Bath & North East Somerset Council

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Date: 5 February 2013
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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, Malcolm Lees, David Martin, Douglas Nicol, Bryan Organ, Martin Veal, David Veale and Brian Webber

Permanent Substitutes:- Councillors: Rob Appleyard, Sharon Ball, John Bull, Sarah Bevan, Sally Davis, Manda Rigby, Dine Romero, Jeremy Sparks and Vic Pritchard

Chief Executive and other appropriate officers
Press and Public

Dear Member

Development Control Committee: Wednesday, 13th February, 2013

You are invited to attend a meeting of the **Development Control Committee**, to be held on **Wednesday, 13th February, 2013** at **2.00pm** in the **Brunswick Room - Guildhall, Bath**

The Chair's Briefing Meeting will be held at 10.00am on Tuesday 12th February in the Meeting Room, Lewis House, Bath.

The rooms will be available for the meetings of political groups. Coffee etc. will be provided in the Group Rooms before the meeting.

The agenda is set out overleaf.

Yours sincerely

David Taylor
for Chief Executive

If you need to access this agenda or any of the supporting reports in an alternative accessible format please contact Democratic Services or the relevant report author whose details are listed at the end of each report.

This Agenda and all accompanying reports are printed on recycled paper

NOTES:

1. **Inspection of Papers:** Any person wishing to inspect minutes, reports, or a list of the background papers relating to any item on this Agenda should contact David Taylor who is available by telephoning Bath 01225 - 394414 or by calling at the Riverside Offices Keynsham (during normal office hours).

2. **Public Speaking at Meetings:** The Council has a scheme to encourage the public to make their views known at meetings. They may make a statement relevant to what the meeting has power to do. They may also present a petition or a deputation on behalf of a group. Advance notice is required not less than two full working days before the meeting (this means that for meetings held on Wednesdays notice must be received in Democratic Services by 4.30pm the previous Friday)

   The public may also ask a question to which a written answer will be given. Questions must be submitted in writing to Democratic Services at least two full working days in advance of the meeting (this means that for meetings held on Wednesdays, notice must be received in Democratic Services by 4.30pm the previous Friday). If an answer cannot be prepared in time for the meeting it will be sent out within five days afterwards. Further details of the scheme can be obtained by contacting David Taylor as above.

3. **Details of Decisions taken at this meeting** can be found in the minutes which will be published as soon as possible after the meeting, and also circulated with the agenda for the next meeting. In the meantime details can be obtained by contacting David Taylor as above.

   Appendices to reports are available for inspection as follows:-

   Public Access points - Riverside - Keynsham, Guildhall - Bath, Hollies - Midsomer Norton, and Bath Central, Keynsham and Midsomer Norton public libraries.

   For Councillors and Officers papers may be inspected via Political Group Research Assistants and Group Rooms/Members' Rooms.

4. **Attendance Register:** Members should sign the Register which will be circulated at the meeting.

5. THE APPENDED SUPPORTING DOCUMENTS ARE IDENTIFIED BY AGENDA ITEM NUMBER.

6. **Emergency Evacuation Procedure**

   When the continuous alarm sounds, you must evacuate the building by one of the designated exits and proceed to the named assembly point. The designated exits are sign-posted.

   Arrangements are in place for the safe evacuation of disabled people.

Development Control Committee - Wednesday, 13th February, 2013
at 2.00pm in the Brunswick Room - Guildhall, Bath

A G E N D A

1. EMERGENCY EVACUATION PROCEDURE

   The Chair will ask the Committee Administrator to draw attention to the emergency evacuation procedure as set out under Note 6

2. ELECTION OF VICE CHAIR (IF DESIRED)

3. APOLOGIES FOR ABSENCE AND SUBSTITUTIONS

4. DECLARATIONS OF INTEREST

   At this point in the meeting declarations of interest are received from Members in any of the agenda items under consideration at the meeting. Members are asked to indicate:

   (a) The agenda item number and site in which they have an interest to declare.

   (b) The nature of their interest.

   (c) Whether their interest is **a disclosable pecuniary interest** *or* an **other interest**, (as defined in Part 2, A and B of the Code of Conduct and Rules for Registration of Interests)

   Any Member who needs to clarify any matters relating to the declaration of interests is recommended to seek advice from the Council's Monitoring Officer before the meeting to expedite dealing with the item during the meeting.

5. TO ANNOUNCE ANY URGENT BUSINESS AGREED BY THE CHAIR

6. ITEMS FROM THE PUBLIC - TO RECEIVE DEPUTATIONS, STATEMENTS, PETITIONS OR QUESTIONS

   (1) At the time of publication, no items had been submitted.

