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Date: 30 Apr 2012

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To: All Members of the Development Control Committee

Councillors: Neil Butters, Nicholas Coombes, Gerry Curran, Liz Hardman, Eleanor Jackson, Les Kew, David Martin, Douglas Nicol, Bryan Organ, Martin Veal, David Veale and Brian Webber

Chief Executive and other appropriate officers
Press and Public

Dear Member

Development Control Committee: Wednesday, 9th May, 2012

Please find attached a **SUPPLEMENTARY AGENDA DESPATCH** of late papers which were not available at the time the Agenda was published. Please treat these papers as part of the Agenda.

Papers have been included for the following items:

14. **LAND AT FORMER FULLERS EARTHWORKS, FOSSEWAY, COMBE HAY, BATH (Pages 3 - 88)**

Yours sincerely

David Taylor
for Chief Executive

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Bath & North East Somerset Council	
MEETING:	Development Control Committee
MEETING DATE:	9th May 2012
REPORT OF	David Trigwell, Divisional Director of Planning and Transport Development Maggie Horrill, Planning and Environmental Law Manager (01225 395174)
REPORT ORIGINATOR	Ms Lisa Bartlett, Development Manager (01225 477281)
TITLE:	LAND AT FORMER FULLERS EARTH WORKS, FOSSEWAY, COMBE HAY, BATH
WARD:	Bathavon West
AN OPEN PUBLIC ITEM	

AGENDA
ITEM
NUMBER

BACKGROUND PAPERS

- (i) **Application for planning permission 00/02419/FUL**
- (ii) **Supporting evidence submitted with the Certificate of Lawful Existing Use Application in 2006 (06/03301)**
- (iii) **Development Control Committee Reports of 29 October 2008; 26 February 2009; 18 May 2011**
- (iv) **Documentation related to enforcement notice appeals dated 20 April 2009**
- (v) **West of England Joint Waste Core Strategy, adopted March 2011 (JWCS)**
- (vi) **High Court Judgment of Mr. Justice Lindblom dated 3 December 2010**
- (vii) **Other historic applications and correspondence**
- (viii) **Statement of Common Ground from call-in Inquiry 2003 in respect of application 00/0241/FUL**
- (ix) **Enforcement Notices dated 25 February 2009**
- (x) **Environmental Impact Assessment – Screening Opinion**
- (xi) **Aerial photographs and 2003 photographs**
- (xii) **National Planning Policy Framework (NPPF)**

ANNEXES

Annex A – Development Control Committee Report of 5 January 2012

Annex B – Development Control Committee Report of 30 March 2012

Annex C - Map in Joint Waste Core Strategy showing boundary of allocation

Annex D- Proposed site plan – Residual Waste Facility

Annex E – Plan showing Areas A-E

Annex F – June 2002 Aerial Photograph

1. PURPOSE OF REPORT

1.1. This Report arises from the Resolution of this Committee at its Meeting on 30 March 2012 and should be read in conjunction with and be informed by the Report to this Committee at its Meeting on 5 January 2012 (Annex A)

1.2. At the Special Development Control Committee Meeting on 30 March 2012, the Committee **RESOLVED**:

- (I) To note that material progress had been made in relation to the Committee's resolution of 5th January 2012 and that Officers were making progress in negotiations with the site owner's Agent with a view to bringing forward a Residual Waste Facility on this site;
- (II) That Officers continue to work with the site owner's Agent to secure the delivery of a Residual Waste Facility on the land;
- (III) That, in the light of progress on negotiations, it was not considered expedient to take enforcement action today (30 March 2012) against the breaches of planning control currently identified at the site as set out in the previous report to the Committee;
- (IV) That an update report be submitted to the Committee in May to ensure that no immunity from enforcement action occurs in respect of the alleged breaches of planning control; and
- (V) That enforcement action be considered and appropriate weight be given to the issue of expediency in the light of the update report

2. PRE-APPLICATION SUBMISSION FOR RESIDUAL WASTE FACILITY

2.1. The Planning Consultant dealing with the proposal on the Residual Waste Facility gave a short presentation on the pre-application submissions for Members information at the March Committee Meeting. The pre-application submission have now been considered by the Council's Development Team. The main conclusion is that it is not considered to be acceptable in its current format, but could be made so with some revisions to the site layout.

2.2. The site remains within the Green Belt and this is listed as one of the Key Development Criteria in the Joint Waste Core Strategy, which states that any development should be designed to minimise any impact on the openness of the Green Belt. Whilst the allocation of the site for residual waste treatment establishes the principle for this type of development at the site, the justification for the non residual elements (the HWRC and existing waste uses beyond the area of established industrial use rights) remains to be demonstrated.

2.3. Given the location of the site, in close proximity to the Cotswold AONB and on the southern gateway to the World Heritage City of Bath, it is considered that the current proposals represent an over development of the site. What is required is a design and landscaping lead approach to developing the site with the aim of further concentrating the proposed new built development around the existing buildings that are on the site and the provision of a wider landscaped buffer around the perimeter of the site without the use of large scale bunding. This would ensure that the impact on the openness of the Green Belt is minimised as sought by the Joint Waste Core Strategy.

2.4 The Owners Agent has been advised of the Development Team's initial response which in summary is as follows:-

1.0 Need to establish a landscape buffer zone to screen the buildings and relocate buildings within this zone, There is a need for structural landscaping to be the design driver here. Specifically there are concerns regarding the two buildings fronting the A367

2.0 The principle of non residual waste treatment facilities has not been established in the Green Belt by the JWCS and the need to take account of impact on the openness of the Green Belt in this location remains a Key Development Criteria;

3.0 Use of large scale bunding is not appropriate.

2.5. Any response received to this feedback will be reported to Committee if received before the 9th May.

3. SUMMARY OF CURRENT USES AND POTENTIAL LAWFULNESS

3.1. The report to your meeting in January of this year provided detailed advice on the nature of the current uses across the site and Members saw these for themselves at a site visit just prior to the Special Planning Committee Meeting in March. The January report also set out why it is considered that breaches of planning control exist across the site and evidence regarding when, on the balance of probability, these commenced.

3.2 In summary, it is considered that breaches of planning control exist at this site consisting of:

- (1) a mixed general industrial and storage and distribution use within Area A, part of Area E, Area D as well as the car parking area in front of the dwellings;
- (2) use of a separate planning unit for the storage, distribution and repair of scaffolding;
- (3) use of a separate planning unit as a stonemasons yard;

Furthermore, based upon the evidence as set out, it appears that the changes of use across the site commenced as follows:

- The mixed use of the wider site appears to have commenced sometime after Spring 2003. The Committee requested further detail on this matter which resulted in advice at the January Committee from officers that it appears the uses occurred no sooner than the end of January 2003. However, there is no definitive evidence of this. As referred to in the January Committee Report it is clear from aerial photography reliably dated at 1 June 2002, that the central part of the site was the only area (mainly including area A) in industrial use at that time;
- It is clear that the self-contained compounds did not physically exist until after 2005.

3.3 Further representations have been made by the landowners through their legal representative just before the deadline for preparing this report. These relate to their consideration of the history of the site and what they consider is not a breach of planning control. This included a letter and a sworn statement from a former employee of Laporte Industries, a former operator of the site.

3.4 The sworn statement elaborates on the nature of the use of land and buildings across the site and is accompanied by photographs. It is not considered to raise issues that change the conclusions reached on the claim that there was an historic un-enforceable use prior to the current activities taking place as set out in the January report.

3.5 In summary, the letter states that:

- They are surprised by the contents of the January report and officer's comments regarding the conclusions of the Inspector and Secretary of State (SOS) following the Inquiry in 2002, particularly paragraph 3.015 regarding the "works" sited at area A being a distinct and separate planning unit in B2 use;
- This is a different interpretation of the report and decision previously taken by Council officers including those involved in the 2002 inquiry;
- It had always been accepted prior to this that the Inspector and Secretary of State had agreed that the entire site had B2 use;
- It is therefore assumed that the officers preparing the January report were unaware that they were reading the report and decision in a different way;

The letter goes on to set out a list of occasions when an opposite interpretation has been reached which includes:

- A letter dated 21 May 2004 from the former Head of Planning Services;
- A May 2004 Counsel's opinion;
- A report to the Development Control Sub-Committee B on 2 June 2004;
- A July 2004 pre-inquiry change to the revised deposit draft local plan;
- The public inquiry into the 2005 revised Deposit Draft Local Plan;
- Leading Counsel's advice in May 2006 stating that, having been provided with documents relating to the call-in inquiry, the decision and Inspector's report, a successful appeal could be maintained on the basis of a B2 use having occurred by 31 December 1963;

3.4 The landowner states that an explanation of what basis the Council has for officers changing their interpretation and why there is now disagreement. They go on to set out their views on the lawfulness of the site which in summary is:

- All uses are within the historic lawful B2 use;
- There has historically been a single planning unit being an area in single use ownership and occupation which is lawful for those purposes;
- This was agreed by all parties that the whole site (including areas A, E and D);
- The point at 3.09 of the January report that the extent of lawful use was not previously subject to in-depth consideration as it was a highly material factor discussed at length in the 11 day public inquiry;

- Reference to a legal case regarding reports and/or decision letters must be read in good faith as a whole and not legalistically (South Somerset DC v SOS 1993). If the Inspector's report is taken as a whole, the site as one planning unit was addressed and the conclusion was accepted by the SOS as did the Statement of Common Ground and the Council's position is set out in paragraphs 185-191 of the Inspector's report;
 - It must have followed that the site was a single planning unit and as the buildings and hardstanding had B2 use, such B2 use would have applied throughout the site;
 - No case was made by third parties to the effect that the planning unit should be limited to the buildings and hardstandings;
 - If the inspector had come to a different conclusion, it would have been spelled out in detail in his report;
 - For the purposes of policy, the relevance of hardstandings and buildings were set out in paragraph 409 of the Inspector's conclusions;
 - A number of paragraphs are referred to the context of how the inspector has referred to the whole site and its use;
- 3.4 Paragraph 3.015 of the Officer's report regarding the works being a distinct and separate planning unit (confined to area A) is wholly misconceived which invites the Council to make just the same legal error it did when it resolved to bring enforcement action in 2008. In their view, the only conclusion one can properly come to when reading the Inspector's report as a whole rather than selective quotations in the January report is that the site was agreed to be a single planning unit in B2 use.
- 3.5 Regarding the SOS's conclusions the letter considers the January report is misleading and the SOS's views on the potential fallback was the same as the Inspector's. That use continues in B2, in their view, and to refer to a more recent 10 year immunity period is an unnecessary exercise and to do otherwise would be a "grave mistake".
- 3.6 In conclusion, the letter states:
- The planning unit has been clearly defined by all parties previously as comprising the are in current use for B2 purposes and nothing smaller;
 - Circumstances have not changed since then either in relation to the use or the extent of the site;

- Counsel's opinion has twice advised the council that it would be inexpedient to enforce;
 - Mr Upshall's further (statement) reinforces the fact that B2 use extended over the entire site;
 - It would be completely inexpedient to enforce now;
 - Strongly recommend the Council reconsiders the contents of the January report in an objective fashion, if the report being taken back to committee is based upon similar inaccuracies then there is a real risk of the Council making decisions on a wrong legal basis.
- 3.7 In response to this, it is necessary to emphasise that the inspector and SOS took their views of what was happening on the site in 2002 and evidence available, as did Council officers involved at that time. In paragraph 3.04 onwards of the January report includes reference to evidence submitted with Certificate of Lawful Existing Use or Development (CLEU). Since that time, we, have had the benefit of site visits, further evidence and advice and have come to a different view of what is happening on the site in 2012 which the Council is entitled to do. Ashfords have been made aware of this view on previous occasions. The January report was made available to them at that time and they are entitled to take an alternative view. The landowner is also entitled to try and establish, where doubt has been cast, to submit a further application for a CLEU. There is no legal obligation upon them to do so and in the absence of that, officers have reached a view taking the evidence available now in the same manner, on the balance of probabilities.

4. POLICY UPDATE

4.1. The policy background relevant to this matter was set out in the Committee Report in January and therefore the January Report should be read in conjunction with this Report.

4.2. National Planning Policy Framework (NPPF) – March 2012

4.2.1. On 27 March central government published the NPPF. The following is a brief update explaining the main implications of this with respect to this case.

4.2.2 The previous advice on Enforcement was contained within Planning Policy Guidance note 18 "Enforcing Planning Control" which has now been replaced by the NPPF. The

approach that should be taken to Enforcement is summarised in paragraph 207 of the NPPF which states that:

“Effective enforcement is important as a means of maintaining public confidence in the planning system. Enforcement action is discretionary, and local planning authorities should act proportionately in responding to suspected breaches of planning control. Local planning authorities should consider publishing a local enforcement plan to manage enforcement proactively, in a way that is appropriate to their area. This should set out how they will monitor the implementation of planning permissions, investigate alleged cases of unauthorised development and take action where it is appropriate to do so”.

4.2.3. The NPPF policies apply immediately and are therefore material considerations even though the continuation of the plan led approach is confirmed. Policies adopted since 2004 in accordance with the Planning and Compulsory Purchase Act 2004 retain full weight for 12 months even if there is a “limited degree” of conflict with the NPPF. If there is more than a “limited degree” of conflict, this raises a question about the weight to be given even to new style development plan documents. In “other cases” (i.e. plans not adopted in accordance with the 2004 act) and after 12 months due weight should be given to relevant policies in existing plans according to their degree of consistency with the NPPF. The BaNES Local Plan was adopted in 2007 although it was adopted under the previous development plan procedures before the 2004 act brought in the need for Local Development Frameworks.

4.2.4. Policies in emerging plans may be given weight according to the stage of preparation; the extent to which there are unresolved objections; and the degree of consistency of relevant policies in the emerging plan to the NPPF. The BaNES emerging Core Strategy has reached the stage of being examined and this stage took place in January and the implication for the main applicable policies are set out below.

4.2.5 The Joint Waste Core Strategy has been adopted through the post 2004 procedures and therefore still has full weight as part of the up to date development plan. However, any policies with more than a “limited degree” of conflict with the NPPF may need some reappraisal with NPPF policies.

4.2.6 NPPF Green Belt:

Planning Policy Guidance note 2 “Green Belts” is replaced but the government has re-affirmed the great importance of Green Belts. The 5 “purposes” of including land in the Green Belt are retained. There is a need to “plan positively to enhance the beneficial use of the Green Belt” which is similar to the previous advice regarding the objectives for the use of

land. It is confirmed that “inappropriate development” is by definition “harmful to the Green Belt and should not be approved except in very special circumstances”. Similar to the previous advice, it is necessary in decision making to ensure that substantial weight is given to any harm to the Green Belt. Furthermore, “very special circumstances” will not exist unless the potential harm to the Green Belt “by reason of inappropriateness and any other harm” is “clearly outweighed by other considerations”. New buildings remain to be considered “inappropriate development” subject to similar exceptions as in PPG2. Other forms of development relating to mineral extraction, engineering operations transport infrastructure, the re-use of buildings as well as developments under “community rights to build orders” are not inappropriate but only “provided they preserve the openness of the Green Belt and do not conflict with the purposes of including land in the Green Belt”.

