BATH AND NORTH EAST SOMERSET COUNCIL

Development Control Committee

13 February 2013

FURTHER UPDATE FOLLOWING THE PREPARATION OF THE MAIN AGENDA

ITEM 15 on main Agenda

UPDATE ON THE FORMER FULLERS EARTH WORKS

Additional papers (not exempt and already in the public domain) :

K. Inspectors Ruling. The Committee will have already received a copy of the Inspector's Ruling dated 31 January 2013 which arrived after the preparation of the above report, but earlier than anticipated.

L. Letter from Harrison Grant. The Council have also received a letter from Harrison Grant dated 5 February 2013. Harrison Grant are the Solicitors acting on behalf of Protect Bath and Victims of Fullers Earth. A copy of that letter is attached, together with the Council's response dated 6 February 2013.

1. INSPECTOR's RULING ON '*RES JUDICATA*'

1.1. The Committee will see that the Inspector has found in favour of the Council and the Rule 6 parties on both the '*res judicata*' point and the interpretation of the 2003 decision letter. Please see Page 3 paragraph 1 of his Ruling.

1.2. Ashfords, the Solicitors acting on behalf of the Appellants, had in their letter of 18 January 2013 (Annex A of the Update Report), advised that if the Inspector's determination went against the Appellants, they would seek judicial review of that determination. The Inspector, in his Ruling has asked that the Appellants make their position on this clear by 8 March 2013.

2. INSPECTOR's COMMENTS REGARDING NOTICE NO. 1

2.1 As stated in the Update Report, suggested revisions, on a 'without prejudice' basis were tabled by the Council at the Preliminary hearing. These initial proposals were not accepted by the Appellants at that stage. Whilst it is considered that there is no doubt that anyone reading/receiving the Notice would not be confused about what they are required to do and it is clear from the appeal papers that indeed this was not an issue for the Appellants, further consideration is being given by your Officers to the wording of Notice No. 1 to take on board the Inspector's concerns.

3. APPELLANTS' EVIDENCE

3.1. The Council raised concerns prior to and at the Preliminary hearing with the amount of new evidence that has been presented in the Appellants' proofs which had not been disclosed to the Council or third parties in the Appellants' Statement of Case.

3.2. The Council have until 1 March to give proper consideration to this new evidence submitted by the Appellants. This process is currently under way.

3.3. The Council have had to appoint an expert in the interpretation of aerial photography to make an assessment of what the aerial photographs submitted by the Appellants' expert show and to confirm or refute the propositions put forward by their expert. This is a very specialist area and those working in this field use specialist equipment to make their deductions.

3.4. The Appellants have also produced a number of statements from those operating from the site as well as a number of tenancy agreements which have, as previously stated, not been referred to in their Statement of Case, or indeed produced previously in their responses to Planning Contravention and other Notices. The Council is investigating these submissions by the Appellants and their former/present tenants..

3.5 Whether or not it will be necessary for the Council to reconsider the issue of the 2012 enforcement notices will depend on the outcome of the Council's investigations as referred to above. If reconsideration does prove necessary a special meeting of this Committee will have to be called.

Annock

The Planning Inspectorate

Inspector's Ruling

Inquiry opened on 29 January 2013

by Brian Cook BA(Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State for Communities and Local Government

Ruling date: 31 January 2013

Notice No. 1: Appeal Ref: APP/F0114/C/12/2179426
Land at the Former Fullers Earth Works, Odd Down, Bath BA2 8PD

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeal is made by Gazelle Properties Limited against an enforcement notice issued by Bath & North East Somerset Council.
- The Council's reference is 12/00404/UNAUTH.
- The notice was issued on 30 May 2012.
- The breach of planning control as alleged in the notice is without planning permission, the change of use of the Land from agriculture and general industrial use (B2) to the mixed use of the Land including the following activities:
  The mixed use of the areas described below for general industrial use (within use class B2), storage and distribution use within the areas shown on the plan attached to Notice No. 1:
  i) Area 'A' coloured yellow;
  ii) Part of Area 'E' coloured brown;
  iii) Area 'D' coloured green as well as;
  iv) The car parking area in front of the dwellings known as Nos 1 and 2 The Firs, coloured blue.
- The requirements of the notice are
  i) Permanently cease using the following areas shown on the plan attached to the notice (the part of Area 'E' coloured brown, area 'D' coloured green as well as the car parking area in front of the dwellings known as Nos 1 and 2 The Firs, coloured blue) for waste processing (within use class B2) and storage and distribution;
  ii) Permanently cease using the Area A coloured yellow shown on the plan attached to the notice for storage and distribution uses other than those which are ancillary to the remaining B2 use;
  iii) Permanently remove from the land referred to in requirement (i) above all stored and processed sands, aggregates, stone, top-soils, sub-soils, green-waste and waste awaiting processing including hard-core, rubble, road-scalpings, timber, pallets, plastic, skips, tyres, vehicles, window and door frames;
  iv) Demolish the bund along the north-east boundary of the Land in the approximate position indicated by the black dashed line shown on the plan attached to the notice and reduce to the level of the adjoining land;
  v) Dismantle all concrete, hardstandings, underlying sub-bases, fences and storage bays (other than within Area A coloured yellow shown on the plan attached to the notice) and remove the resultant materials from the site;
  vi) Following the removal of all materials from the land referred to in requirement (i) above, restore that land to its condition before the breach took place and level with top-soil.
- The period for compliance with the requirements is 18 months.