   (2) To note that, regarding planning applications to be considered, members of the public who have given the requisite notice to the Committee Administrator will be able to make a statement to the Committee immediately before their respective applications are considered. There will be a time limit of 3 minutes for each proposal, ie 3 minutes for the Parish and Town Councils, 3 minutes for the objectors to the proposal and 3 minutes for the applicant, agent and supporters. This allows a maximum of 9 minutes per proposal.

7. ITEMS FROM COUNCILLORS AND CO-OPTED MEMBERS

To deal with any petitions or questions from Councillors and where appropriate Co-opted Members

8. MINUTES: 16TH JANUARY 2013 (Pages 9 - 36)

To approve as a correct record the Minutes of the previous meeting held on Wednesday 16th January 2013

9. MAJOR DEVELOPMENTS

The Senior Professional – Major Developments to provide an oral update

10. PLANS LIST - APPLICATIONS FOR PLANNING PERMISSION ETC (Pages 37 - 94)

11. ENFORCEMENT REPORT - RED HILL HOUSE, RED HILL, CAMERTON (Pages 95 - 100)

To consider a recommendation to take enforcement action to require the cessation of the unauthorised use of the dwelling for business purposes, yoga classes and weekend retreats

12. ENFORCEMENT REPORT - PARCEL 5319, CHARLTON FIELDS LANE, QUEEN CHARLTON (Pages 101 - 108)

To consider a recommendation to take enforcement action regarding the continued use for production of compost

13. QUARTERLY PERFORMANCE REPORT - OCTOBER TO DECEMBER 2012 (Pages 109 - 120)

To note the report

14. NEW PLANNING APPEALS LODGED, DECISIONS RECEIVED AND DATES OF FORTHCOMING HEARINGS/INQUIRIES (Pages 121 - 126)

To note the report

15. UPDATE ON FORMER FULLERS EARTHWORKS, COMBE HAY, BATH (Pages 127 - 208)

To consider an update report by the Planning and Environmental Law Manager

The Committee Administrator for this meeting is David Taylor who can be contacted on 01225 - 394414.

Delegated List Web Link: http://www.bathnes.gov.uk/services/planning-and-building-control/view-and-comment-planning-applications/delegated-report

Member and Officer Conduct/Roles Protocol*

Development Control Committee

(*NB This is a brief supplementary guidance note not intended to replace or otherwise in any way contradict Standing Orders or any provision of the Local Authorities (Mode Code of Conduct) Order 2001 adopted by the Council on 21st February 2002 to which full reference should be made as appropriate).

1. Declarations of Interest (Disclosable Pecuniary Interest *or* an **Other Interest)**

These are to take place when the agenda item relating to declarations of interest is reached. It is best for Officer advice (which can only be informal) to be sought and given prior to or outside the Meeting. In all cases the final decision is that of the individual Member.

2. Local Planning Code of Conduct

This document as approved by Full Council and previously noted by the Committee, supplements the above. Should any Member wish to state declare that further to the provisions of the Code (although not a personal or prejudicial interest) they will not vote on any particular issue(s), they should do so after (1) above.

3. Site Visits

- Under the Council's own Local Code, such visits should only take place when the expected benefit is substantial eg where difficult to visualize from the plans, or from written or oral submissions or the proposal is particularly contentious. Reasons for a site visit should be given and recorded. The attached note sets out the procedure.

4. Voting & Chair's Casting Vote

By law the Chair has a second or "casting" vote. It is recognised and confirmed by Convention within the Authority that the Chair's casting vote will not normally be exercised. A positive decision on all agenda items is, however, highly desirable in the planning context, although exercise of the Chair's casting vote to achieve this remains at the Chair's discretion.

Chairs and Members of the Committee should be mindful of the fact that the Authority has a statutory duty to determine planning applications. A tied vote leaves a planning decision undecided. This leaves the Authority at risk of appeal against non determination and/or leaving the matter in abeyance with no clearly recorded decision on a matter of public concern/interest.

The consequences of this could include (in an appeal against "non-determination case) the need for a report to be brought back before the Committee for an indication of what decision the Committee would have come to if it had been empowered to determine the application.

5. Officer Advice

Officers will advise the meeting as a whole (either of their own initiative or when called upon to do so) where appropriate to clarify issues of fact, law or policy. It is accepted practice that all comments will be addressed through the Chair and any subsequent Member queries addressed likewise.

6. Decisions Contrary to Policy and Officer Advice

There is a power (not a duty) for Officers to refer any such decision to a subsequent meeting of the Committee. This renders a decision of no effect until it is reconsidered by the Committee at a subsequent meeting when it can make such decision as it sees fit.

