

REPORT TO THE PLANNING COMMITTEE –18 FEBRUARY 2004

Joint Report of the Chief Solicitor and the Chief Planning Officer

Miscellaneous Item

Enforcement action in respect of Foxmoor Nurseries, Haywards Lane, Wellington

Background

Members will recall that at the meeting of the Committee on the 28 January 2004 consideration of a report in respect of possible enforcement action against Foxmoor Nurseries was deferred until this meeting. A copy of the original report is attached at Appendix A.

That decision to defer was made to allow:-

1. The owners and other interested parties to make representations to the Committee;
2. A further site visit to take place;
3. Detailed consideration of the report of the Traffic Examiner in respect of the highway access to the site; and
4. Further details of traffic levels to be assessed and enquiries made in respect of the bridge at Haywards Lane.

Representations on behalf of Foxmoor Nurseries

The submissions received on behalf of Foxmoor Nurseries are appended to the report – Appendix B.

Whilst many of the submissions made by Foxmoor are not accepted, in particular in relation to their reference to what constitutes B8 use, there is some new information contained in the submission.

In particular, there have been recent dealings in Foxmoor Nurseries shares which might affect the Council's existing advice on the interpretation of the word "association" in the S106 agreement. There are also references to tenants at the site who were not formerly known to the Council and also reference to a further activity of "pallet checking" by Foxmoor Nurseries themselves. The existing Counsel's advice might alter in the light of these new arrangements which were only implemented at the end of January 2004.

There is further reference to an agreement reached between the solicitors for Foxmoor Nurseries and the Council's Senior Solicitor that no enforcement action would be taken without there first being recourse to mediation. Whilst

there is some dispute as to the exact detail of what was agreed, it is accepted that the reference to such agreement in the letter from Bond Pearce of the 16 December was not challenged, and it is indeed now considered that this may be the appropriate way forward in respect of the interpretation of the term "association" in the S106 agreement. Indeed, mediation would be a necessary step if the Council ultimately decided to take Court proceedings to enforce the terms of the S106 agreement

Site Visit.

A site visit was carried out with the co-operation of Foxmoor Nurseries on the 10 February 2004. A thorough inspection of the site was carried out but it became clear during the visit that the Council and the owners of Foxmoor are not interpreting planning legislation in the same way. Whilst Foxmoor Nurseries allege that virtually all the activity on site is B1, it is the view of the Council's officers that many of the uses are B8. Such difference may ultimately only be resolved on appeal following service of enforcement notices.

Traffic Examiner's Report

The Traffic Examiner from the Vehicle and Operator Services Agency at Exeter visited the site in August 2003 in connection with an application by one of the occupiers of Foxmoor Nurseries for the a licence for an Operating Centre at the site for 14 vehicles. He notes in his report that Haywards Lane which leads to the site varies in width from 3.8 metres to 6.4 metres at the widest part, that in places the edge of the road is eroded and broken and that there is a narrow bridge 3.8 metres wide part way down the lane. He concludes:-

"I consider that an increase in traffic of any kind on (Haywards) Lane, a road which appears unsuitable for even the current volume and type of traffic, would not be beneficial to the safety of either pedestrians or vehicles using the lane."

Traffic levels and the bridge.

It is not possible to give accurate details of the levels of traffic accessing the site without a full survey. However, one of the occupiers, Scholastic Book Fairs, has an operator's licence to run 14 vehicles from the site. Conditions attached to that licence limit vehicles to 7.5 tonnes, with a limitation of hours and days of operation.

In addition however, vehicles serve five other units on site with no restriction on numbers or times of usage. The Nurseries business itself also carries out a "goods checking and inspection service" which currently is dealing with pre-built bathroom units for student accommodation. These are transported to and from site by articulated lorries.

Details of the condition of the bridge on Haywards Lane have been sought from the Bridge Engineer at the County Council and will be reported verbally.

