears to be purely prejudicial. The Appellant well knows (see paragraph 28) that the Council had the benefit of Counsel's input when preparing the January 2012 committee report.

Conclusion

63. It is noteworthy that although the appellant now asserts the 2003 decision "unequivocally determined" an established B2 use across the whole of the

application site, the 'res judicata' argument was not raised until around 7th January this year. If the matter were so clear it could have been raised as part of 2006 Cleud application, the High Court challenge, in the present grounds of appeal, or at the very least, in the Rule 6 statement submitted in September 2012.; particularly as the same Counsel who appeared in the High Court have provided their written Opinion on the matter.

64. In conclusion the Council contend that, properly interpreted, the Inspector's Report and the Secretary of State's Decision Letter did not determine that the whole of the then application site had a B2 use. The B2 fallback position specified applied only to the buildings and hardstandings.

65. Even if that is not the case, the Secretary of State had no jurisdiction (which can only be exercised pursuant to statute), formally and finally to determine the issue on the section 77 appeal, and so the principle of res judicata cannot apply. Consequently, there can be no issue estoppel either as this must arise from a decision to which a cause of action estoppel can apply. Moreover, an issue estoppel cannot arise, in any event, if it is considered that there is ambiguity.

23rd January 2013 **RICHARD HUMPHREYS QC**

THEA OSMUND-SMITH

No 5 Chambers