- The appeal is proceeding on the grounds set out in section 174(2)(b), (c), (d) and (g) of the Town and Country Planning Act 1990 as amended.

Notice No 2: Appeal Ref: APP/F0114/C/12/2179435
Land at the Former Fullers Earth Works, Odd Down, Bath BA2 8PD

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeal is made by Gazelle Properties Limited against an enforcement notice issued by Bath & North East Somerset Council.
- The Council's reference is 12/00404/UNAUTH.
- The notice was issued on 30 May 2012.
- The breach of planning control as alleged in the notice is without planning permission, the change of use of the Land from agriculture to use for the storage, distribution and repair of scaffolding.
- The requirements of the notice are
  - i) Permanently cease using the Land outlined in red on the plan attached to the notice for the storage, distribution and repair of scaffolding;
  - ii) Permanently remove from the Land referred to in requirement (i) above all scaffolding, steel containers, storage crates, storage bins, machinery and vehicles;
  - iii) Demolish all fencing and remove all resultant materials from the Land;
  - iv) Dismantle all concrete hardstandings, underlying sub-bases and remove the resultant materials from the Land;
  - v) Restore the Land to its condition before the breach took place and level with top-soil.
- The period for compliance with the requirements is 18 months.
- The appeal is proceeding on the grounds set out in section 174(2)(b), (c) and (d) of the Town and Country Planning Act 1990 as amended.

Notice No. 3: Appeal Ref: APP/F0114/C/12/2179431
Land at the Former Fullers Earth Works, Odd Down, Bath BA2 8PD

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeal is made by Gazelle Properties Limited against an enforcement notice issued by Bath & North East Somerset Council.
- The Council's reference is 12/00404/UNAUTH.
- The notice was issued on 30 May 2012.
- The breach of planning control as alleged in the notice is without planning permission, the change of use of the Land from agriculture to use for stonemasonry including the preparation, cutting, forming and storage of stone.
- The requirements of the notice are:
  - i) Permanently cease using the Land outline red on the plan attached to the notice for stonemasonry including the preparation, cutting, forming and storage of stone;
  - ii) Permanently remove from the Land referred to in requirement (i) above all stone, steel containers, pallets, machinery and vehicles;
  - iii) Demolish all fencing and remove all resultant material from the Land;
  - iv) Dismantle all concrete, hardstandings, underlying sub-bases and remove the resultant materials from the Land;
  - v) Restore the Land to its condition before the breach took place and level with top-soil.
- The period for compliance with the requirements is 18 months.

- The appeal is proceeding on the grounds set out in section 174(2)(b), (c) and (d) of the Town and Country Planning Act 1990 as amended.

Summary of rulings

Res Judicata

1. There are two aspects to this issue. On the extent of the B2 fallback I agree with the Council and the Rule 6 parties that it is restricted to the buildings and hardstandings only. However, for the reasons I set out, although that will be a matter of fact, it is not a matter about which I am currently clear from the evidence. On the point of principle, I also agree with the Council and the Rule 6 parties that *Porter* (authority no. 10) is fatal to appellant's argument. I therefore conclude that the extent of the B2 fallback is not finally determined by the decision of the First Secretary of State (FSS) in 2003 although I also conclude that it will be a material consideration to which, subject to certain qualifications, substantial weight is likely to be given as it is so clear.

Notice No 1

2. I conclude that the notice is flawed and that the breach of planning control alleged requires correction since the word 'including' in a mixed use allegation where the Council is under-enforcing is contrary to guidance and an albeit non-binding judgement in a permission hearing. I am unable to conclude at this stage whether the notice can be corrected using the powers available in s176(1) of the Act and have identified a number of matters that the Council and the appellant will need to consider.

Background

3. On 30 May 2012 the Council issued three notices as set out in the summary details above. Appeals were made against each and each appeal is proceeding on the grounds within s174 of the Act, again as set out above. Of great significance to the cases of all parties to the Inquiry is a decision of the FSS in August 2003 (the DL). This concerned an application (ref: 00/02417/FUL) submitted by the appellant in these appeals for a development on about 3.38 hectares of land very similar in extent to the land covered by Notice No 1. That application was recovered by the FSS for determination under s77 of the Act and an Inquiry was opened in the autumn of 2002. The report of the Inspector to the FSS on that Inquiry (the IR) is dated 13 February 2003.