4.2.7 The local plan policies set down in the report from January are considered to be generally consistent with the NPPF as they relate to this case. The planning policy team is currently carrying out a detailed appraisal and any variations to this general position will be reported verbally to your meeting.

4.2.8 Core Strategy policy CP8 is again broadly consistent with the NPPF and should be regarded as a material consideration. The main area of difference between NPPF and Green belt policy in B&NES (within this or LP policies) relates to Major Existing Developed Sites (MEDS) which are discussed in the January report.

4.2.9 Other Policy Issues raised by the NPPF:

The guidance is careful in explaining that the plan led system remains and that the statutory status of the development plan has not changed as the “starting point” for decision making. There is however also a “presumption in favour of sustainable development” which it explains should be the “golden thread” running through plan making and decision-taking. Sustainable development includes economic, social and environmental aspects. Where the development plan is absent, silent or relevant policies are out-of-date, permission should be granted unless any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in the NPPF taken as a whole; or specific policies in the NPPF indicate that development should be restricted.

4.2.10 It is necessary to contribute to and enhance the natural and local environment by landscape protection, geological conservation; Recognise wider benefits of ecosystems; Minimise impacts on biodiversity; preventing new and existing unacceptable levels of soil, air, water or noise pollution or land instability; great weight should also be given to

conserving landscape and scenic beauty including within “Areas of Outstanding Natural Beauty” – development near to AONBs such as in this case is not explicitly mentioned.

Again, the general approach in these respects is considered consistent with the policy background set out previously in the January Committee Report.

4.2.11 The Bath and North East Somerset Core Strategy

The January committee report referred to policies DW1, CP6 and CP8 of the Core Strategy which now have a degree of additional weight since they have been subject of an examination. The policies have been approved as a material consideration for Development Management purposes.

Policy DW1 (of the Core Strategy) is broadly consistent with the NPPF. There is a potential area of debate around housing land supply figures. However, this is not related to the issues in this case. Therefore, policy DW1 remains a material consideration in this case.

Policy CP6 (Environmental Quality) is broadly consistent with the NPPF and should be regarded as a material consideration. However, it is worth noting that the NPPF does state that policies should ‘promote the preservation, restoration and re-creation of priority habitats’. Policy CP6 does not specifically refer to priority habitats, however, it does refer to creation, protection, enhancement and management of networks of biodiversity. Therefore, broad consistency is achieved.

Policy CP8 (Green Belt) is referred to above in the analysis of Green Belt Policy.

5. THIRD PARTY REPRESENTATIONS

Further representations have been received since the March Committee Meeting with respect to both the enforcement issues and the pre-application submission which were, with the permission of the landowner, partly displayed at the March Development Control Committee Meeting.

5.1. Many comments related to the pre-application process are of little weight when considering this site as an enforcement case, however many related points have been made. The following are the points considered most relevant from over 300 representations:

5.2. The Protect Bath/Victims of Fullers Earth concerns are as follows (in summary):

- a. The lawful B2 use on a small part of the site, unlawful activity on the remainder of the site and specific allocation in the Joint Waste Core Strategy are fundamental

points providing the baseline against which any future development falls to be assessed. The Environmental Statement should also start from what is lawfully present now;

- b. The pre-app assumes current unlawful uses are the baseline and that the allocation is permissive of broader uses than a residual waste facility (RWF). The allocation was justified on capacity needs and that is the basis for very special circumstances necessary to permit development in the Green Belt;
- c. If any other form of development is permitted, it would need to demonstrate very special circumstances and the pre-app doesn't do so;
- d. The proposals involve a re-arrangement of site with an attempt to secure inappropriate uses outside the JWCS allocation on agricultural land as well as the lawful B2 land;
- e. Any development is likely to cause substantial harm to the Green Belt, the proposals don't demonstrate very special circumstances, site adjoins the AONB, gateway to World Heritage Site and close to urban fringe of Bath – sensitive rural location and could encourage others to develop;
- f. Representations will be made at the 9th May meeting and through the courts if necessary that the Council now enforces against the unlawful uses rather than allowing them to become lawful;
- g. Reference is made to quotations from the previous reports and conclusions on unlawfulness of uses on site and which affirm that the “applicant” is attempting to start from the wrong position. An indication should be given that the proposal will be rejected;
- h. EIA will be required;
- i. There is a complaint that no mention is made of a habitats assessment which should be required – the site is sensitive for the greater horseshoe and bechstein bat, numbers of which are in decline;
- j. Considerable pressure would be added to the transport network;
- k. No mention in pre-app of regionally important geological site;

South Stoke Parish Council

- l. ‘Scoping Application’ appears to ignore the planning History of site and seeks to stretch the outcome of the recent EiP for Joint Waste Core Strategy;

- m. It has been clearly established that a B2 use only exists on the area of this site covered by the Former Fullers Earthworks buildings and the hard standing that was immediately around them prior to 1981;
- n. Use of any area outside this core area, for anything other than its original Agricultural use is and remains unlawful;
- o. Development outside the B2 now or in the future including current unlawful uses or for any other form of waste treatment facility, the applicants would need to show very special circumstances to justify it. No such proof has been offered at any stage in this or any earlier discussions;
- p. Enforcement Action should be taken to stop the present unlawful uses on the current site. Such action will not prejudice discussions as to possible uses of the B2 area. It is both expedient and imperative that enforcement action should be taken without further delay;
- q. The proposed Residual Waste Treatment Facility may not be required for some years yet, if that is the case further delay will only allow the present unlawful uses to persist and become 'Lawful' condemning the Southern entrance to World Heritage City to a disgraceful visual disaster for years.

Other concerns raised are:

- r. Pre-app proposal assumes unlawful uses are allowed to continue and adds residual waste site;
- s. Additional waste management facilities are not suitable in the green belt and on the site extended beyond that which has lawful B2 use;
- t. Proposal does not constitute worthwhile negotiations between the Council and site owner and is stalling until 10 year rule comes into play;
- u. The site already looks ugly and is no excuse to make things worse;
- v. Proposal goes outside of the JWCS allocation by relocating other waste facilities;
- w. No very special circumstances why Residual Waste Treatment Facility should take development beyond B2 historical use;
- x. Traffic congestion, noise nuisance, odour and pollution in general could occur with recent developments on site suggesting that undertakings to mitigate impacts may not be honoured;
- y. The scoping application assumes all current unlawful uses can be relocated onto existing B2 site;

- z. The whole logic appears based on false starting point of existing uses being lawful and they aren't;
- aa. A logically correct baseline is fundamental;
- bb. No very special circumstances why waste facility should go beyond existing B2 use;
- cc. Any enforcement notice should seek restoration of the site that doesn't have industrial use, back to its baseline as an agricultural field and for housing/residential units to be used for those purposes;
- dd. Proposals go outside of what the Council ought to be negotiating and go beyond JWCS allocation;
- ee. Unsightly mounds of rubble need to be removed;
- ff. There would be even more noise in quiet beautiful village;
- gg. Near underground water sources – contamination possibilities;

5.6 These representations although helpful are not considered to raise new issues save for the reference to bechstein bats in addition to greater horseshoe bats referred to in the January report. However, there is no definite evidence of bats being present and this does not change the consideration of nature conservation issues set out in the January report. Members will be aware that there are strong objections to the pre-application submission but for the purpose of this report, those representations are not strictly relevant and will be a matter for consideration if or when an application is formally submitted to the Council for determination.

6. APPLICATION OF DEVELOPMENT PLAN AND OTHER MATERIAL CONSIDERATIONS

- 6.1. Members should consider the Committee Report from January and in particular sections 4.031 – 4.081 which provides an analysis, applying the development plan and other material considerations to the consideration of the unauthorised developments. This should be read alongside the Policy Update set out in paragraph 4 of this Report.
- 6.2. There is a large scale unregulated development presently on site. In January it was considered that substantial weight should be given to the harm to the green belt by reason of inappropriate development affecting the openness and amenity of the

Area, the setting of the WHS as well as the landscape character and harm to living conditions of nearby dwellings. The most significant policy change since then by the introduction of the NPPF is the removal of reference to major existing developed sites within the Green Belt. The January report set out why the site was not considered to be such a site and so that aspect of PPG2 policy did not apply to it. Area A which has the historic established industrial use can be considered to be a “previously developed land”. The unauthorised area of industrial land however doesn’t provide the wider site with any lawful “fallback” position of any significant weight and the current activities and structures are not considered to be “limited infilling or partial redevelopment” of a previously developed site.

- 6.3. Although the development of the wider site in accordance with the JWCS could occur and should be taken into account, as the pre-application submissions and discussions have revealed, such a redevelopment would need to be carefully considered. It is unlikely that a scheme with the same physical extent and impact as the current activities would be supported by the development plan and other material considerations. In addition, the current activities do not have the strategically important benefits that a residual waste facility would.
- 6.4. As previously, it is considered that these matters do not outweigh the substantial harm that has been identified.

7. POTENTIAL IMMUNITY FROM ENFORCEMENT ACTION AND EXPEDIENCY OF TAKING ENFORCEMENT ACTION

- 7.1. In January, it was recommended in the Report to Committee that;
 - b. Given the resolution of the Committee on 18 May 2011 to work positively with the owner of the site to achieve the delivery of a residual waste facility, it would not at this time be expedient to take enforcement action against the identified breaches of planning control.
 - c. If progress towards achieving a residual waste facility is not made, the situation will need to be reviewed and action taken to prevent the current harmful developments becoming immune from enforcement action which would be tantamount to allowing an unconditional mixed industrial use.
 - d. No separate enforcement action is taken against any operational developments that do not have planning permission at this time and unless it is subsequently considered expedient to enforce against the unauthorised uses.

- 7.2. There have been ongoing and productive discussions over the future of the site with a view to delivering a residual waste facility. The current format that has been submitted for consideration is not considered to be acceptable, but it is the purpose of the ongoing dialogue to bring forward a scheme that is acceptable and it is hoped that discussions will continue in the way that they have been. What is not in doubt, is that progress has been made towards achieving a residual waste facility and that the submission is a work in progress and this weighs against taking enforcement action at the present time. While that is so, Members requested that this Report set out the position on immunity.
- 7.3 The landowners' position has consistently been that B2 use across the site does not require planning permission because they consider a lawful industrial use exists across the whole site, but the Council does not accept this position. The reasoning for this is set out within section 3 of the report to your January Meeting. This sets out why it is considered that there are a number of unlawful activities on site outside of the historical 'Area A' which has long been used for industrial purposes. Those activities would become immune from enforcement action once they have been carried on for 10 years without enforcement action being taken (i.e. the service of an Enforcement Notice).
- 7.5. To assist in establishing when the expiry of that time period is an aerial photograph taken in June 2002 and referred to in the January Report shows operations confined to Area A at that point in time. There are arguments that can be made in support of a later date for the purposes of immunity particularly if the site is found to have a mixed use; in February 2003 the Inspector, at the call in Inquiry, found that a small aggregate reprocessing business was being carried out on a part of the site close to the north-eastern side of the buildings which is consistent with the photographs taken in 2003 showing Area E undergoing a change of use to use for storage of aggregates.
- 7.6. The operations at that stage were small in scale and do not support the contention that the whole of Area E had at that time undergone a change of use. That being the case, there would be no immunity for those activities until spring 2013 at the earliest. The last date however that it can be said with some certainty that there was no development outside of that confined area A is June 2002. Beyond June 2012 therefore, there can be no certainty that the unlawful uses will not achieve immunity and the longer those activities continue, the more likely they are to gain immunity - particularly if an Inspector was to accept the argument that the whole of the site is presently in B2 use .

7.7. The possible and impending immunity of unlawful activities on site from enforcement action is a material consideration which is considered to weigh heavily in favour of enforcement action at this stage.

8. CONCLUSIONS

8.1. Overall, it is considered that the changes to the policy background as set out above have not materially altered how the unauthorised activities should be considered.

8.2. Enforcement action remains discretionary and your decision should be proportionate to the breaches of planning control.

8.3. In exercising your discretion with regard to enforcement Members need to:

8.3.1. consider the period of time which brings an unlawful use closer to the point of lawfulness potentially being reached by default. In this regard I would refer Members to the Aerial Photograph dated June 2002 (Annex F) which shows operations confined to Area A at that point in time. Whilst it is considered that there is good evidence that the encroachment did not occur until spring 2003, it is considered that the strongest evidence available to the Council, at this time, is the June 2002 aerial photograph. If time is allowed to lapse there is a possibility that if the unlawful development will gain immunity from enforcement allowing a future unregulated and unconditional use throughout the site. Therefore if Members wish to protect the Council's position they need to be mindful that there is a possibility that immunity from enforcement may arise as early as June 2012., although it is considered that there is good evidence that immunity may not arise until spring 2013.

8.3.1. recognised that negotiations have resulted in the pre-application submissions and that further progress has been made towards a proposal for a residual waste facility on the site. Unfortunately as it is considered that the proposal in its current form is not acceptable, this means that the negotiations that were previously a factor weighing in favour of not taking enforcement action have now reduced in weight.

8.2. An application has not been submitted for the unauthorised development that currently exists on site. Members therefore need to consider the harm caused by the alleged breaches of planning control as set in the as set out in paragraphs 4.076 and 4.077 of the January Report and balance these with what evidence there is in support of the current uses. Substantial weight must be given to the harm to the green belt by reason of inappropriate development affecting the openness of the Area, the setting of the WHS as well as the landscape character and harm to living conditions of nearby dwellings. Weighed

against these negative factors, there is a possibility that a similarly harmful development could be accepted on this site and the current uses do provide some public benefits. In the absence of a planning application, the Council is not aware of any very special circumstances that could be put forward to justify the current inappropriate development. It is considered that any supporting factors that we have taken account of do not together clearly outweigh the identified substantial harm. Planning permission would not in these circumstances, with the information available, be granted for the development that exists at this time because there are not very special circumstances to justify the inappropriate development.

8.3.4. It is considered that the taking of enforcement action would not in itself be a hindrance to carrying on with the pre-application discussions and the intention would be that any enforcement notices could include long periods for compliance to ensure that the unauthorised activities are kept within the control of the Council whilst not preventing the continuation of such negotiations.

8.3.5. whilst it is hope that the negoations will continue, , Members need to be aware that the issue of enforcement notices at this time might well stall or defeat the progress made in bringing forward a residual waste facility at the site but this needs to be balanced against the matters set out in this Report.

9. RECOMMENDATION

Delegate authority to the Development Manager, in consultation with the Planning and Environmental Law Manager, to take any necessary enforcement action on behalf of the Local Planning Authority in respect of the alleged planning contraventions outlined above, by exercising the powers and duties of the Authority (as applicable) under Parts VII and VIII of the Town and Country Planning Act 1990 (including any amendments to or re-enactments of the Act or Regulations or Orders made under the Act) in respect of the above land.

General Note

This specific delegated authority will, in addition to being the subject of subsequent report back to Members in the event of Enforcement Action either being taken, not being taken or subsequently proving unnecessary as appropriate, be subject to:

(a) all action being taken on behalf of the Council and in the Council's name;

(b) all action being subject to statutory requirements and any aspects of the Council's strategy and programme;

(c) consultation with the appropriate professional or technical officer of the Council in respect of matters not within the competence of the Development Manager, and

(d) maintenance of a proper record of action taken.