7. Officer Contact/Advice

If Members have any conduct or legal queries prior to the Meeting, then they can contact the following Legal Officers for guidance/assistance as appropriate (bearing in mind that informal Officer advice is best sought or given prior to or outside the Meeting) namely:-

1. Maggie Horrill, Planning and Environmental Law Manager
   Tel. No. 01225 39 5174

2. Simon Barnes, Principal Legal Adviser
   Tel. No. 01225 39 5176

General Member queries relating to the Agenda (including Public Speaking arrangements for example) should continue to be addressed to David Taylor, Committee Administrator Tel No. 01225 39 4414

Planning and Environmental Law Manager, Planning Services Manager,
Democratic Services Manager, Solicitor to the Council
April 2002

Site Visit Procedure

1) Any Member of the Development Control or local Member(s) may request at a meeting the deferral of any application (reported to Committee)for the purpose of holding a site visit.

2) The attendance at the site inspection is confined to Members of the Development Control Committee and the relevant affected local Member(s).

3) The purpose of the site visit is to view the proposal and enhance Members' knowledge of the site and its surroundings. Members will be professionally advised by Officers on site but no debate shall take place.

4) There are no formal votes or recommendations made.

5) There is no allowance for representation from the applicants or third parties on the site.

6) The application is reported back for decision at the next meeting of the Development Control Committee.

7) In relation to applications of a controversial nature, a site visit could take place before the application comes to Committee, if Officers feel this is necessary.

DRAFT MINUTES PENDING CONFIRMATION AT THE NEXT MEETING

BATH AND NORTH EAST SOMERSET

MINUTES OF DEVELOPMENT CONTROL COMMITTEE

Wednesday, 16th January, 2013

Present:- Councillor Gerry Curran in the Chair
Councillors Neil Butters, Nicholas Coombes, Liz Hardman, Eleanor Jackson, Les Kew, Malcolm Lees, David Martin, Douglas Nicol, Bryan Organ, Martin Veal, David Veale and Brian Webber

Also in attendance: Councillors Ian Gilchrist, Paul Myers, Manda Rigby and Chris Watt

110 EMERGENCY EVACUATION PROCEDURE

The Senior Democratic Services Officer read out the procedure

111 ELECTION OF VICE CHAIR (IF DESIRED)

A Vice Chair was not required

112 APOLOGIES FOR ABSENCE AND SUBSTITUTIONS

There was none

113 DECLARATIONS OF INTEREST

Councillor Martin Veal declared an interest in the planning application at Beechen Cliff School (Item 5, Report 10) as his son was a pupil there. However, he did not consider that this would influence his judgement and he would therefore speak and vote on the application. Councillor Les Kew declared an interest in the application at the Old Coal Yard, Marsh Lane, Clutton (Item 6, Report 10) as he owned land in the area and, as he felt that this could be considered to be prejudicial, he would leave the meeting for its consideration. Councillor Bryan Organ declared an interest in Report 11 Tree Preservation Order at 35 West Hill Gardens, Radstock, as he knew the owner and therefore he would leave the meeting for its consideration. Regarding the former Bath Press site (Item 1, Report 10), Councillor Eleanor Jackson stated that she was a member of the Co-operative Party and clarified that this was not connected to the Co-operative Society which ran the store in Moorland Road. She was also a shareholder in the Radstock Co-operative Society; however, the store in Moorland Road was in a different federation.

114 TO ANNOUNCE ANY URGENT BUSINESS AGREED BY THE CHAIR

There were no items of urgent business

115 ITEMS FROM THE PUBLIC - TO RECEIVE DEPUTATIONS, STATEMENTS, PETITIONS OR QUESTIONS

The Senior Democratic Services Officer informed the meeting that were various members of the public etc wishing to make statements on planning applications and that they would be able to do so when reaching their respective items in Report 10. He pointed out that the Chair had extended the time for statements on the Former Bath Press site in view of this being a large development which had created a lot of public interest with a number of speakers.

116 ITEMS FROM COUNCILLORS AND CO-OPTED MEMBERS

There was none

117 MINUTES: 12TH DECEMBER 2012

The Minutes of the previous meeting held on Wednesday 12th December 2012 were approved as a correct record and signed by the Chair subject to the following:
Minute 99 6th line Delete "neighbour" and insert "architect"
Minute 106 Items 4&5, 3rd paragraph, 2nd line After "…neighbours", insert "on the other side of the road …"

118 MAJOR DEVELOPMENTS

The Development Manager updated Members as follows:

- Former Cadbury's site, Somerdale, Keynsham – Archaeological investigations now completed and report by Taylor Wimpey's Archaeologist would be presented to English Heritage for a decision on Ancient Monument Scheduling. It was anticipated that it would not impact materially on the developable area or housing numbers. Discussions were being held with the Environment Agency regarding floodplain and riverbank issues.