Conclusion

There are two issues. Firstly, whether the various occupants at Foxmoor Nurseries are “associated companies” within the meaning of the S106 agreement. Secondly, even if they are associated companies are the uses being carried out B1 uses rather than B8.

Having visited the site it appears that some of the uses may be B1. However, further guidance is needed as to the interpretation of the S106 agreement in the light of the most recent changes to the shareholdings, and changes of directors, referred to in the Foxmoor Nurseries submissions. The latter needs to be clarified before a final decision on appropriate enforcement action can be taken. Foxmoor Nurseries have indicated a willingness to enter into mediation on this specific point within a limited time scale.

Recommendation

It is therefore RECOMMENDED that:-

- (1) the Solicitor to the Council be authorised to enter into mediation with Foxmoor Nurseries through an appropriate Mediation Service in respect of the interpretation of the S106 agreement only, such mediation to take place by the 19 March 2004; and
- (2) a further report be made to the Committee at its meeting on the 31 March 2004.

Chief Solicitor

Chief Planning Officer

Contacts:- Judith Jackson 356409 j.jackson@tauntondeane.gov.uk
John Hamer 356461 j.hamer@tauntondeane.gov.uk

APPENDIX A

REPORT TO THE PLANNING COMMITTEE –28 JANUARY 2004

Joint Report of the Chief Solicitor and the Chief Planning Officer

Miscellaneous Item

Enforcement Action in respect of Foxmoor Nurseries, Haywards Lane, Wellington

Background

In 1996 planning permission was granted for the relocation of Foxmoor Nurseries from its existing site at Rockwell Green to a site in the open countryside at Haywards Lane, to the east of Wellington. The permission was for the erection of two large glasshouses, but there were concerns that the site was accessed by a narrow lane off the A38.

The permission was therefore subject to a S106 agreement requiring highway works. These were the widening of Haywards Lane itself prior to commencement of use of the glasshouses and the construction of a right hand turning lane from the A38, to be constructed prior to the commencement of the use of the second glasshouse, or within a year of commencement of use of the first glasshouse.

Whilst the first glasshouse was under construction in 2000, an application was received to change the use of 50% of this glasshouse to B1 use (light industrial) for the design, production, assembly and distribution of small garden products (Application No 46/2000/022). This was refused on the 18 September 2000 on the grounds of industrial intrusion into the open countryside and the possibility of precedent.

Subsequently, a further application was made (Application No 46/2000/0340) for the same use, but on that occasion it was explained by the applicant that the permission was being sought to permit the production of “Flower Towers” by Foxmoor Nurseries themselves. A written statement to this effect was submitted. Accordingly, permission was granted but subject to a S106 agreement which sought to limit the B1 use to such uses carried out by Foxmoor Nurseries itself or associated companies. The intention was to ensure that only horticultural type B1 uses were carried out.

Following the conclusion of the S106 agreement, an application was made to vary the earlier S106 agreement such that the right hand turning lane would not be required. Evidence was submitted on behalf of the nurseries stating that the second glasshouse was unlikely to be built and that traffic generation was significantly lower than had been predicted. The application, supported

by the County Highway Authority, was granted. This variation was completed in October 2001.

The Current Position

Since that time there have been ongoing complaints that the terms of the planning permission and the S106 agreement have been breached. This has caused particular concern because of the amount and nature of traffic generated along Haywards Lane by the unauthorised uses.

As a consequence of these complaints a site meeting was held in May 2002 with the nursery owners and their solicitor at which it appeared that a level of agreement had been reached. The Council's understanding of that position was set out in a letter of the 11 July 2002. The basis of the Council's position was that only B1 uses carried out by Foxmoor Nurseries or an associated company were authorised. The Council also accepted that by virtue of permitted development rights Foxmoor Nurseries were entitled to use up to 235 sq m for B8 use (storage and distribution).