Bath and North East Somerset Council			
MEETING: Development Control Committee		AGENDA	
MEETING DATE: 5th January 2012		ITEM NO:	
REPORT OF: David Trigwell, Divisional Director of Planning and Transport Development			
Maggie Horrill, Planning and Environmental Law Manager (Contact Ext. No. 5174)			
REPORT ORIGINATOR: Ms Lisa Bartlett, Development Manager (Tel. Contact No. 7281)			
DATE PREPARED: 20th December 2011			
AN OPEN PUBLIC ITEM			
BACKGROUND PAPERS			
<ul style="list-style-type: none"> (i) Application for planning permission 00/02417/FUL (ii) Supporting evidence submitted with the Certificate of Lawful Existing Use application in 2006 (06/03301) (iii) Development Control Committee Reports of 29 October 2008, 26 February 2009 and 18 May 2011 (iv) Documentation related to the enforcement notice appeals dated 20 April 2009 (v) West of England Joint Waste Core Strategy, adopted March 2011 (JCWS) (vi) Inspector's Report on the Joint Waste Core Strategy (vii) High Court Judgment of Mr. Justice Lindblom dated 3 December 2010 (viii) Other historic applications and correspondence (ix) Appeal forms including grounds of appeal against the enforcement notices dated 20 April 2009. (x) Statement of Common Ground from call-in Inquiry 2003 in respect of application 00/0241/FUL 			
<u>Annexes:</u>			
Annex A – Development Control Committee Report of 18 May 2011			
Annex B – Two enforcement notices dated 25 February 2009			
Annex C – Environmental Impact Assessment- Screening Opinion			

Annex D – Aerial photographs 1946; 1968; 1975; 1999; 2002; 2005; 2006 and 2009

Annex E – 2003 Photographs

Annex F – Plans numbered 1-2

TITLE: Report - Land at Formers Fullers Earth Works, Fosseway, Combe Hay, Bath

WARD : Bathavon West

1.0 PURPOSE OF REPORT

1.01 To consider afresh the expediency of taking enforcement action against the unauthorised uses on the site in view of a decision of the High Court to quash previous enforcement notices and the subsequent resolution of the Committee on 18 May 2011 that;

- 1) the Committee note the contents of the Report acknowledging the decision of the High Court and the allocation of Fullers Earth in the JWCS (Joint Waste Core Strategy) and, in light of this, endorse the Officer's proposal to work positively with the owner of the site to achieve the delivery of a residual waste facility on the land as allocated in the JWCS;
- 2) the owner of Fullers Earth be written to setting out the Council's support for the allocation of the land in the Joint Waste Core Strategy and inviting its assistance in achieving this aim and seeking representations from the owner on any progress on its proposal to fulfil the allocation; and
- 3) the question of whether or not to take any further enforcement action be deferred for a further report pending consideration of recent representations.

1.02 The last Committee report is appended as a background paper within Annex A.

1.03 Following on from the May 2011 Committee, negotiations have been taking place regarding the site in order to work positively towards achieving a residual waste facility and the progress of those negotiations are reported below.

1.04 Furthermore, since the previous report, the interests groups 'Protect Bath' / 'Victims of Fullers Earth' have made an application for expedited Judicial Review on the basis that the Council cannot rationally decline to take enforcement action in respect of the alleged unlawful uses on the site. The Claim states that the time for taking enforcement action expires

in 2012, and that indecision would deny Councillors the opportunity to consider whether enforcement action should be taken. In addition it is claimed that the failure to issue a report to Committee is in breach of the Claimants' legitimate expectation that the Council would consider properly the question as to enforcement time to allow enforcement action to be taken.

1.05 This report will re-appraise the site based upon the information now available to the Council including information from the site owner, third party representations and the latest site visit.

2.0 BACKGROUND

2.01 A recent site visit confirmed that the whole site is presently being used for the following purposes:

- Agriculture;
- Residential - dwellings at 1 & 2 The Firs are still on site, although officers have not seen on the inside of those buildings;
- Waste processing;
- Storage of processed materials;
- Aggregate storage;
- Top soil storage;
- Concrete production and batching;
- Skip storage and possible hire;
- Scaffolding storage and repair;
- Building/engineering/stone mason contractor's yard;
- Siting of a hot-food take-away trailer;

2.02 The distribution of these uses across the site is illustrated by photographs and plans attached to this report.

2.03 There are also physical "operational developments" which need to be considered including:

- A new driveway;
- Fences and gates;

- Revisions to the main entrance to the site;
- Raised car parking Areas and hard-standings;
- Aggregate storage bays;
- Hard-standings and metal compound;
- A permanently sited office building (portacabin);
- Extensions to the main buildings on the site;
- Caravans and some storage containers;

2.04 It is clear that different operators occupy the site for different purposes. Consideration of the nature of the developments on site are complex as is the analysis of the background history and establishing what if any lawful use of the site there is. These issues are addressed in turn below.

Planning history

2.05 There is a lengthy planning history on the site. This is a summary and Councillors can request further details if they feel it necessary before reaching a decision on the contents of this reports:

- Planning permission was granted in 1948 for the addition of a canopy to an existing works building to facilitate the loading of vehicles in adverse weather (ref:1583).
- Planning permission was granted for the erection of a warehouse for the storage of fullers earth (ref:1583/A). In the same year, permission was given for the erection of a canopy (ref:1583/B).
- In 1970, planning permission was granted for the reclamation of land at the fullers earth works by means of stripping the top soil, filling with excavated materials and replacing with 9 inches of top-soil. This related to land north-east (referred to below as 'Area E'). Plans included with subsequent submissions indicate that that this permission was implemented.
- In 1973 an enforcement notice was served with regard to the tipped unauthorised materials not in accordance with permission 1583/B.

- In 1974 no objections were raised by the council for the extension, re-roofing and raising of the roof of parts of the existing building as well as the erection of two silos. This was under the provisions of the General Development Order.
- In 1978, planning permission was granted for the reclamation of land where subsidence had occurred through clay extractions (ref:B2452/A). The plans indicated that earlier phases (including that within Area A) had been previously restored as an earlier phase of the development (at least in part approved by the earlier 1970 permission).
- In 1978 planning permission was refused (ref:B2452/A) for the erection of a concrete batching plant for the production of ready mixed concrete. The reasons for refusal related to green belt policy, landscape impact and increased traffic leading to highway hazards.
- In 1987 an outline planning application was refused for the siting of the buildings and the means of access was made for the redevelopment of the site for light industrial and office purposes. The application was refused for green belt reasons, due to inadequate access arrangements, inadequate sewerage and drainage proposals and inadequate on-site car parking. An appeal against the decision was withdrawn.
- A planning application for the partial demolition, refurbishment and extension of existing building with ancillary access and external works to form office accommodation and 19 "live/work" units was called in by the Secretary of State in 2000 (00/02417). The application was refused notwithstanding the council and planning Inspector's support for the proposal. This was on the basis, amongst other things, that the development would have been inappropriate development within the green belt due to a loss of openness as well as its urbanising effect.

- In 2005 planning permission was refused for the demolition of existing buildings and silos of 1555m³ and the erection of a triple pitched steel framed industrial building of 2250m³ (05/01568/FUL). An appeal against the council's decision was dismissed because even though the Inspector did not consider that particular proposal would have a harmful effect upon the character and appearance of the surrounding Area he considered that;
 - (i) that the development would be inappropriate development harmful to the purposes of the green belt;
 - (ii) that it would conflict with the principles of sustainable development; and
 - (iii) that it would have an adverse impact upon highway safety.

- The erection and operation of a 45m high wind turbine for a fixed period of five years was applied for in 2005 (05/02808) A non-determination appeal was lodged and then withdrawn.

- Planning permission was given in 2004 to "Renew/reposition security/entrance gates" (04/02747).

- A minerals and waste application to change of use of the site from B2 (general industrial) to waste transfer use (05/0117/MINW) which was withdrawn.

- An application for a Certificate of Lawful Existing Use (CLEU) to try and establish "*use as general industrial (class B2) throughout the site with ancillary storage and office uses*" was submitted in 2006 (06/03301) but was withdrawn. The case officer dealing with this application reached a conclusion to refuse the application following preparation of a detailed report. The information submitted in support of the application as well as representations from other parties form important background documents to this enforcement case.

- An application for the “erection and operation of a 45m high wind turbine for a fixed period of 5 years” (06/00209). Withdrawn.
- The “Victims Of Fullers Earth” (who do not own the site) submitted an application to “change of Use of existing 19th century building for use as Ecology, Rural Crafts and Nature Study Centre, demolition of redundant buildings and re-instatement of damaged countryside” (06/02247). The Application was withdrawn.
- A retrospective planning application to seek to regularise the construction of the revised vehicular access (07/00905) is still pending consideration.
- An application was recently approved (10/01774/FUL) for the re-profiling of land for the purposes of agricultural improvement of the field to the south west of the site. This was approved on 13th December 2010. A further application to discharge conditions was then submitted (11/01516/COND) and approved.

3.0 CONSIDERATION OF THE HISTORIC AND CURRENT USES AND DEVELOPMENTS ON THE LAND

3.01 The 2006 CLEU application introduced a map describing various Areas of the land as Areas A – E. Whilst different maps have been used to describe more recent activities, the CLEU plan has become familiar to most people in dealing with this site and is therefore used here as a basis for describing the activities there.

3.02 A number of visits into the site (which can be seen from the main road) have been undertaken. A further site visit has recently taken place, on 7 December 2011 with the co-operation of the landowner. The general descriptions of uses taking place are set out above but it is necessary to look at how those uses are distributed across the site, the degree of relationship between them in terms of function as well as who operates them.

3.03 There is some dispute as to the nature of activities on site and whether those activities require planning permission or have achieved immunity against enforcement action. The following looks at the key points that have been made by the owner of the site (as well as information from individual operators), the formal views of 'Protect Bath/Victims of Fullers Earth' through representations leading to Judicial Review proceedings, and the observations of officers at sites visits and through information held by the Council.

Establishing the lawful use of the land using site plan marked A-E.

3.04 In 2006 Gazelle Properties Ltd submitted an application for a Certificate of lawfulness of existing use ("CLEU"). The application related to the whole of the site A-E and sought to establish on the balance of probability that the use of the whole of that site for B2 (General Industrial) use was lawful as having begun prior to 31 December 1963. The evidence submitted in support of that application did not consider the aerial photographs which were not available at that time but which are considered below.

3.05 The Application was withdrawn prior to determination but the evidence that was submitted in support provides useful background in assessing the lawful use of the site. In addition, the reports of the Planning Inspector and the Secretary of State in considering the called in Planning Application 00/02417/FUL assist in clarifying matters and are considered below.

3.06 The application for the Certificate was accompanied by the following evidence;

- (i) A Statement submitted by the Applicants agent;
- (ii) Statutory Declaration of Mr Andy Ridings, who was at that time the Company secretary of Gazelle Properties Limited;
- (iii) Statutory Declaration of Mr Albert Upshall, a former employee of the site; and
- (iv) Documentary evidence

3.07 The main thrust of the CLEU application was that because the use existed prior to 31 December 1963 a certificate could be granted unless that use has been lost by the operation of law such as is the case with abandonment. Further, it was said that the Council as well as the Inspector at the call-in inquiry had come to the view that the whole of the site benefited from a lawful B2 use.

The Council's position.

3.08 It is agreed that a B2 use existed prior to 1963, and that this wasn't abandoned, but it is the extent of that use on the site that is in dispute. In the Statement of Common Ground prepared for an Inquiry which opened on 24 September 2002 to determine an application for the development of mixed use office and residential units, the Council agreed that;

“The existing use of the site is industrial processing which falls within Class B2 (General Industrial) of the Town and Country Planning (Use Classes) Order 1987.”

3.09 It is correct that at that time and other times the LPA took the view (without reference to specific areas on site) that a B2 use was established on the evidence available. However, the Council was not at any point dealing with a lawful use certificate matter in respect of the whole site and so the extent of the lawful use was never subject to any in-depth consideration. Additionally, the red line site plan that was submitted with Application (00/02417) and which later became the subject of a Public Inquiry included the highway as well as visibility splays. It cannot be right that the use extended over all of those areas, and so the statement of common ground is factually incorrect.

The Inspectors findings.

3.010 The Inspector in his report dated 13 February 2003 was not considering separate parts of the site. He was presented with a red line application that encompassed A-E as on the attached plan and came to the view that there was a B2 use on the application site. That is clearly correct, there was and is a B2 use which the Council accepts is immune from enforcement action, but only on part A of the site.

3.011 It is not clear from the Inspectors findings that he was saying a lawful B2 use was established over the entire planning application site - explicit reference was not made to all parts of the site. The writer considers that the Inspector was not necessarily of that view and carefully limited the findings he could make in respect of that position. In paragraph 435 the Inspector stated;

*“I conclude, therefore, that **the buildings and hardstanding on the site enjoy a B2 fallback**, that is, they may be used for general industry without the need for further planning permission “ (my emphasis).*

3.012 At paragraph 14 the Inspector commented that *“most of the buildings comprising the Fullers Earth works had been erected well before the coming into being of the modern system of planning control.”* It is clear therefore that the Inspector had in mind that the Fullers Earth Works were the buildings and operations at Area A as opposed to any larger area, and that the B2 “fallback” did not include the land outside of that area.

3.013 Other paragraphs in the Report lend support to that conclusion. At paragraphs 10 and 11;

“10. The building were erected to process Fullers Earth, a mineral that was extracted from underground workings in the immediate Area... In the 1980s all extraction of Fullers Earth in the locality had ceased and its processing on the application site finished. Since then, the buildings have remained unused and become increasingly dilapidated....

11. *The rest of the Site to the north and east of the buildings is open and covered in rough grass. A small aggregate reprocessing business is being carried out on a part of the site close to the north-eastern side of the buildings.*”

3.014 At paragraph 432 the Inspector commented;

*“From this chronology it seems to me that up to the early 1960s the processing of Fullers Earth in the works was inextricably tied up with the extraction of the mineral from underneath nearby land and brought directly into the works. **However, since then the works have formed a distinct planning unit in its own right processing the mineral brought in from the new adit at Under Sow Hill, which was some distance from the works.** This physical separation is important.” (My emphasis).*

3.015 From the above, it can be concluded that the Inspector found that the “works” themselves sited at A were a distinct and separate planning unit in B2 use. The Inspector wasn’t in that context looking at the works in relation to the entire application site, but based on the meaning he gave to “the works” and by looking at the photographs that are annexed to this report, there is every indication that until some time after 2002 there was a marked physical and functional separation between the “works” and the surrounding rough grass land. Further, even if the Inspector has considered that the B2 use should extend to the whole of the application site, the decision of the Secretary of State that was given as a result of that call in inquiry came to a different view at paragraph 35;

*“The Inspector identified three fallback position (IR435) and the Secretary of State agrees that these are theoretically available. As to the first (B2) use, the Secretary of State accepts that there is a real prospect of the B2 use of the site continuing (IR 455-6), **though he has insufficient evidence to assess the likely extent or type of B2 use.** He agrees with the Inspector that a*

continuing B2 use could cause some damage to the setting of the World Heritage Site and the visual amenities of the Green Belt. The extent of this damage is dependent on the extent and type of use. The Secretary of State 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” (emphasis added).