4. A letter dated 18 January 2013 from the appellant's legal representatives (the Ashfords letter) identified what it termed 'a preliminary issue for the Inspector' to be resolved at the outset of the Inquiry. A written determination was requested with the statement that if that determination went against the appellant a judicial review of that determination would be sought. Following my own review of the evidence and the wording of notice No 1 it became apparent that there was an additional matter that would need to be resolved before the evidence could be heard. In my view, both issues affected the nature of the evidence to be called and, potentially, whether the Inquiry should proceed at all. In the interests of all parties I considered these matters should be dealt with at the outset and rulings given.

5. I prepared a response in these terms to the Ashfords letter on 20 January 2013 (my first response) and this was circulated to the main and Rule 6 parties by the Planning Inspectorate. This response prompted a flurry of further

correspondence from the Council, Bath Preservation Society and Harrison Grant who represent Protect Bath and Victims of Fullers Earth. I prepared a further response to this correspondence on 23 January 2013 (my second response) which was also circulated by the Planning Inspectorate. The first two days of the Inquiry proceeded in accordance with the programme set out in the second response. However, the Inquiry was then adjourned to be resumed at a future date as necessary following the parties' consideration of my rulings and the position of the Council and the appellant in response to them. This was set out in a further note dated 30 January 2013 (my third response).

6. I set out my conclusions on the two issues raised in the following paragraphs.

Res Judicata

7. There are two issues to address. The first is the extent of the land considered by the FSS in August 2003 to be covered by Use Class B2 of the Town and County Planning (Use Classes) Order 1987 (as amended) as a fallback position. The second is whether the principle of *res judicata* is applicable in these appeals. I deal with them in this order purely because this was the way the submissions were presented.

8. The appellant's submissions were provided as Appendix L to the evidence of Mr Kendrick and were in the form of a Joint Opinion (JO) by David Elvin QC and Alex Goodman. The Council's submissions came in the form of a Joint Rebuttal Opinion (JRO) by Richard Humphreys QC and Thea Osmund-Smith dated 23 January. Further submissions from all parties were made both in writing and by way of oral submissions during the Inquiry. All barristers were supported by those instructing them and I therefore see no merit in summarising the detail of these submissions. All interested parties will have read the papers and heard the material points made and will no doubt use their own records if this becomes necessary at some point in the future.

The extent of the Use Class B2 fallback

9. It was common ground that the starting point must be the DL which should be read, as a whole, as if by an informed reader rather than being subjected to a forensic analysis of syntax and vocabulary. It was further agreed that by analogy with several very well known cases[1] referred to by Mr Humphreys, it was appropriate to look at the IR where it was expressly incorporated into the DL or where it was necessary to do so to attempt to resolve a lack of clarity in the DL itself. There was no firm view as to whether documents referred to and listed in the IR were extraneous material or not but I do not find I need to refer to these in any event.

10. Putting the cases at their simplest, the appellant considers that the DL concluded that the B2 fallback covered the entire application site while the Council and the Rule 6 parties do not.

11. At DL 1 it is confirmed that the FSS has given consideration to the IR and the conclusions of the IR are annexed to the DL (DL 2). At DL 3 the FSS confirms that he disagrees with the IR recommendation. At DL 8 the FSS sets out what he considers the main issues in the case to be and under those relating to Green Belt identifies one as being 'whether a fallback position exists'. Throughout the DL there are references to 'the site' and the FSS never refers

[1] For example *Barnett v SSCLG & East Hampshire DC* [2009] EWCA Civ 476

to it in any other terms. In my view, he can only mean the application site and I believe support for that interpretation can be found at DL 33. Here, there is a reference to IR 445-448 shortly after the use of the term and when IR 445 is turned up it specifically states 'the application site'.

12. There is only one apparent reference in the DL (at DL 28) to any part of the IR that does not form part of its conclusions. However, this appears from the context to be a typographic error and the reference to IR 241 should probably be to IR 421. The FSS does not therefore refer to any of those parts of the IR dealing with the description of the application site and its surroundings or the nature of the proposals. Nevertheless, on any fair reading of DL 15-25 it is quite clear that the FSS fully appreciated the nature and extent of the existing development on the application site and how the development proposed would relate to it.

13. Having set out some context, I turn now to the issue in contention, namely the extent of the area to which the FSS concluded that the fallback position applies. Attention in submissions focussed on DL 30, DL 35 and DL 59. There is also reference in DL 51 to 'fallback' but this does not assist in clarifying its extent and I do not consider this further. Nor do I consider DL 59 any further since, in my judgement, this simply flows from what is said in DL 35.

14. In DL 30 the FSS expressly incorporates IR 427-436 into the DL and the agreement of the FSS with the conclusions in IR 436 as to whether a fallback position exists is explicit. It could be argued that this section of the IR is concerned only with whether a fallback position exists (that being its heading) and that the concluding paragraph (IR 436 explicitly endorsed by the FSS) confirms only that it does and gives a view on the likelihood of the fallback continuing while saying nothing about the extent. This was not however put to me and would be entering the realm of sophistry.