However, complaints continued to be received and a visit by the Enforcement Officer in November found that over 4000 sq m of the area was being used for B8 use. There was also evidence that the premises were being used by several individual companies and further enquiries were made during the early part of 2003, including the service of Planning Contravention Notices on the various occupants.

This led to a further meeting with the owner at which it was acknowledged that the property was occupied by different companies. However, it was claimed that all such companies were "associated" companies within the terms of the S106 agreement and therefore their activities were lawful within the terms of the existing planning permission and S106 agreement. Details of these arrangements were subsequently provided.

The Council has taken Counsel's Opinion in respect of the "association" of the companies and Counsel's advice is very firmly that the arrangements in place are not sufficient to meet the definition of an associated company within the terms of the S106 agreement. Additionally, it appears that the level of B8 use at the property far exceeds the level allowed under permitted development rights. It would therefore appear that all the companies trading at Foxmoor Nurseries other than the nurseries themselves, are unauthorised.

The Economic Development Position

However, it is acknowledged by the Economic Development Manager that the property at present is providing flexible and low cost workspace. He believes that there is clearly a demand for the type of space at Foxmoor Nurseries and that such demand will increase particularly as Taunton Trading Estate is gradually redeveloped.

He believes that currently some of these types of businesses are being lost to neighbouring authorities and that that problem needs to be addressed. Furthermore, his view is that Taunton Deane needs to maintain a diverse/balanced economy and the types of businesses located at Foxmoor should have a place in the Taunton economy. Whilst there may be a supply of good quality workspace in the medium term, he does not believe this is the case for low cost space.

The Owners Position

The owners were advised of the outcome of the Counsel's Opinion and the fact that the situation at Foxmoor was to be reported to the Planning Committee to consider enforcement action. As a result, a meeting was held with the owners and their solicitor to try and establish any common ground.

The meeting concentrated on the interpretation of the S106 agreement and the meaning of "associated company" within that document. Since there is no definition of associated company within the document, it was agreed that the parties would need to look to extraneous material to ascertain the intentions of the parties. There was a suggestion by the owners that at the time the Council entered into the S106 agreement it was aware of "non conforming" uses at the property and that the S106 agreement was entered into in full knowledge of these.

The Council's position was that it had entered into the agreement on the basis that B1 uses by associated companies would be those related to the production of Flower Towers and similar products. Each side was to submit to the other evidence in support of their viewpoint, and if the position was still unclear it was agreed that mediation as to the interpretation of the agreement could be sought.

Since that meeting the Council has supplied evidence to the owners' solicitor indicating that the proposed B1 use was to be the production of Flower Towers by Foxmoor Nurseries, or one of its associated companies, or similar garden products.

The owners have not been able to supply any evidence to the contrary as they have not yet obtained files held by former solicitors. They have been advised that the matter was going to be reported to the Planning Committee at its meeting on the 28 January and asked for the submission of any evidence prior to the drafting of this report.

Assessment

Most, if not all, of the B1 activities at Foxmoor Nurseries would appear to be in contravention of the S106 agreement relating to the site, and the bulk of the B8 uses also in contravention of the planning permission. Whilst the views of the Economic Development Manager are acknowledged, the Local Plan Inspector, who reported in September 2003, has not identified any shortfall in the allocation of B1 or B8 land.

In addition, the Chief Planning Officer considers there are other factors which make this site unsuitable for a general B1 or B8 use and that it is unlikely that planning permission would be granted for such use, even with the imposition of conditions. It is therefore considered expedient to take enforcement action in respect of the unauthorised uses at Foxmoor Nurseries.

However, any enforcement action must be reasonable and measured and take account of the fact that businesses located at Foxmoor will need time to re-locate. The Council would normally also allow a planning application to be made in respect of an unauthorised use prior to the commencement of enforcement action.

In this case, the recommendation to Members allows both a reasonable period of time for companies to re-locate prior to expiry of the enforcement notices, and also time for the owner of the nurseries to make a planning application to seek to regularise the position within the time for compliance, albeit that the indication is that such application is unlikely to be successful.