Evidence submitted with the CLEU Application.

3.016 The statement of the agent in support of the Application commented that; *‘the evidence of Mr Upshall makes clear, it was the entire site that was used for the processing of fullers earth and associated activities, up until the closure of the site for those purposes in 1981.’* For the following reasons, it is not accepted that the evidence of Mr Upshall is conclusive as to the use of the entire site defined as areas A-E.

3.017 The statutory declaration of Mr Upshall says the following at paragraph 9;

“If miners were particularly productive at Under Sow Hill there was not enough room within the site to store all the materials waiting to be processed.”

3.018 The focus of his evidence is on the works buildings (paragraph 4) which it seems in Mr Upshall’s view are the ‘site,’ and not the wider areas. He comments;

“At such times the “green clay” would be stored out on the land between the site and what is now known as the Odd Down Park and Ride. These storage piles could be extensive depending on how quickly the clay was processed. These stockpiles could be particularly large when ships from Avonmouth required emptying....

10. At the height of production the site was often full of material for use. Occasionally pressure on covered space meant that finished products were also stored in pallets outside and covered with tarpaulins until dispatch.”

3.019 Clearly there was some overspill from the buildings at the height of production, but Mr Upshall is not specific about the length of time *‘the height of production’* continued, or how frequently products would have to be stored outside of the buildings. It would appear that this was only *‘occasionally.’* Furthermore, he doesn’t comment on the extent to which, if any, the products were stored other than in the immediate vicinity of the buildings and doesn’t specifically mention moving them onto the grassed area at E. Accordingly, it cannot be concluded that any area other than A was at that time in use for industrial purposes and storage on the basis of that evidence. The aerial photograph from 1968 does appear show some encroachment on the neighbouring grassland, but it is not extensive, and there is nothing to suggest this use was anything other than temporary or that there was a change of the use of the neighbouring land which is now immune from enforcement action.

3.020 The statutory declaration of Andy Ridings comments

“14. In his report the inspector also noted that a recycling business has started on the site in 2002. That business has continued since then and has grown on the site under my direct management, following the refusal of planning permission for the mixed use scheme in 2003.”

3.021 It is not clear what the intensity or location of that activity was in the latter part of 2002 or whether it went outside of Area A. Mr Riding’s assertions that operations intensified in 2003 would seem to accord with photographs taken in 2003 which show the beginning of stockpiling on Area E. Certainly the photograph annexed to this report from summer 2002 doesn’t indicate any activity outside of Area A. In all other respects Mr Ridings defers to what Mr Upshall says regarding the usage of the site.

Other Documentary Evidence

3.022 Additional evidence on historic files has come to light regarding the extent of industrial use of the works. Schemes for the agricultural improvement of land to the north east of the site that had been spoiled by the underground mining of Fullers Earth, were approved in the early and mid 1970s. These applications show that the land to the north east of the historic industrial area was therefore in use for agricultural purpose. This included 'area E' as well as land outside of that being considered now. The earliest of the improvement schemes approved in 1970 which covered much of 'area E' is indicated as having been implemented by the time of the later application.

3.023 A letter and plan were received by the former district Council in 1985 requesting advice about the need for planning permission of a proposed concrete batching plant. The plan included a red line close to the north-eastern side of the main buildings indicating a proposed position of the plant. In terms of the CLEU plan, this red line covers land partly within 'Area A' and partly within 'Area E'. Amongst other things, the planning officer in response to the enquiry stated that the red-line "appears to extend outside the planning unit of the Fullers Earth Works" which lends support to the view that Area A - Fullers Earth Works was a distinct and separate planning unit.

3.024 Site visit notes from officers in 2003 and 2004 and photographs from a previous visit indicate that up to the boundary of the "planning application Area" (which is likely to mean the application that was subject to the call-in inquiry in 2002) were being used as "an inert waste recycling facility". The notes from 25 June 2004 indicate that some physical changes had happened since the previous visit including:

- A new access track through the line of trees to the cottages (i.e. into 'Area D')
- Construction of a bund along the southern boundary "continuing along the northern boundary towards the A367"

- Hardstandings and new Areas of concrete to store skips and accommodate the site offices now virtually covering the entire site

3.025 Stock piles were also noted to contain concrete, building stone, soils, green waste, timber, plasterboard and road planings.

Photographs.

3.026 There are a number of photographs of the evolving site dating back to 1946. Attached to this report are images dating from 1946, 1968, 1999, 2002, 2005 and 2009. Area A is clearly demarcated in the earlier photos and was historically surrounded by a road which defined the area. Surrounding Area A is what appears to be green and unused agricultural land.

3.027 Other than the small encroachment onto Area E as seen in the 1968 image (discussed above), and the large scale development in 2005, industrial activity was previously limited to Area A. The aerial photograph taken in 2002 shows that the industrial uses at that time were still within the boundaries of Area A. Following this, the aerial photograph taken in 2005 shows a significant expansion of the works into Area E and stockpiling of aggregates on the north-eastern part. The 2005 aerial photograph shows no sign of the compounds that by the time officers visited in 2008 had been constructed on the north-western side of the site. The photograph taken in 2009 indicates increased use of Area E for storage that is previously evident in the 2005 photo and a change of use in Area D. Area B and C have remained unaltered throughout.

3.028 The semi-detached dwellings known as “The Firs” were distinct from Area D within the earliest aerial photograph dating back to 1946. The dwellings are also outside of Area D on the CLEU plan.

3.029 There was no obvious industrial use on Area D at the time of the 1946 aerial photograph, and the houses are not referred to in the Statutory Declaration of Albert Upshall which would indicate that he himself did not consider them to be part of ‘the works.’

- 3.030 The 1968 aerial photograph shows some structures or surfaces in Area D adjacent to the dwellings. However by 1999, Area D had become overgrown and the curtilages of the dwellings were still distinct from it.
- 3.031 Area D was still largely overgrown in 2002 according to the aerial photograph. Some parking was taking place on a hard-surface to the south of the dwellings at this time. By 2005 this small parking Area had been extended further into the adjoining agricultural land and Area D had signs of being in use possibly in connection with Area A. This is apparent because the surface of the land is scarred by what looks like an informal track created by activity originating from Area A. There are also some materials on Area D at this time.
- 3.032 This small parking area had increased substantially by the time officers visited in 2008. By 2009 an aerial photograph shows that Area D appeared to have containers on it. A site visit in February 2010 confirmed that this area had a hard surface although no containers existed at that time.

Further Representations.

Gazelle Properties and site operators

- 3.033 The site is owned by Gazelle Properties Ltd. Their consistent view has been that the current uses take place across the site and are entirely lawful being within use class B2.
- 3.034 On 26 September 2008 the Council served a number of PCNs on the owner and different operators at the Site. PCNs were sent out to the following;
- (a) Maple Scaffolding
 - (b) Stonecraft of Bath Ltd
 - (c) Maple Skip Hire
 - (d) Hanson Quarry Products Limited
 - (e) Waste Recycling @ Bath Limited

(f) Beechwood Environmental Logistic Limited

(g) Aggsales

3.035 The following is, so far as is now considered relevant, a summary of the responses that were received from both the owner of the site (Gazelle Properties Limited) and other businesses operating from the land that were identified at the most recent site visit.

3.036 Gazelle Properties Ltd is the freehold owners of the whole site. The PCN returned by them in 2009 indicated that they were not aware of all of the businesses operating from their land but they did give some details. The company displayed a distinct lack of knowledge at that time of many activities and developments taking place on its own land. For example, the returned PCN stated that it is “not known” in response to questions about:

- (i) which companies operate skip hire/skip storage;
- (ii) any relationship between skip hire/storage and any other use of the site; and
- (iii) when the concrete surfacing of the compound was constructed;
- (iv) materials stored.

3.037 It was confirmed that 1 & 2 The Firs is within residential use “entirely separate to the B2 planning unit”. However, as can be seen from the photographs, the degree of physical separation of each residential curtilage with surrounding land has been blurred. The parking Area on the south-western side of the dwellings (CP1) has been increased in size and although the company stated that this Area is “authorised for use only by those occupying planning unit 1 and 2 The Firs” - that was clearly not the case and at the time of the PCN, a site visit revealed the parking of vehicles which are not registered to the occupants of the dwellings.

3.038 In relation to the second parking area the company stated that it is “authorised for use purely by occupiers of the B2 site defined in Banes SOCG” (statement of common ground). From the survey undertaken by officers at that time, it appeared that the parking Area extended outside

of the Area covered by the statement of common ground which again blurs the edges of the land used operationally by the businesses on the site and encroaches into land previously not used as a part of the industrial use of Area A.

Waste Recycling @ Bath Ltd

3.039 The returned PCN provided a list of businesses operating from what it describes as the B2 open industrial site defined by BANES Statement of Common Ground submitted to the inquiry, that was different to the list presented by Gazelle Properties Ltd.

3.040 The description of the use included on the returned PCN is difficult to read clearly - but with respect to the skip hire uses on the site, the contention within the PCN is that “all skip operations and storage exist purely and exclusively as ancillary to the Waste Recycling business operating within the B2 site defined by BANES” (within the statement of common ground). In addition, it is stated that the skips are exclusively an ancillary part of the waste recycling operation and that any skips stored bring waste exclusively to the site for processing. The companies operating from the site are given as:

- Aggsales Ltd
- Maple Scaffolding
- Stonecraft of Bath
- Bath Recycling Skips
- Maple Skip Hire
- Batemans Skip Hire
- MJ Church Plant

3.041 The use of land for a skip hire business would normally be considered as a *sui generis* use, not falling within any particular use class. It is possible that an element of the skip use at the site could be ancillary to the waste processing use, and certainly at the most recent site visit, the number of skips stored on site could be considered ancillary to the lawful B2 use.

3.042 In relation to the construction of concrete for the compounds on Area E, the PCN indicated that this was “permitted development” due to the B2 use which is referred to as “lawful”. Even if at the time of that development, the B2 use of the site had been “lawful”, the compound is considered to be outside of the Area that would have had any lawful B2 rights. For “permitted development” rights to be enjoyed for the “provision of a hard surface”, it would need to have been “within the curtilage of an industrial building” and this is not the case as the land adjoined the curtilage of the industrial buildings but was not within it.

Stonecraft of Bath Ltd

3.043 Previously, this company was identified as operating from Bay 2 on part E of the site. The most recent site visit confirmed that the company was still operating from Bay 2; although there was no one there at the time there were still portacabins and stored stone in that area. Their business as it appears on their website is that

“Stonecraft offers a fully integrated masonry service including: design; project planning; materials sourcing; fabrication; new build; stone carving; stone cleaning; rubble work; site installation; fireplaces; repairs and restoration to both commercial and private clients. All work undertaken is carried-out by our highly skilled team during every stage of the installation.”

3.044 Despite the operators view that this is a B2 general industrial use, it is considered to be a general building/ engineering, stone mason contractor’s use of the area, which does not neatly fall within any use class (sui generis). Given the degree of functional and physical separation from the main site, it would appear that Bay 2 has become a separate planning unit and that there has been a change of use of that part of the site.

Maple Scaffolding.

3.045 This business was originally identified as operating from Bay 1 within the compound area. The recent site visit confirmed that the Business was still operating from within that compound indicated by the presence of scaffolding and the signs on the compound.

3.046 In their original PCN, Maple Scaffolding stated that their business operated from anywhere within the Industrial land defined by BANES SOCG and attached to their lease. They stated their use was “Alteration, repair, maintenance, cleaning, greasing and breaking up of scaffold equipment with ancillary office and storage.” Despite this, given that there is no evidence of scaffolding or associated operations anywhere else on site; the degree of physical separation between the Bay 1 in the compound and the rest of the site; and the presence of a portacabin in Bay 1 to provide facilities for workers of Maple Scaffolding, it is unlikely that Bay 1 is subsumed within the larger area at A and that it has become a distinct and separate planning unit to the rest of the site, which has undergone a change of use.

3.047 It was noted previously that the use of Bay 1 appeared to be mainly storage of the scaffolding which was confirmed by the recent site visit. If there are any other operations in respect of the scaffolding, it is likely that they are ancillary to the storage use.

Protect Bath/Victims of Fullers Earth

3.048 The communications leading to the recent Judicial Review were critical of the Council’s approach in the previous enforcement action in terms of the nature of the alleged breaches as well as not having taken action since the previous notices were quashed.

3.049 Representations concerning the site have included the assertion that the present use of the site is a sui generis use not B2 use. It is accepted that Area A has accrued a lawful B2 use, but it has been commented that the range of activities currently being undertaken on the whole of the site do

not fall within the B2 category and even if they did, they are a change of use of the land because they fall outside of Area A.

3.050 Further, although Protect Bath/Victims of Fuller's Earth accept that there is a need for a waste management facility within the JWCS allocation, the allocation envisages a high standard of design with appropriate landscaping and protection of nature conservation and geological interests with development designed to minimise the impact on the openness of the green belt, the AONB and the World Heritage Site.

3.051 The development presently on site cannot be permitted simply because of the allocation as it is uncontrolled development contrary to that envisaged by the Waste Strategy. It was argued that the current uses constitute obviously inappropriate development in the Green Belt and that because no very special circumstances have been demonstrated for the development, the Council has no logical basis for deciding not to enforce. It is hoped that those concerns are addressed throughout this report.

3.052 Full representations can be found at

<http://idox.bathnes.gov.uk/WAM/showCaseFile.do?appNumber=11/05218/CONSLT>

Conclusions

Areas A, D the dwellings (1 & 2 The Firs) and adjoining parking area and E.

3.053 Area A comprises "the works," as described by the Inspector and Mr Upshall which includes buildings and hard standing associated with B2 use which began prior to 31 December 1963 and is immune from enforcement action. Area A seems from available evidence to be used primarily for the recycling of waste by sorting and processing into, where possible, re-usable materials. This is considered to be a B2 general industrial operation that appears to have expanded into the north-eastern

part of Area E so that there is now no physical separation between A and E.

3.054 That part of Area E is being used for the storage and some processing of materials and not all of this appears to be as a direct result of the processing of waste, or materials awaiting processing either in the recycling facility or concrete manufacturing. At the time of the last visit this included storage of large amounts of soil not apparently directly related to a process being carried out on site but which was being stored to be spread on the adjoining agricultural land which is not considered in this report.

3.055 In respect of Area E, Mr Upshall's evidence (addressed above) does not support ancillary storage use in the period that he was employed by the Fullers Earth Union. Furthermore, the aerial photographs do not support a lawful B2 use in that area. The photograph in 1999 indicates that which the Inspector found in his report - an open area covered in rough grass. It is accepted that at the time of the report operations had begun to spill over into Area E. The Inspector found that a small aggregate reprocessing business was being carried out on a part of the site close to the north-eastern side of the buildings which is consistent with the photographs taken in 2003 showing Area E undergoing a change of use to use for storage of aggregates. It is accepted therefore, that Area E has undergone a material change of use, but that the area has not yet accrued any lawful B2 (Industrial use) or B8 (Storage use) rights and is not therefore immune from enforcement.

3.056 The north-western part of Area E has been separated out into 3 main compounds, with an access track through the middle leading to the rest of Area E including aggregate storage bays.