15. The approach taken by Mr Robinson in these IR paragraphs is more a matter for the second strand of the *res judicata* point. Irrespective of how he got there, his conclusion at the opening of IR 435 cannot, in my judgement, be in question. To quote, he says 'I conclude, therefore, that the buildings and hardstandings on the site enjoy a B2 fallback, that is, they may be used for general industry without the need for further planning permission. In addition, building A enjoys a warehouse/storage (B8) fallback.' He goes on in IR 435 to identify three possible scenarios arising from that conclusion and expresses a view as to which would be the worst in terms of visual, environmental and traffic impact.

16. It flows from what is said about incorporation above [paragraph 9] that this passage should be read as if it is a part of the DL given what is said at DL 30.

17. Moving on to DL 35, this is in the section of the DL that addresses the other considerations that need to be weighed against the totality of the harm to the Green Belt arising from the development to determine whether the very special circumstances necessary to justify inappropriate development in the Green Belt exist. DL 35 considers one of those other considerations, namely the benefit that would flow from the development proposed preventing the fallback positions being pursued.

18. The main reason the extent of the fallback is in contention is because of the sentence midway through DL 35 which says 'The (FSS) is 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.' (my emphasis). In my first response I expressed what could only be an initial view given that no submissions (other than the appellant's JO) or evidence had at that point been heard and tested, that this paragraph was unambiguous. On its face and in the context of the way the FSS has used the words 'the site' [paragraph 11], I do not consider that initial view to have been unreasonable and it remains the view of the appellant.

19. However, it was put by the Council and the Rule 6 parties (most robustly by Mr Forsdick) that the DL had not been challenged on any point and was therefore a lawful decision attracting a presumption of regularity. To now interpret it as inconsistent with the IR would be wrong as a matter of law. I asked for the authority to support this contention but by the time of the adjournment none had been produced[2]. Mr Goodman accepted that the DL was valid until quashed but argued that this did not constrain me from interpreting its meaning. Mr Forsdick's position however was that, as a lawful decision, the correct approach was to identify the reasons why it was consistent, not the other way round. I can see the force of that argument if what I considered to be the proper interpretation of DL 35 could only be explained by concluding that the FSS had misunderstood the IR.

20. DL 35 begins by recording the agreement of the FSS that the three fallback positions identified by Mr Robinson are theoretically available. In doing so the FSS refers to IR 435 which is where the unequivocal conclusion about the B2 fallback quoted above [paragraph 15] appears. That does appear to set the context for DL 35. It continues by addressing the first of these fallbacks and saying (with reference to IR 455-6) that the FSS accepts that there is a real prospect of the B2 use **of the site** continuing although a reservation is expressed (my emphasis). DL 35 goes on beyond the sentence at issue before concluding on the first fallback. The other two fallbacks are then addressed in brief. Mr Humphreys therefore invited me to construe 'the site' in DL 35 as being the site of the first fallback when reading that part of it.

21. The use of the phrase 'of the site' in DL 35 is drawn from IR 455-6 where it appears more than once and differs from the phrase in IR 436 where the phrase used in the exact same context is 'on the site'. I raised this distinction in my second response but none of the advocates addressed this. To do so would probably stray into the realm of forensic analysis and the better view is most likely to be that Mr Robinson simply used a different word within what is a very lengthy report.

22. Having said that, to agree with Mr Humphreys' interpretation would mean accepting that in this one paragraph of the DL 'the site' had a meaning ascribed to it different to that throughout the rest of the DL. However, given that the conclusion in IR 435 and incorporated by the FSS in DL 30 is so clear, on balance, I accept that is the correct interpretation.

23. I therefore conclude that there is no inconsistency between DL 30 and DL 35 and find therefore that the B2 fallback relates only to the buildings and hardstandings on the site.

[2] On 5 February Mr Forsdick provided *R(Holland) v SSCLG* [2009] EWHC 2161 (Admin) and *Save* [1991] 1 WLR 153. In my view, *Save* does not assist Mr Forsdick since, as I state in paragraph 11, read fairly, the proper construction of the DL is that the FSS means the application site when referring to 'the site'. However, I agree that the part of the speech of Lord Bridge in *Save* referred to me (page 164) is authority for the point made.

24. Unfortunately, for the purposes of the appeals before me this only takes us so far at present since the actual extent of the fallback area remains unknown on the evidence before this Inquiry. The IR defines these areas by description, not by a plan. The areas now identified by letter in the notices are not referred to in that way in the IR so there is no direct read across. Appendix C to the proof of Mr Kendrick (the application boundary plan) is drawn on a base plan that is different to that used for the notice plans. However, Figure 4 in Core Document 43 appears to be a much closer fit to the notice plan base and purports to show the existing buildings and hardstandings. The area covered by these seems significantly less than that shown as Area A on the notice plans.