In this respect Members should note that although the site currently provides low cost units, in the event that permission were to be granted it is likely that rents would rise given the site's close proximity to the motorway junction.

Recommendation

It is therefore RECOMMENDED that:-

- (1) the Solicitor to the Council be authorised to serve enforcement notices on the occupiers of each of the unauthorised uses currently trading at Foxmoor Nurseries requiring the uses to cease within a period of 12 months from service of the notices;
- (2) the owner of Foxmoor Nurseries be advised that any application seeking to regularise the position should be submitted expeditiously; and
- (3) the owner of Foxmoor Nurseries be advised against any further lettings at the Nurseries without prior confirmation that the Council considers such proposed letting to be for an authorised use.

Chief Solicitor

Chief Planning Officer

Contacts:- Judith Jackson 356409 j.jackson@tauntondeane.gov.uk
 John Hamer 356461 j.hamer@tauntondeane.gov.uk

APPENDIX B

**Submissions of Foxmoor Nurseries Limited ("Foxmoor")
in response to Joint Report of the Chief Solicitor
and the Chief Planning Officer to the Planning Committee
dated 28 January 2004**

The following submissions are put forward in response to the Report of the Chief Solicitor and the Chief Planning Officer dated 28 January 2004 ("**the Report**") in which it is recommended that Enforcement Notices be served upon Foxmoor and each of the unauthorised users currently trading at Foxmoor Nurseries.

1. **Grounds for enforcement action**

1.1 It appears from the Report that the grounds for taking enforcement action are, first, that Foxmoor is acting in breach of the user conditions contained in the Section 106 Agreement dated 26 March 2001 ("**the s.106 Agreement**") and, secondly, that unauthorised B8 usage is taking place at the property which exceeds permitted levels. Both of these grounds for taking enforcement action are challenged, in turn, as follows:

2. **Breach of Section 106 Agreement User Conditions**

2.1 The Council alleges that Foxmoor is acting in breach of the B1 user condition contained in Clause 2(c) of the s.106 Agreement. Clause 2(c) states that "*the permitted use shall only be carried out by Foxmoor Nurseries Limited or any associated or subsidiary companies which may from time to time be formed or by individual persons associated therewith ("**the Associated Users**").*" The Council claims that some or all of the businesses currently occupying the Foxmoor site, and who are carrying on B1 uses on the site, do not comply with Clause 2(c) in that those businesses are not "associated users" within the meaning of Clause 2(c). Foxmoor contend that all the existing B1 users on their site are indeed "associated users" within the meaning of Clause 2(c), on

the basis that they are either companies who are associated, as individuals, with Foxmoor, or represent sole traders who are associated with Foxmoor.

2.2 The key issue to date between Foxmoor and the Council in ascertaining whether or not Foxmoor is acting in breach of Clause 2(c) has been defining the word "associated" as it appears in Clause 2(c). The Council's position throughout has been that the phrase "associated" should be defined very narrowly on the basis of a strict statutory definition of the word "associated", as would be found in the relevant provisions of the Companies Act 1985 and the Income and Corporation Taxes Act 1988. In short, such statutory definitions require there to be shown to be either a substantial element of shareholder ownership or alternatively, a substantial degree of executive control through executive involvement in operational matters. The Council does not consider that the existing B1 users satisfy such a definition.

2.3 Foxmoor contend that the word "associated" should not be defined by reference to a strict "Companies Act" statutory definition, but should be given its normal everyday English language meaning, such as (to paraphrase the definitions appearing in the Oxford English Dictionary) "*connected with, joined with, or to have frequent dealings with*". Foxmoor support their wide interpretation of this phrase on the basis that:

(i) the s.106 Agreement contains no express definition of the word "associated", and if the parties had intended it to have a narrow statutory based meaning then such a definition would and should have been included. In the absence of any express definition, the wider normal English language meaning should apply;