3.057 In one compound there is a large amount of scaffolding including a large area of racking used for storage of scaffold poles as well as open areas with some storage of materials such as corrugated roofing sheets, bins with scaffold brackets and there is a large storage container. Officers have not seen inside the container. This is run by Maple Scaffolding

whose administrative base is elsewhere and who also have another yard. The use is stated as being general industrial within the returned PCNs and also recent correspondence. There is however no obvious indication of any processes taking place and the yard has the appearance of a storage area. Although the operators indicate that they use part of the rest of the site it is not clear where that is and there doesn't appear to be any functional link between the activities in the compound and elsewhere on site.

3.058 A stone masons/builders yard is in another compound and although there are indications that this uses other parts of the site to store or get access to reclaimed materials, there is now considered insufficient functional link with the rest of the site to be considered part of an overall mix of uses.

3.059 The third compound was previously used for keeping skips believed to have been part of a separate skip hire business. However, at the time of the most recent visit, it was used to stored scrap tyres that had been processed on Area A.

3.060 Area E is therefore subdivided with part of it now being part of a mixed use planning unit with Area A which overall is used for B2 processes as well as storage of materials (B8 use). The compound used for scaffolding and stonemasons are separate planning units within Area E. The other compound used for tyre storage, due to the functional link through to Area A is considered to be a part of that planning unit. Area D and the car park in front of the dwellings is also subsumed within the enlarged planning unit related to Area A.

3.061 Area D was largely excluded from the call-in planning application. It is also within the application site for the recently approved agricultural improvements and the allocated land for residual use within the JCWS, as are the dwellings and the adjoining parking Area. The inspector did not make any findings in relation to it, and the evidence in the CLEU application did not suggest industrial use of this Area. The photographs show that although some structures or surfaces were on this area in the

late 1960's it is not clear that there was industrial use. It is just as likely that any use could have been related to agricultural or the adjoining domestic use of the dwellings.

3.062 The boundaries of the curtilages of the dwellings have become blurred through activities within the last 10 years including those within Area D and the car park created to the south. There is some evidence of links through to the rest of the site but there is no evidence to show directly that the domestic use of the dwellings themselves is in is doubt. The car park appears to be used by operators and employees across the whole site.

3.063 There has therefore been a material change in use of Area D which involves the storage of containers and parking of vehicles and has been accompanied by the hard-surfacing of the Area. This appears to have commenced around at some point after 2002. The use of agricultural land to the south of the houses for parking appears to have commenced earlier but was substantially extended between 2002 - 2005. The change of use is likely to be functionally related to the lawful use of Area A.

3.064 Area D is clearly being used for parking of vehicles as well as skip storage which would appear to be linked with Area A in terms of the accesses through. Similarly, the car parking area to the south of the dwellings is also used as part of the wider site.

3.065 The successful legal challenge to the previously issued enforcement notices did not relate to the principle of whether or not unauthorised material changes in use of the land or any other unauthorised developments had occurred. The previous Committee reports are included within Annex C.

3.066 In summary, it is considered that breaches of planning control exist at this site and that this consists of:

- a mixed general industrial and storage and distribution use within Area A, part of Area E, Area D as well as the car parking area in front of the dwellings;
- use of a separate planning unit for the storage, distribution and repair of scaffolding;
- use of a separate planning unit as a stonemasons yard

3.067 Furthermore, based upon the evidence as set out, it appears that the changes of use across the site commenced as follows:

- The mixed use of the wider site appears to have commenced by mid to late 2003;
- The self-contained compounds did not physically exist until after 2005

Area B

3.068 This Area does not have any lawful B2 use. The Area is not shown as in use in the aerial photograph of 1999 and is not described by Mr Upshall as having been used for periodic storage. Further, the topography of the Area suggests its use would be one of last resort and it was not included in the planning application that as discussed above, was the subject of a lengthy Inspectors report.

Area C

3.069 The Area does not have a lawful B2 use and has not recently been used for industrial purposes. The Area is not shown as in use in the aerial photograph of 1999 and is not described by Mr Upshall as having been used for periodic storage. It is not shown to be in B2 use in any of the aerial photographs and again, was not included in the planning application.

3.070 Given the findings in relation to Areas A, D and E it is therefore necessary to consider the expediency of taking enforcement action,

taking account of the development plan and all other material considerations.

4.0 EXPEDIENCY OF TAKING ENFORCEMENT ACTION

HIGH COURT JUDGMENT

- 4.01 As has previously been reported, the Council's past decision to issue enforcement notices against the Fuller's Earth Site was successfully challenged in the High Court by Gazelle Properties Limited on the basis that the Council's decision to issue the notices was unfair and irrational. The High Court found in favour of Gazelle, quashed the notices, and determined that negotiations which had taken place between the Council and the Appellant were a material consideration the weight of which was for the Committee to decide in balancing whether or not it was expedient to take enforcement action against the site which they hadn't done.
- 4.02 Further, as Members will be aware, the Fuller's Earth Site has been allocated for a waste recycling facility in the Joint Waste Core Strategy. On this matter, Mr Justice Lindblom held that;

“ In pursuing the allocation of the site for a waste recycling facility the Council has self-evidently accepted the principle of this form of industrial use on the site, no matter whether it is properly to be categorized as a “sui generis” or as a Class B2 use. To have done this the Council must presumably have considered whether such a facility could be acceptable in principle, notwithstanding the site's presence in the Green Belt and its proximity to the Area of Outstanding Natural Beauty and the World Heritage Site. As Mr Elvin observed, the fact that the site had originally been kept out of the emerging core strategy, and was only put in after enforcement action had been taken, is itself a material change in circumstances. I do not think that the fact that any redevelopment of the site for such a waste recycling facility would necessarily require planning permission, or the fact that the Council apparently does not see the site

being required for this purpose immediately, goes against that acceptance in principle. In my judgment, the fact of the site's having been promoted for waste recycling development is, on any sensible view, a consideration relevant not merely to the merits of Gazelle's ground (a) appeals against the enforcement notices but also to the expediency of the very decision to enforce."

- 4.03 It is important to note that the Decision of the High Court in that case does not preclude the Council from taking enforcement action against the site. It is however incumbent upon the Council to identify and assess all of the relevant material considerations in determining whether it is expedient to enforce against the present use of the Fuller's Earth Site.
- 4.04 It is clear that breaches of planning control exist. The High Court Judgment does not fetter the Council's ability to reconsider enforcement action however there are matters that need to be taken account of that were not properly considered previously.
- 4.05 Enforcement action should not be taken unless it is expedient to do so having regard to the provisions of the development plan and to any other material considerations.
- 4.06 An unauthorised change of use has occurred on site and it is therefore open to the Council to consider enforcement action. As explained above, the Judgment of Mt Justice Lindblom commented on the following material considerations in respect of the expediency of enforcement action:
- The first issue related to negotiations between the owners of the site and another company.
 - The second related to the support given by the council for the site to be included as an allocated site within the JWCS as a 'residual waste facility'. Residual waste is defined within the JWCS as that which remains after recycling and composting has or can reasonably be

assumed to have occurred (i.e. the waste no longer able to be recycled, re-used or composted).

4.07 On the first issue, the Committee should be aware that the Council has had discussions with agents acting on behalf of the owners of the site. These discussions have been to pursue the implementation of the Council's Policies set out in the JWCS. In particular the discussions have been in relation to the implementation of Policy 5 of the JWCS. This indicates that planning permission for a residual waste treatment facility will be granted on this site, as identified in the allocation plan attached, subject to development management policies.

4.08 The discussions have included national waste treatment operators. Advice has been provided in respect of the process of bringing a planning application forward and early officer opinions have been given in relation to possible technologies that would be appropriate for waste treatment at the site. It is fair to say that these discussions are at a very early stage but they do offer an indication that there is interest in bringing forward a proposal which will deliver a facility required in the JWCS. The owner's agents and operators have indicated that these discussions should remain confidential at this stage. This is quite understandable and indeed not unusual given the commercial nature of aspects of the discussion.

4.09 It should also be stated that these discussions have been instrumental and helpful in facilitating the recent inspection of the site. This in turn has facilitated the preparation of this report. It is clear from these discussions that the owners of the site are clearly interested in actively investigating the prospect of a proposal which would implement the Council's adopted policy for the site. Council officers will continue to provide support and advice to assist in bringing a suitable proposal forward for consideration.

4.010 These discussions are considered to be a material consideration in the assessment expediency of taking enforcement action.

4.011 On the second issue, the JWCS now forms part of the development plan and the site is allocated as being suitable for a residual waste facility. It is necessary therefore to consider the degree of support this provides for the current developments and weighing up the fact that the site could very well be used for industrial purposes in the future towards that end.

4.012 The relevant policies are therefore set out below within the summary of material development plan policies. The implications of accepting an industrial use is also a material consideration is also taken into account.

Development Plan policies

4.013 If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts, the determination must be made in accordance with the plan unless material considerations indicate otherwise.

4.014 The development plan includes the Bath and North East Somerset Local Plan (including minerals and waste policies) adopted October 2007. The following are the mainly relevant aspects:

- Paragraph B1.5 states that within rural Areas the overriding objectives for development are the protection and enhancement of the character of the countryside and its settlements and the maintenance of economic and social vitality or rural Areas.
- GB.1 sets out general policy for development in the green belt. In particular, it sets out a list of the types of development that are acceptable with others not being acceptable other than in “very special circumstances”. Table 6a of the plan lays out the purposes of including land as well as the objectives for the use of land in the green belt.
- GB.2 seeks to protect the visual amenities of the Green Belt
- NE.1 states that development which does not either conserve or enhance the character and local distinctiveness of the landscape will not be permitted.

- NE2 amongst other things, this states that major development within an Area of Outstanding Natural Beauty or outside it which would harm the designated Area will be determined on the basis of the advice in PPS7.
- NE.4 requires development to not have adverse impacts, amongst other things, upon trees, woodlands, wildlife, landscape and amenity.
- NE.5 development in the Forest of Avon, will only be permitted where it respects the existing and developing woodland setting and does not conflict with the objectives of the Forest Plan, having regard to its aims in the layout of development, including landscaping
- NE.9 relates to locally important species and habitats. Development which would adversely affect, either directly or indirectly the nature conservation value of, Sites of Nature Conservation Importance, Local Nature Reserves or Regionally Important Geological and Geomorphological Sites, as shown on the Proposals Map, or any other sites of equivalent nature conservation value, will not be permitted unless; material factors are sufficient to override the local biological geological / geomorphological and community/amenity value of the site; and any harm to the nature conservation value of the site is minimised; and compensatory provision of at least equal nature conservation value is made.
- ET.5 relates to the development of office, industry or storage uses (B1, B2 & B8) in the countryside where it allows some limited development but not within the green belt.
- ES.10 states amongst other things that development will not be permitted where it would have an adverse impact on health, the natural or built environment or amenity of existing or proposed uses by virtue of odour, dust and/or other forms of air pollution.

4.015 The West of England Joint Waste Core Strategy was adopted in March 2011 (JWCS). The site is allocated as a 'Residual Waste Facility' and policies 5 – 7 relate to this. Other policies within the JWVS are also relevant to consider with respect to the current use of the site.

4.016 Paragraph 5.6.7 confirms that the JWCS does not replicate or replace local development management policies. However, it explains that some local plan policies will be superseded by the JWCS and they are highlighted within Appendix 3 to that document. LP policies WM1, WM3, WM5, WM6, WM7, WM8, WMN10, WM12, WM13, WM14 and WM15 are all thereby superseded.

4.017 The report to the 18 May 2011 Committee explained the process through which this site was considered for allocation, including detailed references to the Inspector's report following the examination into the JWCS.

4.018 In addition, although the current use of the site is not for "residual waste" processing, section 6.5 of the JWCS also sets out the approach that should be taken to "non-residual waste treatment facilities (excluding open windrow composting)". Paragraph 6.5.3 gives some background to recycling. It states that recycling, processing and treatment facilities cover a wide range of technology types. It also explains that these facilities may be grouped together or with other industry such that outputs can be used as a useful resource. Such facilities are expected to enable waste to be used as a resource and to recover materials that will be put to beneficial use. Paragraph 6.5.4 explains that recycling and processing of waste is increasingly being carried out within enclosed modern, purpose designed buildings that can be located in a range of locations and "in terms of supporting sustainable communities, the location of waste treatment facilities within the urban fabric is preferred". With respect to the preference that should be taken between residual and non-residual waste facilities, paragraph 6.5.6 states that "sites identified within policy 5 may also be appropriate for non-residual waste related facilities, but not at the expense of delivering residual waste treatment capacity and provided the development meets the identified key development criteria in Appendix 1."

4.019 The key development criteria for this site are included within Appendix 1 figure 10, which includes a site plan (including Areas A, D, E, the

dwellings as well as the car park to the south of the dwellings). Attention is drawn to the main issues to consider including: traffic; strategic flood risk; habitat regulations; bats; site design; visual impact; green belt; and land contamination.

4.020 Paragraph 6.7.1 and the subsequent paragraphs and policy 4 discuss the benefits of secondary and recycled material as a substitute for virgin materials at mineral extraction sites. Whilst this site is close to historic mineral sites there is not believed to be any direct link to any nearby active mineral sites.

4.021 Policy 2 states that planning permission for non-residual waste treatment facilities involving recycling, storage, transfer, materials recovery and processing (excluding open windrow composting) will be granted, subject to development management policies:

- 1) on land that is allocated in a local plan or development plan document for industrial storage purposes or has planning permission for such use, or
- 2) on previously developed land, or
- 3) at existing or proposed waste management sites, subject in the case of landfill and landraising site or other temporary facilities, to the waster use being limited to the life of the landfill, landraising or other temporary facility.

4.022 Paragraph 6.8.8 of the JWCS states that strategic sites (listed in policy 5 which includes this site) are essential to the delivery of the JWCS. Policy 5 states that planning permissions for development involving the treatment of residual wastes where it supports the delivery of the Spatial Strategy will be granted, subject to development management policies. Paragraph 6.9.1 explains that the JWCS is not technology specific, recognising that residual waste treatment facilities incorporate “mechanical and biological processes which may recover materials and/or energy” and “thermal processes which will recover energy, either through heat and/or electricity”.

