

Bath & North East Somerset Council

MEETING: Development Control Committee

MEETING DATE: 9th May 2012

AGENDA
ITEM
NUMBER

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

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.