(ii) the word "associated" was added into the s.106 Agreement specifically at the request of Foxmoor and its previous solicitors in order to allow greater latitude than would have been afforded simply by the inclusion of the word "subsidiary", which had appeared in the original first draft of the s.106 Agreement and the heads of agreement which preceded it. The fact that the word "associated" was inserted at a later date, without any specific definition, clearly evidences that the intention of the

parties at the time was to permit the application of a wide definition of the phrase "associated";

- (iii) the principal B1 user which the s.106 Agreement was designed to allow at the time it was entered into was Flower Tower Company Limited ("**Flower Tower**"). It was Flower Tower's light industrial activities on the site that the s.106 Agreement was specifically designed to cover. At the time of the s.106 Agreement Flower Tower was not a subsidiary company of Foxmoor, and Foxmoor held no substantial shareholdings in it. The only link between Foxmoor and Flower Tower were that 2 of the 3 directors of Flower Tower were also directors of Foxmoor. Applying the Council's strict Companies Act definition of "associated" to Flower Tower would have meant that Flower Tower itself would not have come within such a definition. Flower Tower would however have fallen within the wider, plain speaking, definition of "associated" that Foxmoor submit to be the correct intended definition.

3. **The current B1 Users situate at Foxmoor Nurseries**

- 3.1 The following is a description of the current businesses occupying space at Foxmoor Nurseries which are all presently carrying out B1 light industrial use within the meaning as required by the s.106 Agreement and associated planning permission (i.e. light industry use incorporating process function including testing, development, planting, assembly, packing, storage and despatch). The reference to B1 (light industrial) use in the 2001 Planning Permission and the s.106 Agreement is clearly intended to have its statutory definition as contained in the 1987 Use Classes Order. There is no attempt to cut down that definition by any condition contained in the planning permission. Class B1 includes use for "any industrial process". "Industrial process" is defined by Art 2 to the 1987 Order as a process for or incidental to, amongst others, the following purposes:

- (a) the making of an article or part of an article

- (b) the altering, repairing, maintaining, ornamenting, finishing, cleaning, washing, packing, canning, adapting for sale, breaking up or demolition of any article
- (i) Flower Tower – they assemble, pack and despatch plastic garden and household product items of varying designs which are manufactured off site. The primary activity is the assembly of the garden and household products, a use clearly within the definition of an industrial process, with the subsequent packing and despatch of the assembled products being incidental to that primary activity.
- (ii) RH Fibreboard Limited – manufacturers and suppliers of cardboard and other packing materials, who supply packaging for Foxmoor and Flower Tower products, and store on site materials and stocks of goods manufactured by them. The primary activity is the manufacture and finishing of cardboard and other packing materials, again clearly within the definition of an industrial process with the storage and subsequent despatch of such manufactured materials being incidental to that primary activity.
- (iii) Office Furniture Direct Limited – assemblers and suppliers of office furniture. They store on site quantities of material for the assembly of their products, as well as storing quantities of finished products prior to their despatch. Again, the primary activity is the assembly of units with the storage of materials and the finished goods being incidental to that process.
- (iv) Scholastic Book Fairs Limited – they supply books to schools which are sold at book fairs. They obtain, sort, and pack books supplied by wholesalers ready for supply to schools, and retain on site stocks of books and cabinets awaiting display and sale at such book fairs. The sorting and packing of goods for subsequent sale is clearly within the definition of an industrial process and is the primary activity on the site. The sales to schools and individual parents take place off site and

would not, in any event, form part of any warehouse or distribution use within Class B8 of the 1987 Order.

- (v) Cards and Stationary Limited – manufacturers and suppliers of cards and stationary who store finished items on site following manufacture for sorting and despatch. Again, the primary activity is the manufacture and finishing of goods with the subsequent supply being incidental to that use.
- (vi) Cider Woods Theme Beds – an incorporated business owned by Mr Ian Addison who designs and manufactures beds, and who store on site materials used for the manufacture of their beds as well as storing and despatching finished products. The design and manufacture of beds is clearly an industrial process within the meaning of the 1987 Order.
- (vii) Georgina Cardew – an unincorporated sole trader who weaves textiles. She stores materials on site prior to weaving, and subsequently stores finished products prior to despatch. The weaving of textiles is the primary activity and is clearly within the definition of an industrial process within the meaning of the 1987 Order.