4.023 The Area defined within the JCWS approximately covers Area A, E and D and is stated as being 3.36ha in Area.

Other material Considerations – emerging Local Policy

4.024 The Bath and North East Somerset Submission Core Strategy (May 2011) is at examination stage and therefore has limited weight. The following policies are relevant:

- DW1: District wide spatial strategy
- CP6 Environmental Quality
- CP8 Green Belt

Other material Considerations – National Policy

4.025 Government guidance does not form part of the development plan but is an important material consideration.

4.026 In particular, Planning Policy Guidance 2 “Green Belts” (PPG2), is important when considering the various terms used in the complex Area of green belt policy and its practical application. It assists in the consideration of LP policies regarding the position of the site within the green belt. The advice explains that there is a presumption against inappropriate development within the green belt and such development should not be approved except in “very special circumstances”. Furthermore, inappropriate development is by definition harmful to the green belt. There are 5 purposes to including land within the green belt and of particular relevance to this case are:

- To assist in safeguarding the countryside from encroachment and
- To preserve the setting and special character of historic town

4.027 Planning Policy Guidance 18 “Enforcing Planning Control” sets out how enforcement matters should generally be considered. If conditional control is necessary over unauthorised development, PPG18 advises that a landowner should be invited to submit a planning application. If

the owner refuses to do so (as in this case – because they do not accept that there is a need to apply for planning permission) the advice confirms that the council would be justified in serving an enforcement notice although this should set out in the reasons for issuing the notice that a grant of conditional planning permission would remedy any harm. Other advice on how enforcement should be approached as set out in PPG18 includes: that the decisive issue should be whether the breach would unacceptably affect public amenity; that the action should be commensurate with the breach giving as an example that it would usually be inappropriate to take formal enforcement action against a trivial or technical breach of control which causes no harm to amenity in the locality of the site; furthermore, it states that initial attempts to persuade the owner that or occupier of the site voluntarily to remedy the harmful effects of unauthorised development fails, “negotiations should not be allowed to hamper or delay whatever formal enforcement action may be required to make the development acceptable on planning grounds or compel it to stop”.

4.028 Planning Policy Statement (PPS) 1 “Delivering Sustainable Development” (and the accompanying document “The Planning System: General Principles”); PPS 4 “Planning for Sustainable Economic Growth” and PPS7 “Sustainable Development in Rural Areas” (PPS7) are also of particular relevance to this case and will be referred to where necessary.

4.029 The Draft National Planning Policy Framework (2011) is a consultation document at this stage and therefore has limited weight.

Other material considerations – representations received

4.030 The use of the site in the manner described above has been the subject of substantial representations over recent months. Around 150 representations have been made which can all be considered to object to the continued use of the site and to be seeking enforcement action. These can be summarised as requiring the council to:

- Find a more suitable site for any expansion of waste recycling not within the green belt or adjacent to an Area of Outstanding Natural Beauty and World Heritage City;
- Take effective enforcement action to bring the activities back to the part of the land which has established use rights for industrial purposes;
- Restore the land without established rights to its original condition, including wildlife, trees and hedges;
- Ensures the clean up of the mess;
- Halt the motor biking activities which creates misery for residents, reverberates across the valley; endangers a badger sett & poses safety risk to people using the public footpath;
- Ensure industrial use doesn't go outside of the council's control;

Other concerns are:

- Inconsistency – why do some people have to abide by laws and regulations when others do not;
- noise from lorries;
- The aim to use the site as a residual waste facility;
- allowing incinerators belching fumes would blow south westwards to Sulis Meadow's/Odd Down estates;
- impact upon views to landmarks and the rural scene;
- suggestions about alternative uses – including extension to the park and ride;
- site should be taken into ownership by the council;
- the site operators' track record and alleged breaches of waste license regulations enforced by the Environment Agency;
- is the operator 'fit for purpose'?
- the Avonmouth site is preferable for residual waste from the Area and would produce energy from waste;
- the site should be withdrawn from the JWCS;
- the site lies over an aquifer;
- compliance with the agricultural improvements planning permission;
- the site deters visitors to the city and from the A367;

- obstructions of the public footpath;
- trees have been felled hedgerow destroyed;

Application of development plan and other material considerations

4.031 Although the edges of the curtilages of the dwellings at 1 and 2 The Firs have been blurred by activities that have spilled over from the adjoining industrial uses, it is considered from evidence available that they remain dwellings. There is an argument that the “planning units” have merged with the industrial site, on balance it is now considered that it is more likely that they remain separate albeit that part of the garden areas are within the industrial site. The dwellings therefore remain outside of the consideration of enforcement action but the protection of living conditions for residents at the properties is an issue to be considered when further assessing the other matters in this case.

4.032 Work is proceeding towards the implementation of the agricultural improvement works on the field to the south-west of the site (the dwellings and car parking Area are also within this Area). The previous mounds of green waste have been removed from the field. This part of the site is now considered to be largely a separate part of the site albeit in the same free hold ownership but with little in the way of functional links through to the rest of the site, other than temporarily due to the storage of soil used for the improvements, within Area E (discussed further below).

4.033 The use of Areas B and C do not appear to be active. Although there is some concern about the spread of materials onto site close to the public footpath, these do not directly appear to relate to a material change in use of that land.

4.034 The expediency of enforcement action therefore needs to be considered with respect to the uses within Areas A, E and D, including the car parking to the south of the dwellings. The issue of unauthorised operational development is also dealt with below.

4.035 The main issues to consider in assessing this are:

- 1) Whether the developments outside of Area A are inappropriate development within the green belt including any impacts upon the character and appearance of the countryside and setting of the World Heritage Site (WHS);
- 2) Impacts upon the living conditions at the dwellings at the site and elsewhere;
- 3) The impacts upon highway safety;
- 4) The impacts upon nature conservation;
- 5) Other considerations including whether taking all material factors into account, there are very special circumstances sufficient to outweigh any green belt harm.

Green Belt, countryside and setting of the WHS

4.036 It is notable that the Planning Inspector who considered the “called in” application on the site in 2003 considered that the continuation of the B2 industrial use “*would be highly damaging to the setting of the World Heritage and the visual amenities of the Green Belt. “It would also adversely affect the setting of the adjoining AONB”* (para 456). The current development is different but this confirms that this site is sensitive in these respects.

4.037 The unauthorised uses involve the sprawl of an industrial development within the countryside in a manner which reduces the openness of the land, due to the additional enclosures, structures, piles of material, siting of containers and skips, in an important location for the setting of the built up Area. PPG2 (at paragraph 3.12) states that the making of any material changes in use of land are inappropriate development unless they maintain openness and do not conflict with the purposes of including land in the green belt.

4.038 Some allowance is made within annex C to PPG2 regarding the infilling or redevelopment of “major developed sites” in the green belts.

However, for those purposes, the site would have to be allocated as a major developed site within the development plan. The allocation for a proposed use within the JWCS is not considered to be such an allocation because it does not relate to the existing or extended uses taking place at the moment. Furthermore, the unauthorised extension of the industrial site is not within the definition of “infilling” or “redevelopment” set out in the annex.

4.039 The encroachment of industrial use into the surrounding land which has occurred beyond the previous “fall-back” position has produced a larger scale industrial development which has a greater impact upon the surrounding rural Area. The impact is considered to adversely affect the otherwise generally rural character of the Area which, as already mentioned, is important for the setting of Bath.

4.040 Some of the large mounds of material are very prominent from the Fosseway, a main road leading into the Bath. The development on land sited towards the park and ride facility to the north of the site as well as that adjacent to Fosseway has compromised the character and appearance of the Area. PPS7 requires that the quality and character of the wider countryside is protected and where possible enhanced (para 15 has not been superseded by PPS4). At paragraph 26 it re-affirms the policies within PPG2 and also that Local Planning Authorities should aim to secure environmental improvements whilst reducing potential conflicts between neighbouring land uses. Furthermore, recent policy guidance in PPS4 states at paragraph EC6.1 that:

“Local planning authorities should ensure that the countryside is protected for the sake of its intrinsic character and beauty, the diversity of its landscapes, heritage and wildlife, the wealth of its natural resources and to ensure it may be enjoyed by all”.

4.041 Furthermore, Paragraph EC6.2 confirms that in rural areas local planning authorities should strictly control economic development in open countryside away from existing settlements, or outside areas allocated for development in development plans.

4.042 The openness of the green belt would not be maintained. The extended area does not safeguard the countryside from encroachment and the setting and special character of WHS City is not preserved. The encroachment of the industrial site and the development is therefore “inappropriate development” and which is therefore by definition harmful to the green belt (para 3.2 of PPG2). The unauthorised development does not comply with LP policies GB.1, GB.2, NE.1 and NE.4 of the adopted local plan as well as PPG2, PPS4 and PPS7. There should be a presumption against approving such a development unless there are very special circumstances to justify the development. PPG2 states that very special circumstances to justify inappropriate development will not exist unless the harm by reason of inappropriateness and any other harm is clearly outweighed by other considerations.

Residential living conditions

4.043 The dwellings on site are within the same ownership as the industrial site, but any impacts need to be considered in relation mainly to land use issues rather than ownership. They are close to an existing industrial site and would suffer some degree of day to day disturbance whether or not the Area had been extended. However, there has been substantial encroachment towards these dwellings by reason of the developments on Area D as well as the car park to the south of the dwellings. Activity from the car park tends also to encroach even nearer to the rear of the dwellings with vans parked on what would have originally been gardens. The area is also used for the positioning of some skips. These dwellings are between a busy main road and the historic industrial site. Residents have very little opportunity for private and quiet enjoyment of any amenity area. The use of the site in this manner further reduces the quality of living conditions of these dwellings, although it should be noted that no complaint has been received by them.

4.044 The site is approximately 1km to the south-west of the main built up part of Odd Down. Industrial use of this site is likely to continue whether or not the extended Areas are enforced against. Although the increase in

size of the site is likely to increase the level of activity, the uses involved are unlikely to substantially increase the impact of the industrial site upon residents in those Areas.

4.045 Notwithstanding this, the unauthorised activities are considered to have a harmful impact on the dwellings within the site which does not therefore comply with LP ES.10 as well as the government document “The Planning System: General Principles” which lends support to the taking of enforcement action.

Impacts upon highway safety

4.046 The hot food trailer previously operating on the land was considered unacceptable as it would attract customers from outside of the site leading to implications upon highway safety. It appears that intentions have changed and that the trailer is now only intended for use for those within the site and so these impacts are unlikely to occur. In any event, at the recent site visit the trailer was clearly not in use and had not been for some time.

4.047 In other respects, even with the greater capacity of the site since it has been extended, the number of additional vehicles that use the site can be safely accommodated given that the access into and egress out on to the A367 is adequate. This is a neutral factor and does not weigh in favour of the development when balancing the issues.

Nature Conservation

4.048 The site is locally designated for ecological interests. No information is available on the value of the site prior to the unauthorised activities although a greater horseshoe bat roost is referred to within the Joint Waste Core Strategy but the exact location was not recorded. Badgers' setts are also referred to within the representations but it is not clear where these are located. There is an indication from some notes on the file from 2003/04 that the concrete hardstanding have encroached onto

the positions of badgers' setts but it is not clear where precisely these were.

4.049 It seems likely that some further harm has also occurred to the potential for nature conservation at the site due to the removal of grassland and some other semi-natural features which have been replaced by hard-surfacing, fencing and the piles of stored material. As this is an unauthorised development, there has been no opportunity for the Council to request ecological surveys. The impacts on such sensitivities will have already occurred. Much of the hard-surfacing of the "compound" Areas will make any possible impacts difficult to reverse. The non-hard-surfaced Areas are also heavily used by vehicles and are used for storing skips and materials such as gravel and hard-core.

4.050 The site is also close to a Special Area of Conservation but no significant effects on this designation as a result of the unauthorised uses are considered likely on this designation.

4.051 Further reference is made to ecology within the reporting of the EIA screening opinion, below. It is difficult in the absence of specific evidence to show that the development of the site has been harmful or continues to be harmful to the purposes of LP policies NE.4 and NE.9. This therefore is a neutral factor when weighing up the issues.

Environmental Impact Assessment.

4.052 Before a local authority serves an enforcement notice in respect of unauthorised development which appears to engage The Town and Country Planning (Environmental Impact Assessment) Regulations 2011 ("EIA Regulations"), then it must, before the notice is issued, adopt a screening opinion. A screening opinion considers whether a full Environmental Impact Assessment is required in respect of a development and has been undertaken in this case. A copy of the screening opinion is attached.

4.053 The development of the land at the former Fuller Earth Works was considered to fall for assessment under Schedule 2 of the EIA Regulations as an Industrial Estate Development Project in excess of 0.5 hectares. Schedule 3 lists the selection criteria for screening Schedule 2 developments and includes consideration of a number of potentially relevant factors including

- (a) The size of the development;
- (b) The cumulation with other development;
- (c) The use of natural resources;
- (d) The production of waste;
- (e) Pollution and nuisances;
- (f) The risk of accidents, having regard in particular to substances or technologies used;
- (g) The location of the development; and
- (h) The potential impact.

4.054 The screening opinion considered the following potential environmental effects;

(i) Traffic

4.055 There is a regular flow of HGVs to and from the site on a daily basis as part of the lawful B2 use of the site. The stonemasons and scaffolding uses are likely to lead to a few traffic movements per day taking materials and equipment to and from sites where they are utilised, and in addition there is likely to be a short term increase in traffic in order to import 55,000m³ of material pursuant to agricultural improvements. However, any increase in traffic movements needs to be judged bearing in mind the historic use which was a mineral processing use which would inevitably have entailed a significant number of traffic movements. The increased numbers of vehicles if the use of the site was permitted would not be so noticeable or substantial as to have significant impacts.

(ii) Air Quality and Noise

4.056 Again, this has to be assessed in the context of the historic use of the site which may have led to dust within the air and noise from machinery.

There are two dwellings within the site, but it is otherwise remote from residential Areas. The uses on the site are not, obviously substantial polluters in terms of gaseous emissions or smells and while the industrial processes within the compounds may lead to some temporary dust emissions, it will only have a local impact within the site. The waste processing use appears to involve largely inert material which is sorted and moved around, and although there have been some incidents of fires on the site, the circumstances of these are not precisely known but they do not appear to form a normal part of the waste processing operations.

4.057 Within the compound, the industrial uses may require the use of hand-tools for stone-cutting and other maintenance but at the time of site visits by officers, these noises are not generally distinguishable from background noise levels. The waste processing use is the main source of noise on the site because it requires the operation of large utility vehicles with hydraulic systems and they are the source of banging and clattering noises. These are very noticeable locally within the site but are not overbearing outside of the site given the concentration of activity is in a central position within the site and much of it takes place under cover. The buildings help to reduce the impacts and as does the noise from the nearby A367 which provides a high level of background noise in this Area.

(iii) Water

4.058 There are no particular concerns about the impact of the development upon water because while there may be some local impacts due to spillages and leaking of fuel and oil from machinery and vehicles, most of the material on site appear to be inert with little potential harmful leaching into the groundwaters, and the site is not subject to designations relating to water source protection or hot springs protection. It is not within an indicative flood plain or overland flood paths.

(iv) Ecology

4.059 The site is close to a Special Area of Conservation which (Bath and Bradford on Avon Bats 'SAC'). It is likely that some damage may have already occurred to the feeding or foraging areas around this and also to

other ecological interests due to the removal of grassland and some other semi-natural features which have been replaced by hard-surfacing, fencing and the piles of stored material. Much of the hard-surfacing of the “compound” Areas will make any possible impacts difficult to reverse.

4.060 The trees alongside the access driveway are protected by a Tree Preservation Order and provide a habitat opportunity for birds and bats and although some concerns have been raised due to the impacts around the base of the trees, they remain in place. These and other Areas around the margins of the site may still allow for ecological interests.

(v) Landscape / visual impact;

4.061 The site is within the Green Belt and within the forest of Avon Area where there is a policy seeking to respect the developing woodland setting. Furthermore, it adjoins an Area of Outstanding Natural Beauty. It is considered that the visual impacts of the authorised as well as the unauthorised development is significant, both the buildings on site, and the piles of stored material are obvious from the main road. There have been extensions to the buildings in the centre of the site. However, overall it is considered that these impacts are not significant with respects to the EIA regulations.