- Bath Western Riverside – The Reserved Matters applications for the next 2 stages were currently being registered.

- Bath Spa Station Vaults – The problem with water ingress was being addressed so that remaining users could begin fit-out works. The Highways Development Control Team Leader stated that the temporary barriers in Brunel square would be removed shortly.

- Former Railway Land, Radstock – Pre-application discussions had commenced for a reworked project to be submitted to the Council with Linden Homes on board. A timetable for the project would be submitted to a future Committee meeting.

- Rail Electrification – No details likely to be available until March. An update would be made at a future meeting.

119 PLANS LIST - APPLICATIONS FOR PLANNING PERMISSION ETC FOR DETERMINATION BY THE COMMITTEE

The Committee considered

- The report of the Development Manager on various applications for planning permission etc

- An Update Report by the Development Manager on Item Nos. 2 – 4, a copy of which is attached as *Appendix 1* to these Minutes

- Oral statements by members of the public etc on Item Nos. 1 – 6, the Speakers List being attached as *Appendix 2* to these Minutes

RESOLVED that, in accordance with their delegated powers, the applications be determined as set out in the Decisions List attached as *Appendix 3* to these Minutes.

Item 1 Former Bath Press site, Lower Bristol Road, Bath – Mixed use redevelopment comprising 6,300sq m of retail (Class A1), 4,580sq m of creative work space (Class B1), 2,610sq m of offices (Class B1), 220sq m of community space (Class D1/D2), 10 residential houses, basement car park, landscape and access (including realignment of Brook Road)(Ref 12/01999/EFUL) – The Case Officer updated Members on this proposal including late representations from Crest Nicholson regarding the gas holders; and further representations from the applicant regarding the retail issues. She advised that there was no change to her recommendation as a result of these representations. A correction was made to the 3rd line of the 2nd reason for refusal of the Recommendation to Refuse permission, namely, that "in out data" should read "input data". She gave a power point presentation on the scheme to the Committee.

The public speakers made their statements against and in support of the proposal. The Chair stated that the Ward Councillor June Player, if able to attend, would have objected to the scheme in its present form as would the other Ward Councillor Sharon Ball.

Councillor Eleanor Jackson opened the debate. She expressed doubt regarding benefits to the economy from this scheme and felt for a number of reasons that this was not the right site for this scheme. Traffic issues had not been properly addressed and, importantly, the proposal would have a significant impact on the nearby Moorland Road shopping centre. She therefore moved the Officer recommendation to refuse permission which was seconded by Councillor Martin Veal.

Members debated the motion. It was considered that the reasons for refusal were substantial with the Health and Safety Executive advising that there was a potential danger to human life by virtue of proximity to the gas holders. Traffic problems were still anticipated, the requirements of the sequential test had not been met and there would be an adverse impact on the Moorland Road District Shopping Centre. A number of Members indicated that they supported the motion. Councillor Martin Veal considered that the report was detailed and balanced but the lack of more detailed highway plans in the Officer presentation was an oversight. The highway implications

of the scheme were a major issue particularly because the Council had its own highway improvement scheme and the implications of both schemes needed to be made clear for Members.

At the suggestion of the Chair, the Senior Transport Planner gave a detailed presentation using the application site plan which showed the proposed junction arrangement adjacent to the site. He explained the proposals being put forward by the applicant and the Council and explained the implications of both schemes at the junction and the wider highway network. He answered questions by Members on this aspect of the proposals.

Some Members considered that this was a good scheme which would clear a derelict site and help to regenerate the area. It would provide employment for a lot of people and funding for decommissioning the gas holders would be provided by the private sector. In response to a Member's query, the Development Manager gave advice regarding the West of England LEP: Revolving Infrastructure Funding (RIF) and the Development Agreement with Crest Nicholson regarding a staged implementation of the Bath Western Riverside development. Reference was made by Members to the benefits from the Tesco store in Keynsham but the Development Manager advised that this was a different situation as that proposal was in accord with Local Policies and it was not a good comparison to this site where the proposal was contrary to Policy. The proposed development would impact on the viability of Moorland Road District Shopping Centre a short distance away.

Members generally supported the motion to refuse permission which was put to the vote. Voting: 9 in favour and 4 against. Motion carried.