3.2 The Report contains no particulars of the users which the authors of the Report consider to be within the B8 category. It is clear, however, that this cannot include any of the above businesses.

4 **B1 Users – Shared Services and Activities with Foxmoor**

4.1 In support of Foxmoor's contention that each of the above B1 users are "associated users" within the meaning of Clause 2(c) of the s.106 Agreement, to the extent that they share operational activities and services with Foxmoor, the following points should be noted:

- (i) Foxmoor provides operational assistance to each of the B1 users through the supply of forklift truck services when required for the movement of their products and materials.
- (ii) Foxmoor provides joint office facilities on site for reception and administration purposes.
- (iii) Foxmoor staff provide office support and reception services for the B1 users through telephone answering, fax receipt and other office support services.
- (iv) Foxmoor provide additional staff to the B1 users to assist in storage and despatch activities when needed during busy periods.
- (v) All the B1 users share power and water services with Foxmoor.

5 Inter-Company Shareholdings and Directorships between Foxmoor and other B1 Users

5.1 As from 23 January 2004 each of the B1 limited company users, being RH Fibre Board, Scholastic Book Fairs, Office Furniture Director and Cards and Stationary Limited have acquired shareholdings of 20% each in the shares of Foxmoor. The two unincorporated B1 users, Mr Ian Addison of Cider Woods Theme Beds and Miss Georgina Cardew, have both been appointed directors of Foxmoor. There is attached to this Report as Schedule 1 copies of the relevant Share Certificates issued to each of the four limited company B1 users, copies of the director appointments in relation to the two unincorporated traders, together with copies of the relevant resolutions authorising such actions.

6 Compliance with Clause 2(c) of Section 106 Agreement

6.1 Taking account of the sharing of operations and facilities described in paragraph 4.1, together with the substantial inter-company shareholdings and individual directorships as described in paragraph 5.1, Foxmoor submits that as at the present time all of the current B1 users clearly fall within the definition of "associated users" within Clause 2(c). Although Foxmoor

continues to submit that its looser definition of "associated user" more accurately reflects the true intention of the parties to the s.106 Agreement, it contends that the inter-company shareholdings and related directorships entirely satisfies the narrower statute based definition that the Council seeks to apply. On the basis of either interpretation, therefore, the B1 users qualify as "associated users", and there is currently no breach of this provision of the s.106 Agreement.

7 **Linkage of B1 User to Horticultural User**

7.1 The Council has sought to indicate at various times that any B1 user on the site must be carrying out some user that is related to horticulture. Foxmoor submits that such an interpretation is neither supported by the wording of the s.106 Agreement and its related planning permission, and nor does it represent the true intentions of the parties at the time of the s.106 Agreement. The following points should be noted:

- (i) Flower Tower, whose activities the s.106 Agreement was originally designed to accommodate, was not carrying out horticultural activities. Its uses have always been, and continue to be, B1 light industrial uses comprising the assembly packaging and despatch of plastic garden and household products.
- (ii) Horticultural use was specifically allowed by the original primary 1996 permission allowing Foxmoor to relocate and transfer its horticultural operations to Haywards Lane. Ongoing horticultural use was therefore already fully covered, and the subsequent Planning Permission of March 2001 which permitted a change of use to B1 light industrial use was needed specifically because light industrial use of a non-horticultural type was to be carried on the premises. Non-horticultural use was therefore the very reason behind the grant of the March 2001 Change of Use and accompanying s.106 Agreement.
- (iii) Foxmoor note that Recital (4) to the s.106 Agreement states that "*the Council is concerned to ensure that the permitted use remains related to the existing horticultural use of the land.*" Foxmoor submit that this

recital (although of no legal effect in itself) was given effect through the provisions of Clause 2(d), which stipulated that the permitted B1 use should be conditional upon Foxmoor continuing to operate or trade from the site. Foxmoor was engaged in horticultural activities at the time of the s.106 Agreement (and continues to be so engaged), and its continuing operations on the site would thereby satisfy the intention set out in Recital 4 (i.e. retaining a link with horticultural use).

