

## Bath & North East Somerset Council

MEETING:	Development Control Committee
MEETING DATE:	13 February 2013
REPORT OF: REPORT ORIGINATOR	David Trigwell, Divisional Director of Planning and Transport Development Maggie Horrill, Planning and Environmental Law Manager Lisa Bartlett, Development Manager
TITLE:	UPDATE - LAND AT FORMER FULLERS EARTH WORKS, FOSSEWAY, COMBE HAY, BATH
WARD:	Bathavon West

### AN OPEN PUBLIC ITEM

#### BACKGROUND PAPERS

- (i) Development Control Committee Report 5 January 2012
- (ii) Development Control Committee Report 30 March 2012
- (iii) Development Control Committee Report 9 May 2012
- (iv) Inspector's report dated 13 February 2003 and Secretary of State's Decision dated 1 August 2003

#### List of attachments to this report:

Annex A – Ashfords Letter dated 18 January 2013 addressed to the Planning Inspectorate (PINS), with the Appellants Joint Legal Opinion dated 7 January 2013

Annex B – Inspector's Note in response to Ashfords dated 20 January 2013

Annex C – The Council's letter addressed to PINS in response to the Inspector's note dated 22 January 2013

Annex D – Pre-Action Protocol letter from Ashfords dated 21 January 2013

Annex E – Inspector's Further Note in response to the Council's letter dated 23 January 2013

Annex F – The Council's Joint Legal Opinion dated 23 January 2013

Annex G – The Council's letter addressed to PINS dated 24 January 2013

Annex H – The Council's response to Ashfords Pre-action Protocol letter dated 25

February 2013.

Annex I – Possible revised wording for Enforcement Notices put to the Inquiry

Annex J – Inspector’s Note 3: Matters arising at the adjournment dated 31 January 2013.

## **1 COMMITTEE’S PREVIOUS DECISION**

1.1 The purpose of this Report is to update Members following a Preliminary Hearing by the Inspector on this matter.

1.2 This Committee at its Meeting of 9 May Resolved:

- (i) That the Divisional Director of Planning and Transport Development in consultation with the Planning and Environmental Law Manager, serve the necessary enforcement notice(s) on behalf of the Local Planning Authority before 31 May 2012 in respect of the alleged planning contraventions outlined in the report by exercising the powers and duties (as applicable) under Parts VII and VIII of the Town and Country Planning Act 1990 (including any amendments to or re-enactment of the Act or Regulations or Orders made under the Act) in respect of the above land;
- (ii) To give an 18 month period for compliance with the Enforcement Notices(s).

1.3 Three Enforcement Notices were issued on 30 May 2012

1.4 The Committee will be aware that appeals were lodged with PINS against the Enforcement Notices and that a four day Public Inquiry was set to commence on 29 January 2013.

## **2 CORRESPONDENCE AND LEGAL OPINIONS**

2.1 Members of the Committee will have a copy of Ashfords letter of 18 January 2013 and the Appellant’s Counsel’s joint legal opinion (Annex A) and are advised that this needs to be read in full and from which they will see that it is argued that *“the Council’s attempt to revisit the extent of the B2 use is unlawful and unreasonable”* They are arguing that the Secretary of State in the course of determining the call-in application for planning permissions for live/work units necessarily determined that there is an established lawful B2 use which extended across the entire site and that that determination precludes the Council from revisiting the extent of the B2 use i.e. the principle of *“res judicata”* applies meaning that the Council are in effect ‘estopped’ from raising an issue that has already been legally concluded.

2.2 Members will have a copy of the Council’s letter of 22 January 2013 (Annex C) and its Joint Legal Opinion dated 23 January 2013 (Annex F), which again should be read in full, which:-

- 2.2.1 States that it does not accept any of the arguments put forward in respect of the *res judicata* point
- 2.2.2. Raises concerns with the amount of new evidence that has been presented in the Appellants' proofs of evidence which has not been disclosed to the Council previously or third parties and seeking an adjournment to enable proper consideration to be given to this new information.
- 2.3. PINS had also received representations made by Third Parties supporting the arguments that *res judicata* does not apply in this case.

### **3 INSPECTOR'S NOTES (AND PRE-ACTION LETTERS)**

3.1 Following the Inspector's first Note of 20 January 2013 (Annex B) Ashfords served the Pre-Action Protocol letter on the Council (Annex D).

3.2 In the interim PINS received the Council's letter of 22 January 2013 and the Inspector issued his further note of 23 January 2013 which advised:

3.2.1. That the *res judicata* needed to be ruled upon by him before the evidence is heard

3.2.2. That he had concerns with regard to Notice No. 1 and that he wanted to hear submissions on this

3.2.3. Revised Inquiry programme in the following terms:

- “(i) Shortened formal opening of the Inquiry taking appearances but not witnesses as this may alter
- (ii) 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 Rule 6 parties on this.
- (iii) Adjourn to consider the submissions and write my rulings on those matters that I need to. I would expect to adjourn on Tuesday.
- (iv) 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 everyone is represented and allow a period for parties to consider it. As stated in my earlier Response I see no merit in may 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.”

3.3 The Council responded to Ashford’s Pre-Action Protocol letter (Annex H) and received an email from Ashfords advising that their pre-action protocol letter had been sent before the Inspector had sent his second procedural note and that they would therefore await what will occur on Friday.

#### **4 PUBLIC INQUIRY**

4.1 The Inquiry started at 10 am on Tuesday 29 January 2013 to hear the legal arguments on the *res judicata point* from the Appellants, the Council and Third Parties. These submissions took up the whole of Tuesday and part of Wednesday with the Inquiry adjourning at 3pm.

4.2 As part of these deliberations the Council, as requested by the Inspector, put forward proposals on a ‘without prejudice’ basis to vary the Notices (Annex I). The proposals have not been accepted by the Appellants at this stage, but the Inspector and all parties have taken the proposals away with them for further consideration and/or further amendment.

4.3 At the close of the Preliminary hearing the Inspector advised that he would not be in a position to give his ruling on the *res judicata point* until Friday 8 February 2013.

4.4 The Council then have until midday on Friday 1 March, to consider the Inspector’s rulings and to respond to PINS to set out its position with regard to the Notices and any additional evidence that it considers will need to be called.

4.5 By Midday 8 March all parties (except the Council) should respond to PINS in consideration of the Inspector’s rulings and the Council’s position with details of any new evidence they consider will be required and full details of documents in line with the Inquiry rules.

4.6 By Midday on 15 March all parties have to provide realistic estimates of the time to present their cases and cross examine the other side.

4.7 The Inspector’s Note No. 3 sets out the revised timetable (Annex I)

#### **CONCLUSION**

4.8 The Inspector’s ruling is not expected until after this report goes to print, but will be available for the Committee Meeting on 13 February. The Committee on receipt of this will need to consider the Council’s position and it may be necessary, at that stage, for detailed legal advice to be given. This legal advice will be the subject of a further report for the Committee which is likely to be exempt and therefore considered in private session