25. Nevertheless, what did comprise the buildings and hardstandings at the time of the DL must be a matter of fact that should be known to most, if not all, of the parties to these appeals since they also took part in the 2002 Inquiry. This is therefore something that will need to be agreed upon and included in the Statement of Common Ground.

Principle

Context

26. The courts have held that on appeals under ss77, 78 and 174(a) the Secretary of State does not have to cast about for a fallback position. However, where it is argued that a lawful fallback position is available it is a material consideration that must be taken into account with the weight attributed to it being influenced by the likelihood of the fallback being taken up[3].

27. It is axiomatic that a fallback must be lawful otherwise it could not be taken up. This was discussed at my request during the Inquiry and it was common ground that to be lawful the fallback position must be subject of an extant planning permission, be permitted by Schedule 2 of the Town and Country Planning (General Permitted Development) Order 1995 (as amended) or have been determined to be lawful by application under s191 or s192 or by appeal under s174 (b), (c) or (d) or s195.

28. It was put to the FSS in 2002 that there was a fallback position so he had to take it into account. He explicitly did so by identifying it as being among his main issues [paragraph 11 above] and he concluded on the point at DL 30. As set out above he incorporated without any reservation or comment Mr Robinson's reasoning and conclusions [paragraph 16 above].

29. At the 2002 Inquiry Mr Robinson was faced with a situation where there was no material planning permission in place, no material application under s191 or its predecessors had been made and no material enforcement action had been taken by the local planning authority. Moreover, although the applicant and the Council were agreed on the position, the Umbrella Group of Rule 6 Parties disputed the existence of a lawful fallback. The existence of a lawful fallback was therefore contested. None of the oral evidence as to fact was taken under oath and none of the written evidence as to fact was by way of statutory declaration; both would be usual in enforcement appeals or submissions and appeals under s191 and s195 respectively. It would be usual also to conclude on the balance of probabilities.

[3] See *Snowden* listed at authority no. 15 and the numerous others referenced at P70.30 in the Encyclopedia of Planning Law and Practice

30. It is quite clear from IR 427 and IR 428 that Mr Robinson was concerned with establishing the lawful fallback use. These two paragraphs set out the well established principles in such considerations. He then assesses the evidence before concluding in IR 433 that '...the works thus have a lawful use for general industry (B2).' At IR 435 he draws the unequivocal conclusion that has been referenced at various points above. He, and by incorporation the FSS, therefore confirmed that a fallback existed; defined (in words) the area over which it applied; and stated what the lawful use was. In my view there can be no doubt about this since two of the three fallback scenarios set out what could be done without the need for **further** planning permission (my emphasis).

The gist of the cases made

31. The appellant argues that *Thrasyvoulou* (authority no. 9) imports a private law principle into public law. That principle is that, once an issue of legal right has been determined in a matter, it becomes the final determination of that issue between those parties. It is a matter of public interest that the finality of the determination is recognised and not subjected to further litigation between the parties. While *Thrasyvoulou* was an enforcement case the appellant argues that the determination by the FSS in 2003 of the lawful fallback amounts to a determination of a legal right and thus the principle of *res judicata* applies in the case before me. The effect is to require the notices to be varied to ensure that the lawful B2 use is preserved across the material area. For the reasons set out above, I disagree with the appellant as to the extent of that area.

32. The Council and the Rule 6 parties disagree with this analysis. They argue that the FSS did not have the specific jurisdiction under s77 of the Act to determine an issue which established a legal right and that, respectfully, the appellant is therefore mistaken to rely so heavily on *Thrasyvoulou.* In any event, *Porter* is fatal to the appellant's case.

Jurisdiction

33. In *Thrasyvoulou* Lord Bridge stated that the twin principles that underpin the doctrine of *res judicata* must apply to adjudications in the field of public law where the statute has created a specific jurisdiction for the determination of any issue which establishes the existence of a legal right (p289 C-D). In my view it is not clear whether the 'specific jurisdiction' referred to in that case is the Town and Country Planning code as a whole or the more limited part of it dealing with the enforcement of planning control. At p288 F-H Lord Bridge summarises the appellants' cases as put and the second submission refers to the 'complete and self-contained statutory code governing the enforcement of planning control'. I believe that at p289 C-D Lord Bridge is dealing with the second submission. On balance, I therefore consider that in context Lord Bridge is referring at p289 C-D to what is now Part VII of the Act rather than the Act as a whole.

34. However, in 2003 the FSS was placed in some difficulty. I have already noted that where a fallback position is put forward the courts have held that it must be taken into account [paragraph 26]. Typically in determinations of planning applications and appeals, the nature of the fallback position is clear. What is often in issue is the likelihood of it being taken up in the event of the application being refused permission and/or the appeal being dismissed. That was not the case in the matter before the FSS.