(vi) Geology

4.062 Despite the development that has taken place, there are no obvious significant irreversible impacts.

(vii) Cultural Heritage

4.063 The site is adjacent to the A367 Fosse Way which is the route of the former Roman road and the gateway to Bath with its World Heritage designation. However the site has an existing permitted industrial use and is considered to be sufficiently remote from the world heritage designation so as not to have significant effects upon it (in the context of the EIA regulations).

(viii) Cumulative Impacts

4.064 The above sections consider the environmental effects of the unauthorised development both in isolation and in combination with the permitted uses for the site and no significant cumulative impacts have been identified.

Conclusion on Screening opinion.

4.065 The conclusion in the screening opinion is that overall, the environmental effects from the existing uses on the site appear to be locally restricted in impact and do not have significant effects on the environment. A full Environmental Impact Assessment is not therefore required.

4.066 The recommendations in this report have been reached taking account of the conclusions of the screening opinion.

Other considerations relevant to the question of whether it would be expedient to enforce.

4.067 The allocation of the site within the JWCS is a significant change in policy since the previous decisions to take enforcement action. Although some representations have questioned the appropriateness of this allocation, that matter has been through the scrutiny of the Local Development Framework process, forms part of the development plan and is not a matter to be reconsidered at the time of individual development management decisions such as this. The uses on the site are not for the purposes of Residual Waste Treatment and therefore are not directly supported by policy 5 of the JWCS which is the main policy in achieving the objectives of the JWCS.

4.068 The use for current purposes within Area A as well as the extended Areas (all of which fall within the allocated site in the JWCS) therefore does not help to achieve the implementation of the allocation for a residual waste facility. As the discussions with the landowner indicate, there is some goodwill on behalf of the owner of the site to bring forward

a residual waste scheme. However the effectiveness of this will clearly depend upon market forces including the demand or need for such facilities as well as the continued co-operation and interest of the parties who need to be involved in those negotiations. There may also be some implications from a recent decision to allow a residual waste site near Avonmouth although it is considered that in terms of delivering sustainable development objectives, there would be advantages to delivering this site to meet the needs of sub-regional Zone C which includes Bath and the environs as defined within the JWCS.

4.069 Paragraph 6.5.6 of the JWCS states that sites identified within policy 5 may be suitable for non-residual waste related facilities and policy 2 allows for such facilities, subject to development management policies. However, it is considered that the degree of support for such non residual waste facility on this site would extend only to Area A and that the policies do not provide for an extension of such a site into the undeveloped countryside. Furthermore, although the use of Area A is partially for B2 waste recycling purposes, there are non waste related uses taking place such as the scaffolding and stonemason's compounds as well as the storage of materials and car parking Areas outside of any previously developed land.

4.070 If a planning application were to come forward for a residual waste proposal it would need to be considered on its merits. However it would be likely to be approved if it complies with development management policies and the criteria set out within figure 10 (BA12) of the JWCS. However, at this point in time the negotiations are at an early stage. There is no certainty that this will lead to a planning application. Furthermore, even if a planning application is forthcoming, there is no certainty that it would be implemented if approved.

4.071 The way in which the site would be redeveloped along the lines envisaged within the JWCS is not clear and would depend upon the specific requirements of the intended operator. Such a use could potentially have similar impacts upon the openness of the green belt as well as upon the character and appearance of the countryside as the

current development. However even if that were the case the purposes of such a development in line with the JWCS would be to meet the strategic requirements of that part of the development plan and a substantial degree of weight would need to be given to it – the circumstances would be very different. At the moment however given the uncertainty of such a use coming forward or being implemented, as a similarly “harmful” fallback position, this matter can only be given modest weight in favour of the extended area of development currently on site.

4.072 Furthermore the current use of the site does not, from information available, have the same strategic benefits as the preferable allocated use. The current uses serve a useful economic purpose but there has been no information from the landowners to indicate that they could not be provided on existing industrial estates closer to the urban Area. A countryside location is not considered essential for the waste recycling or the other industrial uses taking place here. Indeed, paragraph 6.5.4 of the JWCS states that “in terms of supporting sustainable communities, the location of waste treatment facilities within the urban fabric is preferred”. If a planning application had been submitted for the current uses on the site, the applicants would be expected to justify the development including an assessment of why a countryside location is essential. The economic and other benefits, due to the lack of compliance with the strategic objectives in the JWCS, development plan or other emerging policies for the extension of the site gives little weight in favour of the development.

4.073 In addition, from a procedural perspective, there is clearly an intention from the landowner to move forward with the preferable use of this site as set out in the JWCS and the Committee has already resolved that officers should work positively to achieve the delivery of the preferable use across the site. If the Council were to take enforcement action at this tentative stage of negotiations, it could undermine these discussions with a landowner who, despite some difficulties in the past, has now demonstrated positive intentions to work with the Council. A further indication that there has been a change of attitude from the landowner was the assistance given that enabled the recent site visit to take place

prior to the preparation of this report. These circumstances are considered to be material to the decision about whether or not it is expedient to take enforcement action.

4.074 As set out above, it also appears from available evidence that there is no immediate prospect of the unauthorised uses becoming immune from planning control. Whilst negotiations about the future of the site cannot be allowed to become protracted, this is also an issue to be weighed up when considering expediency.

4.075 The need to pro-actively seek a preferable use of the site in accordance with the development plan; the tentative stage of the discussions towards that aim; the position on the balance of probabilities that the unauthorised uses are unlikely to be immune from enforcement action until spring 2013 at the earliest; and the harmful impact that taking enforcement action at this stage would have, are factors that should at this stage be given significant weight in favour of not taking enforcement action regarding the unauthorised uses.

Overall Balancing of issues

4.076 Substantial weight must be given to the harm to the green belt by reason of inappropriate development affecting the openness of the Area, the setting of the WHS as well as the landscape character and harm to living conditions of nearby dwellings.

4.077 Weighed against these negative factors, there is a possibility that a similarly harmful development could be accepted on this site and the current uses do provide some public benefits. However, it is considered that these matters do not clearly outweigh the identified substantial harm. Planning permission would not in these circumstances, with the information available, be granted for the development that exists at this time because very special circumstances to justify the inappropriate development would not exist to justify the development.

4.078 However, PPG18 advises that local planning authorities should work with owners and occupiers of sites in order to remedy harmful impacts from unauthorised developments. Taking enforcement action is a discretionary power to be used in the public interest. There would be a substantial public benefit that would meet the aims of the development plan if the positive discussions continue effectively. In the current circumstances of this case, this position is considered to be a material consideration of substantial weight that clearly outweighs the green belt harm and other harms that have been identified above.

4.079 However, it is likely that if the continued discussions do not lead to a planning application for a residual waste facility in the near future the balance would tip back the other way.

Expediency of taking enforcement action against operational developments

4.080 As set out above, there are a number of physical developments that exist at the site which do not have planning permission. These are integral to the unauthorised uses. Some of those looked at in isolation would now be “Immune” from enforcement action. However, if it is considered necessary to enforce against the uses on site, the operational developments could be controlled where they are an integral part of those uses and where they need to be removed in order to ensure cessation of the respective uses.

4.081 At this time, it is not considered expedient to take enforcement action regarding these physical developments.

5.0 Recommendations

5.01 Given the resolution of the Committee on 18 May 2011 to work positively with the owner of the site to achieve the delivery of a residual waste facility, it would not at this time be expedient to take enforcement action against the identified breaches of planning control.

5.02 If progress towards achieving a residual waste facility is not made, the situation will need to be reviewed and action taken to prevent the current harmful developments becoming immune from enforcement action which would be tantamount to allowing an unconditional mixed industrial use.

5.03 No separate enforcement action is taken against any operational developments that do not have planning permission at this time and unless it is subsequently considered expedient to enforce against the unauthorised uses.

HUMAN RIGHTS ACT 1998

In order to be compatible with the European Convention of Human Rights (the Convention) regard must be had to Convention rights in the decision making process. Therefore the Council must strike a fair balance between the competing interests of individuals and the community as a whole.

General Note

This specific delegated authority will, in addition to being the subject of subsequent report back to Members in the event of Enforcement Action either being taken, not being taken or subsequently proving unnecessary as appropriate, be subject to:

- (a) all action being taken on behalf of the Council and in the Council's name;*
- (b) all action being subject to statutory requirements and any aspects of the Council's strategy and programme;*
- (c) consultation with the appropriate professional or technical officer of the Council in respect of matters not within the competence of the Head of Planning Services, and*
- (d) maintenance of a proper record of action taken.*

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Bath & North East Somerset Council	
MEETING:	Development Control Committee
MEETING DATE:	30th March 2012
REPORT OF	David Trigwell, Divisional Director of Planning and Transport Development Maggie Horrill, Planning and Environmental Law Manager (01225 395174)
REPORT ORIGINATOR	Ms Lisa Bartlett, Development Manager (01225 477281)
TITLE:	UPDATE REPORT – LAND AT FORMER FULLERS EARTH WORKS, FOSSEWAY, COMBE HAY, BATH
WARD:	Bathavon West
AN OPEN PUBLIC ITEM	

AGENDA
ITEM
NUMBER

BACKGROUND PAPERS:

- (I) Application for planning permission 00/02417/FUL
- (II) Supporting evidence submitted with the Certificate of Lawful Existing Use Application in 2006 (06/03301)
- (III) Development Control Committee Reports of 29 October 2008; 26 February 2009; 18 May 2011
- (IV) Documentation related to enforcement notice appeals dated 20 April 2009
- (V) West of England Joint Waste Core Strategy, adopted March 2011 (JWCS)
- (VI) High Court Judgment of Mr. Justice Lindblom dated 3 December 2010
- (VII) Other historic applications and correspondence
- (VIII) Statement of Common Ground from call-in Inquiry 2003 in respect of application 00/0241/FUL
- (IX) Enforcement Notices dated 25 February 2009
- (X) Environmental Impact Assessment – Screening Opinion
- (XI) Aerial photographs and 2003 photographs

ANNEXES

- Annex A – Development Control Committee Report of 5 January 2012
- Annex B – Letter dated 12 January 2012 from Harrison Grant
- Annex C – Map in Joint Waste Core Strategy showing boundary of allocation
- Annex D - Proposed site plan – Residual Waste Facility

1.0 PURPOSE OF REPORT

1.1 This Report arises from the Resolution of this Committee at its Meeting on 5 January 2012 and its purpose is to update the Committee on the progress of negotiations to bring forward a Residual Waste Facility on the site and to address the further points of the Resolution. A copy of the January report is attached to this Report (Annex A), for ease of reference, but without the annexes.

1.2. This Committee unanimously resolved at its Meeting on 5 January 2012:-

- (1) to continue to work positively with the owner of the site to achieve delivery of a residual waste facility on the site;
- (2) that the Committee Members make a Site Visit;
- (3) that a further report detailing progress with negotiations towards achieving a residual waste facility on the site be submitted to this Committee on or before 30th March 2012 and that the Strategic Director for Service Delivery if possible attend that meeting to give appropriate advice;
- (4) that it was not considered expedient to take enforcement action before the matter is considered further by this Committee on or before 30th March 2012 where the contents of a further report will be considered including further consideration of the expediency of whether or not enforcement action should be taken against what appears to be breaches of planning control as identified in the Report; and
- (5) that the report address the matters raised within the bullet points of the statement provided by the Bath Preservation Trust

UPDATE

2. THIRD PARTY REPRESENTATIONS

2.1. Representations have been received from Harrison Grant, acting on behalf of Protect Bath Limited – Victims of Fullers Earth (Annex B). Harrison Grant were advised of the Committee's resolution and that Officers have been engaged in gathering information so as to ascertain the position regarding unauthorised development on the site and invited to forward any evidence or information that may assist Officers further in their analysis. No evidence or information has been received from Harrison Grant.

2.2. Several letters and other correspondence have been received from a concerned local resident raising the following concerns:

- Administrative concerns about the negotiations with the landowner and lack of information available publicly;
- Concerns about whether or not officers have been acting in accordance with instructions from the Committee;
- A call for a publicly available 'development brief' directing the negotiations;
- Concerns about whether sufficient safeguards are being ensured to minimise harm to the green belt;
- Comment that The unauthorised activities and the potential Residual Waste Facility (RWF) are separate and the latter should not be an excuse for inactivity;
- Concerns that the land owner has not confirmed agreement with the view expressed by officers at the meeting in January that there would be no immunity before 1 March 2013.
- Concerns about agreements of details pursuant to conditions for the agricultural land improvements (10/01774/FUL) on adjoining land, potentially prejudicing the taking of enforcement action. This mainly relates to the stockpiles of material; and
- The RWF should not extend beyond the area marked 'A' (and coloured yellow) on the report to the January meeting and that no favourable consideration should be given to RWF beyond that area;

2.3. It is necessary to comment upon these points in turn. The administrative concerns and other concerns have been addressed by specific replies from both the Divisional Director and the Strategic Director. The discussions about the potential Residual Waste Facility are commercially sensitive and so not fully available to members of the public. The proposals are for the potential operators to suggest rather than a brief from the Council albeit that the policy background (see below) sets constraints for the development. Any proposals are expected to be designed to minimise harm to the green belt amongst other constraints.

2.4 The discussions presently taking place are without prejudice to the full decision making process. Although the discussions about the RWF and the unauthorised activities are separate matters, the committee has already directed officers to negotiate with the landowners. The negotiations have been taking place as explained in this report, but clearly, the consideration of the expediency of enforcement action needs to be reviewed and the time limits including the potential risk of a legal challenge are very relevant concerns to consider.

2.5 The discharging of conditions relating to the neighbouring agricultural land improvements has not legitimised the stockpiles. It has not affected the Council's ability to consider enforcement action on the Fullers Earth Site. The conditions do not restrict the source of soil used and nor do they affect land outside of that application site.

2.6 On the final point The Committee will be aware that Bath and North East Somerset Council adopted the Joint Waste Core Strategy (JWCS), as did the other unitary authorities making up the former Avon area, on the 25 March 2011. The JWCS' adoption resulted from an examination in public and a binding report published by the Inspector in January 2011. The JWCS sets out the strategic

planning policy for the provision of waste management infrastructure in this area and the Committee are no doubt aware that an area of land within the former Fullers Earth Works has been identified and allocated as a site for delivery of a Residual Waste Facility. The extent of that allocation is delineated red on a Map contained at figure 10 of Appendix 1 – Key Development Criteria and Detailed Maps in the JWCS and extends to 3.36 hectares (ANNEX C). Although the area marked 'A' is considered the "fallback" area which has an historic industrial use, the current 'development plan' defines a broader area for this specific type of development and that is the starting point for decision making.