8 The trading activities of Foxmoor

8.1 Although not an issue expressly raised by the Council in its Report, Foxmoor is aware that the Council has drawn attention at various times during this dispute to allegations that Foxmoor is no longer trading from the site, and that in those circumstances the condition set out in Clause 2(d) is not being fulfilled, thereby disallowing the permitted B1 usage. Foxmoor wishes to make clear, to avoid any misunderstanding on this point, that Foxmoor continues to trade actively from the site. Its business involves two primary operations. The first is as a partner in a joint venture horticultural business with Frank Rowe Limited relating to the cultivation of fuchsias and geraniums. Under the terms of the joint arrangement Foxmoor provide growing areas, as well as technical expertise and support in relation to the cultivation of the plants, together with further staff assistance in relation to cultivation, sales and accounting functions. Foxmoor's second business operation on the site involves the provision of a goods checking and inspection service on behalf of customers. Customers deposit consignments of goods with Foxmoor who then proceed to check those consignments for quality control purposes, palletising and bar coding as necessary. The customers then subsequently collect those checked goods from Foxmoor. Foxmoor submits that this activity falls squarely within its B1 light industrial permission.

9 Other horticultural users

9.1 In order to avoid any misunderstanding Foxmoor wish to clarify what other horticultural users there are on the site other than the horticultural activities of

Foxmoor and Frank Rowe which have already been described in paragraph 8.1.

9.2 The only other horticultural user is Riverford Organics Limited. They presently occupy 1260 square feet of premises and are solely engaged in the cultivation, production and delivery of organic plants. Foxmoor submit that this is a clear example of horticultural use which falls within the terms of the original 1996 Permission.

10 **Unauthorised B8 User**

10.1 In their Report, the Council claim that the second ground for bringing enforcement action against Foxmoor and the other site users is the excessive level of B8 usage, in the form of distribution activities, which materially exceed existing B8 user limits.

10.2 Foxmoor deny entirely that there is presently any breach of B8 usage limitations. The B1 usage which is expressly permitted under the s.106 Agreement and its related planning permission is expressly stated to include "*light industrial use incorporating a processing function including testing development planting assembly packing storage and despatch*". Foxmoor wishes to make clear that the only storage and despatch of goods that is presently being carried out on the site relates to (i) the storage by existing B1 users of either materials or finished products and (ii) the subsequent despatch by the B1 users of their finished products. There are no distribution centre activities being carried out on the site by any other parties which could constitute unlawful B8 user. Foxmoor submits that the storage and despatch of finished goods by the B1 occupants is expressly permitted under the wording of the B1 definition contained in the s.106 Agreement and its associated Permission and is clearly incidental to an industrial process as defined in the 1987 Order.

10.3 A similar example of ancillary storage and despatch activities are those carried out by Foxmoor in the course of carrying out its pallet checking service. This involves not only the storage of customers' goods for checking, but their subsequent collection and despatch once Foxmoor has completed its checking

operations. These activities are fully permitted under Foxmoor's B1 user entitlement. Foxmoor consider it possible that third parties may have confused the delivery and collection of consignments of goods to Foxmoor for checking and palletising as constituting some form of commercial distribution centre operation, which is certainly not the case.

10.4 Foxmoor is aware that the Council were concerned at the storage activities of a previous occupant of the site, Bales Removals. Bales have now vacated the site entirely.