35. Although the main parties were agreed, the Umbrella Rule 6 Parties were not and there appears on the evidence in the IR to be no settled legal basis for the main parties' position [paragraph 29]. It seems to me therefore that to meet the obligation placed upon him by the courts the FSS had no alternative but to come to a view about the fallback position in the first instance. As the matter was being dealt with under Part III of the Act the specific jurisdiction for doing so was not available to the FSS.

36. While those opposing the appellant argued that the FSS had no jurisdiction, no authorities were put to me to say that a decision of this nature taken under the incorrect part of the Act was invalid. In my view therefore any lack of jurisdiction does not alter the fact that a decision was made and then acted upon.

Determination

37. In oral submissions Mr Humphreys and Mr Forsdick both characterised the FSS as having 'come to a view' about the fallback position. I believe it was more definitive than that.

38. What is said in IR 427-436 is unequivocal. Indeed, that this is so is fundamental to the Council's and the Rule 6 Parties' cases on the extent of the fallback determined. If the FSS considered that the evidence did not justify such an unequivocal finding he could have said so. However, in DL 30 he accepted the conclusions and the reasons for them without qualification. In my view, this amounts to a determination of the lawful fallback and thus a determination of a legal right.

The effect of Porter

39. So far on this matter of 'principle' I have concluded that the FSS had to conclude on the fallback since this was a necessary part of the reasoning required for him to meet the obligations placed upon him by the courts. I have also found that the finding was so clear that it amounted to a determination of a legal right on this subsidiary issue. As I understand the appellant's case that is sufficient for the doctrine of *res judicata* to be applicable in these appeals.

40. However, this does appear to ignore *Porter* where this very point was taken and found, on the majority decision, to be a misinterpretation of *Thrasyvoulou.* While Mr Goodman argued that *Porter* was a case turning on hypothetical facts, this does not appear relevant to the passages on pages 702 and 703. At p702j to p703a Stuart-Smith LJ reviews what Lord Bridge was saying and concludes that if he had meant to imply that an issue estoppel could arise from some finding of fact by the Secretary of State and necessary to his conclusion on whether or not to grant planning permission he would have said so. Stuart-Smith LJ concludes that it is implicit from his judgement in *Thrasyvoulou* that he thought no such thing.

41. Since I understand this to be the point from *Thrasyvoulou* that the appellant relies upon I agree with the Council and the Rule 6 parties that it is fatal to the appellant's case. There may be an argument against this fatality but again I agree with the Council and the Rule 6 parties that it was not put other than in terms of an inherent fairness issue about the public interest need for finality in litigation on the same essential point.

42. In the light of this conclusion I have not found it necessary to comment upon the other authorities relied on and listed since it was not argued by Mr Goodman that any of these overcame the *Porter* case put against him.

Conclusions

43. On the matter of *res judicata* I have found against the appellant on both points in the preliminary issue raised. The Ashfords letter states that in these circumstances a judicial review shall be sought although at the Inquiry Mr Goodman took a more flexible position. The appellant will need to be absolutely clear about this not later than midday on 8 March in order that all parties may assess their positions on the timetable set out in my third response.

44. At the Inquiry there was a short discussion about the effect had I agreed with the appellant on both points. I believe it was common ground that it would simply have set a benchmark for the appeals although there was no settled view as to the date of that benchmark.

45. In my view, even though I have not agreed with the appellant's position, this may not alter the determination that the FSS made regarding the lawful B2 use of whatever, as a matter of fact, was then the extent of the buildings and hardstandings. This would thus be a material consideration to which, subject to submissions, I am likely to attach substantial weight unless the evidence demonstrates, on the balance of probabilities, that finding of the FSS was wrong.

The wording of Notice No 1

46. In the first response I set out my concerns regarding the drafting of this notice and referred the parties to a non-binding judgement[4] in a permission hearing that I considered relevant. In response to a number of points raised by the Council in its letter of 22 January I made a number of further comments in the second response. Although the Council tabled two alternatives for the wording of the notice at the end of the first day there was little substantive discussion on the second day as the appellant wished to consider the matter further.

47. The breach of planning control alleged is entirely a matter for the Council as are the steps required to deal with it. It is for the Council alone to decide what it is expedient for it to seek to achieve through taking enforcement action. However, the principle established in *Miller-Mead*[5] is that the person to whom the notice is issued must be told fairly both what he has done wrong and what he must do to remedy it from within the four corners of the document. The breach of planning control alleged and the steps set out to deal with it must therefore be clear and unambiguous. In deciding whether to use the power available to me under s176(1) my only concern is to correct what would otherwise be a notice that is invalid for uncertainty or even a nullity.