3. COMMITTEE SITE VISIT - 19 MARCH

3.1. By the time this matter is reported back to Committee Members will have had the benefit of visiting the Site.

4. BATH PRESERVATION TRUST

4.1 The points made by the Bath Preservation Trust are outlined with responses below:

a. The Trust requested it be made clear what the terms of negotiation are and at a minimum note that, if any breakdown in negotiations were to occur, including refusal for reasonable site access in order to plan for future uses, the decision on expediency of enforcement action would be reviewed;

These matters are covered in the main body of this report.

b. The Trust requested it be made clear in what timeframe a planning application for a residual waste facility should be brought forward; and given that the Officer's report had suggested that such a facility may not now be needed at the scale envisaged, this could not be left as the reason to hold fire on the site as a whole; and

A pre-application submission to the development team and a formal request for a scoping opinion for the development - a residual waste facility and the consolidation of existing waste development and concrete batching operations at the former Fullers Earthworks site has been received by the Council. The submitted masterplan for the site comprises of four main elements:

- A household waste recycling centre
- Consolidated skip hire, concrete batching and bulk waste recycling centre
- Offices in the existing Fullers Earth works building

- A new waste facility comprising mechanical biological treatment and refuse derived fuel production and an anaerobic digestion plant

c. That enforcement proceedings may be initiated against all operational developments which do not have planning permission outside Site A.

As explained in the previous committee report in January (section 4.080 of Annex A), if enforcement action were taken, it would be possible to seek the removal of any operational developments that are an integral part of those uses.

4.2 The next available development team meeting is the 17th April and a response to a request for a scoping opinion should be made within 5 weeks of receiving that request. Based on receiving the Council's response by early May the pre-application submission provides an illustrative timetable leading to the submission of a planning application for the proposed development by early November 2012.

5. NEGOTIATIONS

6.1 Discussions to pursue the implementation of the Councils Policies set out in the Joint Waste Core Strategy have continued since the Development Control meeting on the 5th January. These discussions have been with agents acting on behalf of the owners of the site and national waste treatment operators. Meetings have been attended by Glen Chipp and David Trigwell. Matthew Smith has also attended meetings to provide information about the waste stream that the Council manages.

5.2 An initial pre-application meeting was held on the 3rd February with the Owner's Agent. Details of the proposed development were outlined, which included the provision of an anaerobic digestion plant, household waste recycling centre and retention of the existing materials recycling facility. It was considered likely that EIA would be required and that this would need to cover: transport, landscape, noise, air quality, ecology, land quality, flood risk/surface water management, cultural heritage and socio-economic issues. A copy of proposed lay-out for the Residual Waste Facility is attached to this report (Annex D).

5.3 It was agreed at that meeting that submission of further pre-application information for consideration by the Development Team would take place before 14 March 2012. The additional information was actually submitted by email on 9 March 2012 and included both a pre-application submission report and a formal Scoping Opinion request.

5.4 The operators are clear at this stage they want their involvement to be kept confidential and this position has recently been restated. This is understandable given the commercial sensitivities involved. Agents acting on behalf the site owners have set out a programme for the submission of an application and have, as outline above, now formally engaged in the pre-application process. They are prepared to make some of this public.

5.5 Details of the proposed development have been outlined including the major elements of the scheme and the Environmental Impact Assessment process falls within the public domain. Normally the rest of the pre application process would not be in the public domain unless the applicant was prepared for it to be made public. In this case the agent has confirmed that additional information which includes details of the nature of proposed waste treatment plant will be available. This is shown to be an anaerobic digestion plant, household waste recycling centre and retention of the existing materials recycling facility with a total site capacity of an estimated 127/8,000 tpa, which is within the indicative requirements for residual waste treatment given in the Joint Waste Core Strategy. However discussions and assessments to determine the acceptability of this site delivering this capacity still have to be undertaken. These details are available to view on the Public Website – scoping request number 12/01148/CONSLT. The pre-application advice will be dealt with via the Councils Development Team. This is appropriate given the nature of the development proposed.

5.6 Officers are using the 9 Key Development Criteria set out for this site in the JWCS to help the agent bring forward a proposal. It has been agreed that the application can be submitted in outline form but officers have advised that this is subject to sufficient information being submitted to enable potential impacts of the proposed development to be properly assessed.

5.7 The continued engagement with the Council at this pre-application stage demonstrates that the owners of the site and the waste industry are clearly interested in actively investigating the prospect of a proposal. The potential operators have confirmed that they consider that the Fullers Earth site is the most viable site for strategic scale waste resource recovery and recycling development within the whole of B&NES.

6. EXPEDIENCY OF TAKING ENFORCEMENT ACTION

6.1 The intended submission would be an outline proposal and so if approved, would also require a further set of details to be submitted and approved before development could commence which of course takes time and provide no guarantee that the proposal will come forward.

6.2 The expediency of taking enforcement action was thoroughly assessed in the report to your meeting on 5th January. At that time it was not considered expedient by Officers to enforce against the development if progress could be made towards achieving the objectives of the JWCS, and given that there was an expressed intention by the landowner to move forward with the preferable use of the site as set out in the JWCS. Reference should be made to that report which is included as 'Annex A'.

6.3 Paragraphs 4.076 – 4.081 of that report considered the overall balancing of the numerous issues that were considered. At that time, the material considerations were finely balanced but it was considered necessary to allow more time for active negotiations to proceed. Negotiations have progressed and a pre-application

submission has now been formally made following on from the negotiations. This is currently being considered and the forward progress made on negotiations will have to be weighed against the harm caused by the development and issues of immunity to conclude whether or not enforcement action as this stage is expedient.

7. Conclusion

7.1 Following the resolution of the Committee in January 2012, progress has been made in relation to negotiations aimed at bringing forward a RWF in line with the Council's policy framework. The submission of a pre-application submission and a request for a Scoping Opinion is considered to be material progress. A timetable has been set out leading to the submission of an outline planning application in November 2012.

7.2 This is encouraging and officers will continue to work with the site owner and their agent through the pre-application process.

7.3 This needs to be weighed against the timetable set out by Officers in relation to the likely timeframe for immunity set out in the previous report. This timeframe is based upon available evidence.

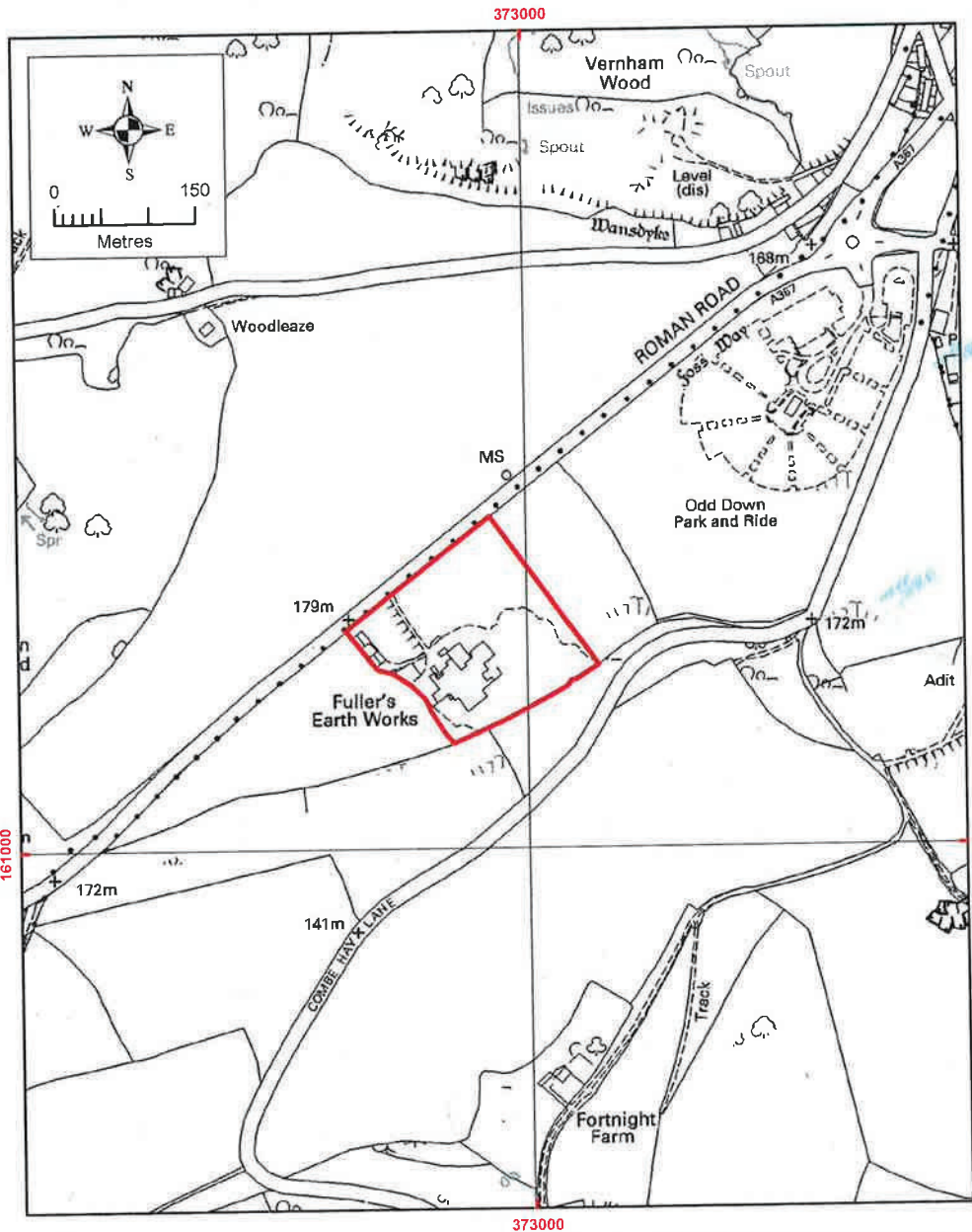
8. Recommendation

8.1 That the Committee note that material progress has been made in relation to its resolution of 5 January 2012 and that Officers are making progress in negotiations with the site owner's Agent with a view to bringing forward a RWF on this site;

8.2 In these circumstances, if the Members agree with the Officer recommendation that the Committee Resolve:-

- (a) That Officers continue to negotiate with the site owner's Agent to secure the delivery of a Residual Waste Facility on the land;
- (b) That in light of progress on the negotiations it is not currently considered to be expedient to take enforcement action against the breaches of planning control currently identified at the site as set out in the previous report.

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KEY:
 Boundary of Site Area Considered

Figure 10

CLIENT: West of England Partnership <small>ERM</small> Eaton House Wallbrook Court North Hinksey Lane Oxford, OX2 6DS Telephone: 01865 384900 Facsimile: 01865 204982	TITLE: Site BA12: Former Fullers Earth Works, Fosseway, Bath			
	<small>ERM</small>	DATE: 01/10/2009 DRAWN: JJH	CHECKED: NM APPROVED: SA	PROJECT: 0089422 SCALE: 1:8,000
SOURCE: Reproduced from Ordnance Survey digital map data. © Crown copyright. All rights reserved. 2009 Licence number 010031673 PROJECTION: British National Grid		DRAWING: BA12_A5Grid.mxd		

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Revision	Description	Rev By	Date
A	First Issue	NWT	09.03.2012

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 architecture project management sustainable design
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Project Title: **FULLERS EARTH 2012
 RESIDUAL WASTE FACILITIES**
 Drawing Title: **SITE BOUNDARY PLAN**
 Drawn By: NWT Checked By: - Date: 09.03.2012 Scale: 1:2500 @ A4
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Bath & North East Somerset Council

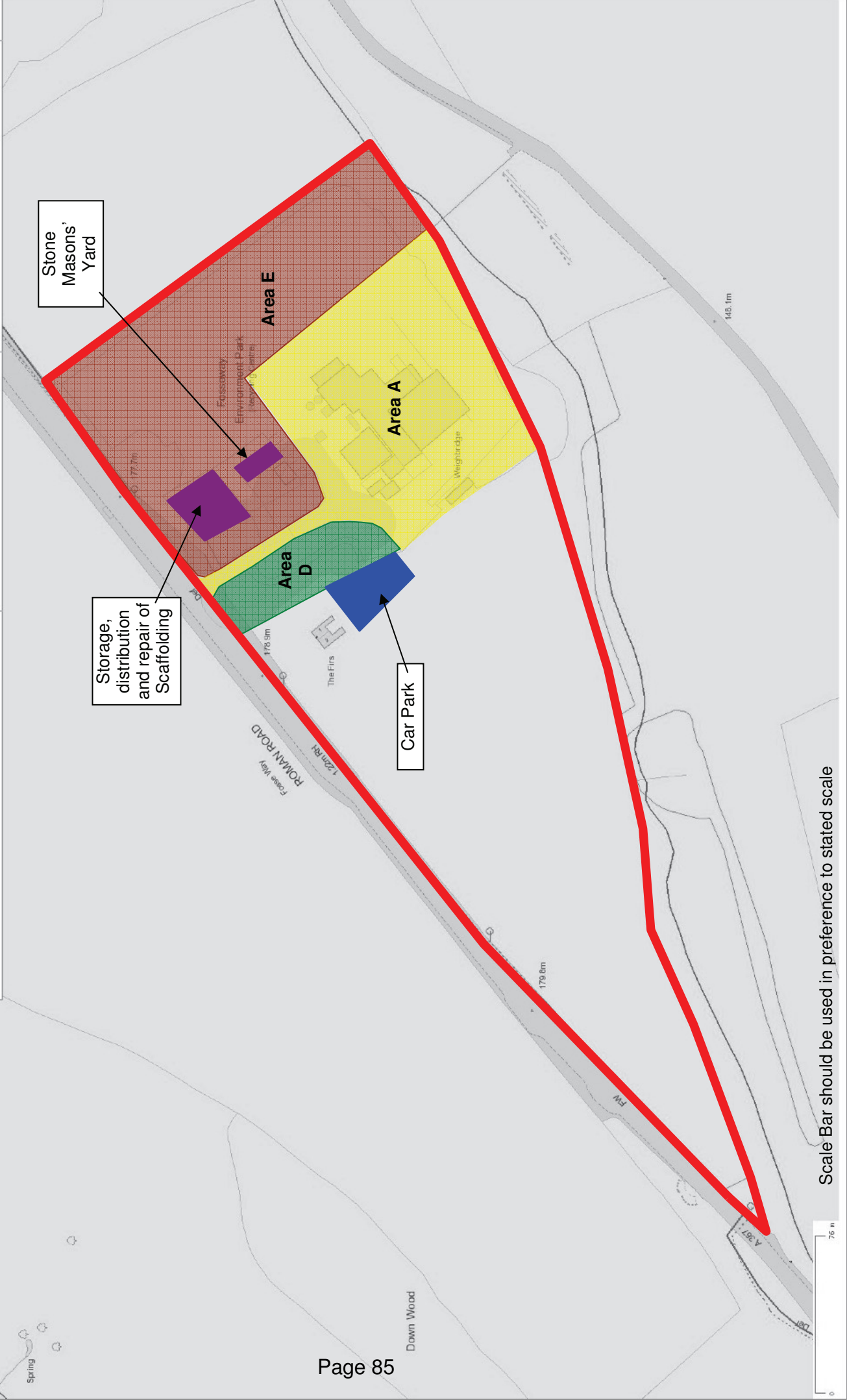
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Date: 7-3-2012
 Scale: 1:2500
 Map Centre - easting / northing:
 372798 / 161198

Bath and North East Somerset District Online

GMS Web Mapping PDF

S330 Plan version: 21 March 2012



Storage, distribution and repair of Scaffolding

Stone Masons' Yard

Car Park

Scale Bar should be used in preference to stated scale



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