

BY EMAIL AND FIRST CLASS POST

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Date: 25 January 2013  
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Dear Sir

**Re: 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**

**I write in response to your letter dated 21 January 2013 (received in hard copy on 24 January 2013).**

**The details of the matter being challenged**

The putative Claimant seeks judicial review of the alleged 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. As paragraph 7 of the letter admits, these notices have now been appealed and a public inquiry is due to open on 29 January 2013 to consider them.

**Response to the proposed claim**

The putative Claimant does not identify a date on which it is alleged that has been a failure to review the decision.

The Council has taken legal advice both before issuing the enforcement notices and during the preparation for the appeal.

The Council in its response (dated 22<sup>nd</sup> January) to a note issued to all parties by the Inspector on 21<sup>st</sup> January stated:

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“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 takes the view, as further set out in its Response to the putative claimant’s legal opinion dated 7<sup>th</sup> January 2013 that:

- (1) the Secretary of State did not determine that the whole of the 2003 application site (or the enforcement notice site) had B2 use rights;
- (2) further, the Secretary of State did not have jurisdiction to do so;
- (3) no issue estoppel could arise or has arisen;
- (4) further, and in any event, could not arise if there is ambiguity in what was decided.

It is not accepted that this position is incorrect in law so it is not accepted that the enforcement notices were issued unlawfully; and if the matter is not ‘res judicata’ the Council is entitled to proceed with its notices.

The putative claimant is seeking to have the res judicata point determined as a preliminary issue by the Inspector appointed to determine the inquiry. Ashfords raised this (ie. a preliminary issue) process as a possibility in their letter to the Inspector dated 18<sup>th</sup> January to which the Inspector responded on 21<sup>st</sup> January. The Inspector has already indicated, therefore, that he intends to determine this matter as a preliminary issue, as requested by the putative claimant, so an alternative remedy exists for the determination of this issue.

The Council acknowledges that it has applied for an adjournment of the inquiry (for reasons set out in its letter dated 22<sup>nd</sup> January) which in practice (please see the most recent note from the Inspector dated 23 January below) will now occur.

The Inspector has confirmed the Council’s understanding of the Inspector’s position in his note dated 23 January 2013 that he has not formed a view on the issue of res judicata at this present time and cannot have “since I have heard detailed argument from only one party.” The Inspector did not formally determine the preliminary issue in his response of 21<sup>st</sup> January. The Inspector, moreover, has of course invited representations from the Council. Indeed it is axiomatic, a basic principle of natural justice, that the Inspector will “hear the other side”, indeed sides (and some third parties are moreover legally represented and have indicated that they will be making submissions next Tuesday) before determining that preliminary issue. At the date of the Note dated 21<sup>st</sup> January the Inspector, understandably, had only seen the Legal Opinion prepared by Counsel for the Appellant. The Council notes also

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that the Inspector was not provided by the putative Claimant with copies of the authorities referred to in that Opinion. It is noted that the pre-action letter was despatched to the Council (by email, after 'close of play', at 6.35 pm on Monday 21<sup>st</sup> January) in the knowledge that representations on the Joint Opinion were to be sent by the Council to the Inspector by 5 pm Wednesday 23<sup>rd</sup> January, as indeed occurred. The timing of the pre-action protocol letter in circumstances both where the appellant has raised this very issue for determination by the Inspector and was to receive the Council's legal submissions by 23 January is, with respect, both misconceived and/or unexplained.

### **Summary**

We are responding by 25<sup>th</sup> January as requested.

We do not propose at this stage to reconsider the enforcement action in the light of the Inspector's letter in terms of the position vis-à-vis res judicata or otherwise in relation to the interpretation of the decision letter.

Yours faithfully



Ms. M. Horrill  
Solicitor  
Planning & Environmental Law Manager