48. Although the wording is somewhat cumbersome, the nature of the appeal made suggests that the appellant is nevertheless clear as to what is alleged and required. As I understand it (with the benefit of now having seen the evidence), as issued the allegation means that the Council believes one mixed

[4] *The Queen on the application of East Sussex County Council v Secretary of State for Communities and Local Government , Michael Robbins, Gary Robbins* [2009]EWHC 3841 (Admin)
[5] *Miller-Mead v Minister of Housing and Local Government* [1963] 2 WLR. 225

use of the land (agriculture and B2) has been changed to another (B2, storage and distribution plus other use(s) unspecified-implicit in the use of the word 'including'). Four separate areas of land are identified with all being in the unauthorised mixed use.

49. Requirements 5 (i) and (ii) set out the uses that are to cease. Requirement 5 (i) identifies these as 'waste processing (within use class B2) and storage and distribution' in all areas within the notice land except Area A. Requirement 5 (ii) correctly seeks to preserve what the Council considers to be the lawful use of the land, namely the B2 use of Area A, by requiring the cessation of only specific storage and distribution uses within Area A thus leaving any B2 uses, and storage and distribution uses ancillary to them, not enforced against.

50. In my view, there are a number of matters raised by the wording of the issued notice.

51. First, the use of the word 'including' in a mixed use allegation implies that not all of the uses taking place (both lawful and allegedly unauthorised) are listed. Where, as in this case, the Council intends through the requirements to leave some uses in place across the whole of the notice land (under-enforcement) this is not acceptable for the reasons set out in paragraphs 2.9 to 2.13 of Circular 10/97 (*Enforcing Planning Control: Legislative Provisions and Procedural Requirements*) and paragraph 20 of the judgement referred to at footnote 4. While the Council may use s173A of the Act to waive or relax any requirement of a notice, this power does not extend to the terms of the allegation which, once issued and appealed, can only be corrected under s176(1) and, only then, if no injustice to either party would be caused as a result of so doing.

52. Second, requirement 5 (i) requires the cessation of a use (waste processing) that may not be a use included in the alleged breach. I say 'may not be' because the requirement either assumes that all waste processing uses on the specified areas of the site fall within the B2 Use Class alleged or it intentionally enforces against only those waste uses that do so; this is not clear and so the notice is uncertain.

53. Third, I have already raised an issue in respect of requirement 5 (iv) in both my first and second responses. This may well be a matter for the evidence unless the Council wishes to reflect further at this stage.

54. I am aware of correspondence between the Council and the appellant during November and December 2012 following the Council's discovery of what it considers a relevant case commentary and appeal decision. This has caused it to review its assessment of the waste uses on the site and in its letter to the appellant on 12 December it suggested the alleged breach might be more appropriately described as 'mixed waste processing and B2 and storage and distribution'.

55. In a letter to the Planning Inspectorate dated 22 January 2013 replying to my first response it proposed a correction of the alleged breach to 'general industrial use (within Use Class B2), storage and distribution' to deal with the 'including' point. While it would remove the word, this would not deal with the substance of the point if the alleged breach still failed to include all the uses taking place when the notice was issued.

56. Finally, at the end of the first day of the Inquiry the Council tabled, without prejudice, a revised notice No1 with the alleged breach saying '....to a mixed use for general industrial use (B2), storage and distribution use (B8) and the deposit of waste material'.

57. To conclude on this matter, I am clear that the breach of planning control alleged needs correction to address the point raised in *East Sussex*. Since December 2012 the Council has put forward three different versions of the alleged breach of planning control which might replace that in the notice. The Council therefore needs to make its intentions for this notice absolutely clear by not later than 1 March. In doing so it will need to satisfy itself that the alleged breach of planning control includes all the uses taking place on the site on 30 May 2012. It will also wish to have regard to paragraph 2.11 of Circular 10/97 in particular when it considers the relationship between the corrected allegation and the existing requirements.

58. By not later than 8 March the appellant will then have to consider the corrected notice. In doing so the proof of evidence of Mr Kendrick (and section 8 in particular) should be reviewed and a view taken about the extent to which the matters that might be raised by the new notice wording have already been addressed.

Brian Cook

Inspector

APPEARANCES

FOR THE APPELLANT:

Alex Goodman of Counsel	Instructed by Ashfords Solicitors

FOR THE LOCAL PLANNING AUTHORITY:

Richard Humphreys QC and Thea Osmund-Smith of Counsel	Instructed by Mrs M Horrill, Solicitor & Planning & Environmental Law Manager with the Council

Rule 6 Parties:

David Forsdick of Counsel	Instructed by Protect Bath and Victims of Fullers Earth
Alison Potter of Counsel	Instructed by Bath Preservation Trust
Trevor Osborne	Representing himself