11 **Summary**

11.1 For the reasons stated in paragraphs 4 to 10 Foxmoor submits that the Council has no basis for claiming that there has been any breach of Clause 2(c) of the s.106 Agreement by itself or any other site users, as all current B1 users properly fall within the definition of "associated users".

11.2 However, notwithstanding this submission, should the Council still be minded to proceed with enforcement action in respect of such an alleged breach, the Council should be aware their solicitor Judith Jackson expressly agreed with Foxmoor's solicitors at a meeting on 11 December 2003 that no enforcement action would be taken in respect of this alleged breach until the parties had referred to mediation the issue of the definition of "associated users" within the s.106 Agreement. We attach the letter from Foxmoor's solicitors, Bond Pearce, at Schedule 2 which confirms the agreement reached. For the Council to now proceed with enforcement action on this issue without first seeking to settle the matter through mediation, would, it is submitted, be a serious and unjustified breach of an agreement reached in good faith between the respective parties' solicitors.

11.3 Foxmoor submits that, for the reasons detailed in paragraph 10, there is at present no unauthorised B8 user being carried out on the site, and that all storage and despatch activities that are being conducted are all being carried out by the existing B1 users squarely within the terms of the permitted B1 usage as described in the s.106 Agreement and related permission.

11.4 Should the Council, notwithstanding the submissions of Foxmoor set out in this Report, decide to proceed with enforcement action against Foxmoor it should be very aware of the dire financial consequences of such action for Foxmoor. The serving of enforcement notices, whatever their validity, will place Foxmoor in breach of its banking covenants, which will almost certainly lead to the immediate withdrawal of vital banking support. This will cause Foxmoor to cease trading, with the likelihood of substantial financial losses, together with a loss of jobs. It will of course also bring about the cessation of the supply of flexible low cost work space for small businesses currently provided at the nursery site. The Council's own Economic Development Manager has specifically recognised the lack of availability of such space in the Taunton area.

Bond Pearce, Solicitors for Foxmoor

6 February 2004

SCHEDULE 2

**BOND PEARCE
LETTER OF 15 DECEMBER 2003**

Ms Judith Jackson
Senior Solicitor, Legal Services
Taunton Deane Borough Council
The Deane House
Belvedere Road
Taunton TA1 1HE

Darwin House, Southernhay Gardens
Exeter EX1 1LA

Telephone 01392 211185
Direct Dialling 01392 415210

Fax 01392 435543
DX 8321 Exeter

E-mail atobey@bondpearce.com
www.bondpearce.com

Our Reference
ABT/AM

Your Reference

15 December 2003

Dear Ms Jackson

**FOXMOOR NURSERIES
SECTION 106 AGREEMENT**

I thought it would be helpful to all parties if I wrote following our meeting on 11 December to summarise the various points agreed:

- 1 With regard to the "associated company" user issue, we agreed that this was a complex matter that merited further evidential investigation on both sides. We would therefore look further at our respective background files and see if the contents of those files cast useful light upon the intended definition of "associated company" and then report back on our findings.
- 2 Should that further evidential investigation cast no further light upon the definition of "associated company", then we would agree to refer to mediation the issue of the definition of "associated company" as used in the Section106 Agreement, with the aim of seeking to find a mutually acceptable definition for that phrase. We agreed that pending the outcome of any such mediation it would be inappropriate for the Council to commence any form of enforcement proceedings.
- 3 You agreed to take immediate steps to remove the Pending Land Action entry in a Land Charges Register as against Foxmoor Nurseries. Please confirm as soon as your application to remove has been made.

Both my clients and myself considered last Thursday's meeting to be most helpful in clarifying a way forward in resolving the "associated company" user issue. My clients remain committed to seeking a way forward that will avoid the need for costly and unpleasant litigation, and I am confident that the framework as described above will assist towards such a resolution.

I look forward to hearing from you when you have had chance to review your files on this issue. I confirm that I will do likewise.

Yours sincerely

Andrew Tobey
Partner