SUBMITTED AUTHORITIES

1 *Pioneer Aggregates (UK) Ltd v Secretary of State for the Environment and others* [1985] 1 AC 132
2 *Williamson v Mid Suffolk DC* [2006] EWLands LCA 73 2002
3 *Watts v Secretary of State for the Environment and South Oxfordshire DC* [1991] 62 P. & C.R.
4 *R (on the application of Wandsworth LBC) v Secretary of State for Transport, Local Government and the Regions* [2003] EWHC 622 (Admin)
5 *Keevil v Secretary of State for Communities and Local Government* [2012] EWHC 322 (Admin)
6 *The Queen on the application of Exmouth Marina Ltd v First Secretary of State* [2004] EWHC 3166 (Admin)
7 *Stancliffe Stone Co Ltd v Peak District National Park Authority* [2004] EWHC 1475
8 *David Saxby v Secretary of State for the Environment and Westminster City Council* [1998] EWHC QBD
9 *Thrasyvoulou v Secretary of State for the Environment* [1990] 2 AC 273
10 *Porter and another v Secretary of State for Transport* [1996] 3 All ER 693
11 *Johnson v Gore Wood & Co* [2002] 2 AC
12 *Specialist Group International Limited v Richard Simon Deakin and Charles David Deakin* [2001] EWCA Civ 777
13 *Special Effects Limited V L'Oreal SA and another* [2007] EWCA Civ 1
14 *Tesco Stores Ltd v Dundee City Council* [2012] UKSC 13
15 *Snowden v Secretary of State for the Environment and Bradford City Metropolitan City Council* [1980] JPL 749

DOCUMENTS

1 Licence Number EAWML 100028 submitted by the appellant

Annex 2

HARRISON GRANT
SOLICITORS

175 - 185 GRAY'S INN ROAD
LONDON WC1X 8UE

TELEPHONE: +44 (0)20 7812 0639
FAX: +44 (0)20 7812 0654
EMAIL: hg@hglaw.co.uk
WEBSITE: www.hglaw.co.uk

Maggie Horrill
Planning and Environmental Law Manager
Legal & Democratic Services
Bath & North East Somerset Council
Northgate House
Upper Borough Walls
Bath BA1 1RG

Our Ref: V0F0012
Your Ref: MH/PEV7241

By Post and Email

5 February 2013

Dear Ms Horrill

FORMER FULLERS EARTH WORKS, ODD DOWN, BATH

We write further to the Inquiry held at the Fry Club & Conference Centre on 29 and 30 January 2013 for the above.

We have asked for a copy of your revised EN1 and look forward to receiving this shortly. We note that the Council will be reviewing the merits of proceedings with the EN in the light of the late evidence received from the Appellant. We have studied that evidence with care and consider that far from establishing that which the Appellants need to establish it conclusively demonstrates that area E was not used as part of a single planning unit prior to 2002. In the unlikely event that you consider that there is any basis for withdrawal of any or all of the notices, please ensure that you give us advance notice of your intention to do so, so that we may make representations. It would, of course, be impermissible for you to withdraw the notices having heard only one side of the story.

Further, and in any event, please accept this letter as a formal request for you to reissue your Enforcement Notice of 22 February 2009 in accordance with section 171B(4)(b) of the Town and Country Planning Act 1990. Plainly any such enforcement notice would ensure that the Appellants do not benefit from the three year gap between the initial enforcement notice and the issuing of EN1, EN2 and EN3.

I look forward to hearing from you.

Yours sincerely,

Nnenna Morah
Harrison Grant

Bath & North East Somerset Council

Legal & Democratic Services
Bath & North East Somerset Council
Northgate House,
Upper Borough Walls,
Bath BA1 1RG
www.bathnes.gov.uk

Date: 6 February 2013
Our Ref: MH/PEV8707
Your Ref: V0F0012
Phone: 01225 395174
Fax: 01225 395153
E-mail: maggie_horrill@bathnes.gov.uk
DX: 8056 BATH

Nnenna Morah
HARRISON GRANT
Solicitors
175-185 Gray's Inn Road
LONDON
WC1X 8UE

By Post and email

Dear Ms Morah

FORMER FULLERS EARTH WORKS, ODD DOWN, BATH

Thank you for your letter dated 5 February 2013.

Enforcement Notice EN1 has not been formally revised. As specifically indicated to the Inspector at the inquiry last week, the Council had put forward provisional wording, on a 'without prejudice' basis, to show how the Inspector's initial concerns could be addressed, if considered necessary. I forwarded, under cover of my email of 1 February, the 'Possible revised wording' you requested.

With regard to the 2012 Notices, the Council, as the Local Planning Authority, will further consider its position once we have had the opportunity to consider the Inspector's ruling (which we have just received since preparing this letter). If the Council were minded to withdraw the notices following investigation of the evidence received from the applicant, I can confirm that, in the circumstances of this case, we would first give you notice, as requested.

As you will be aware, an update report is going before the Council's Development Control Committee on 13 February 2013 (this had been despatched today before receipt of the Inspector's ruling). Any legal advice given to the Committee will be likely to be given in private session, in the usual way. I can confirm, however, that the formal request which you make in your letter concerning a "second-bite" notice will be raised with the Committee.

Yours sincerely

Maggie Horrill
Solicitor
Planning and Environmental Law Manager