Items 2&3 No 17 George Street, Bath – (1) Change of use of upper floors from offices (Use Class B1) to 7 residential units (Use Class C3) and associated works (Resubmission)(Ref 12/04296/FUL); and (2) internal and external alterations to enable conversion of upper floors from residential, and associated internal access alterations at ground floor level (Ref 12/04297/LBA) – The Historic Environment Team Leader reported on these applications and the recommendations to refuse planning permission and listed building consent. The Update Report commented on further representations received. The applicants' agent made a statement in support of the proposal.

Councillor Brian Webber as local Member opened the debate. He referred to the possible conflict between conservation of a building and use for modern day needs. Residential use had been accepted by the Officers and there were various benefits from such use. It was not a Grade I listed building and there would be no external changes. He felt that, on balance, the benefits from conversion to residential use outweighed any possible harm to the layout of the interior of the building and, on that basis, moved that the recommendations be overturned and that permission and consent be granted. The motions were seconded by Councillor Bryan Organ. The other Ward Member, Councillor Manda Rigby, indicated that she agreed with Councillor Webber.

Members debated the motions. Some Members felt that fewer units would be better and that the proposal affected the grandeur of this Georgian Town House. Other Members felt that the proposal should be approved as the rooms were still a good size with no major alterations and the fireplaces unaffected.

The motions were put to the vote separately and were both carried, voting being 9 in favour and 4 against. It was clarified that the applications would be delegated to Officers for the imposition of appropriate conditions.

Item 4 Lloyds TSB Bank Plc, 2 Silver Street, Midsomer Norton – Erection of 4 terraced dwellings on land to the north east of 2 Silver Street (Ref 12/04456/FUL) – The Case Officer reported on this application and her recommendation to (A) authorise the Development Manager, in consultation with the Planning and Environmental Law Manager, to enter into a Unilateral Undertaking to secure a contribution of £7,387.55 for Education Services; and (B) upon completion of the Undertaking, authorise the Development Manager to Permit subject to conditions. She referred to the Update Report which amended the recommendation by adding conditions; also, a further representation about a fence.

The public speakers made their statements against and in favour of the proposal which was followed by statements by the Ward Councillor Paul Myers, and also Chris Watt, speaking against the proposal.

Members asked questions about the proposal to which Officers responded. Councillor Eleanor Jackson referred to a previous refusal for residential development on this site and felt that retail or some form of employment use would be better. She made reference to another local site Gladys House where offices had been converted to residential use. Councillor Jackson also felt that the design was not good and furthermore the development would result in overdevelopment of the site; two semi-detached houses with front gardens would be better. Access and parking close to a busy junction was also a concern. For these reasons, she moved that permission be refused which was seconded by Councillor Doug Nicol.

The Development Manager gave advice regarding the proposal. The site was not protected for commercial use and was in line with housing policy. The policy position had been different in the Gladys House case.

Members debated the motion. Most Members supported the motion. However, one Member considered that for various reasons it would be difficult to refuse permission.

The motion was put to the vote. Voting: 11 in favour and 2 against. Motion carried.

Item 5 Beechen Cliff School, Kipling Avenue, Bear Flat, Bath – Alterations and extension to existing 6th Form Block to form new Student Accommodation and Classroom Block (Ref 12/04515/FUL) – The Case Officer reported on this application and her recommendation to Permit with conditions. She referred to representations (previously circulated) from Councillor David Bellotti, Ward Member for the adjoining Ward, supporting the proposal.

The public speakers made their statements against and in favour of the proposal which was followed by a statement by the Ward Councillor Ian Gilchrist objecting to the development.

Members debated the application. Councillor Les Kew considered that this was a good proposal that would enhance the site and commended the Officer for her presentation. He therefore moved the Officer recommendation which was seconded

by Councillor Eleanor Jackson. The motion was then put to the vote and was carried unanimously. (Note: Councillor Nicholas Coombes subsequently declared an interest in this application as he used to work for the architects a number of years ago; however, he did not consider this to be significant.)

Item 6 Old Coal Yard, Marsh Lane, Clutton – Erection of steel framed building with external cladding to roof rear and two sides, front elevation to remain as open portal (Ref 12/05093/FUL) – The Case Officer reported on this application and her recommendation to Permit with conditions. The public speakers made their statements against and in favour of the proposal.

Councillor David Veale as local Member stated that Marsh Lane was a single track road and this intensified use demanded a better access onto a sensibly constructed road. He considered that there would be more lorries and some form of study should be undertaken on lorry movements. Councillor Eleanor Jackson considered that the development would be screened and would not cause any harm to the area. She therefore moved the Officer recommendation which was seconded by Councillor Liz Hardman.

Members briefly debated the motion and issues raised in the applicant's statement. The motion was put to the vote and was carried, 10 voting in favour and 2 against. (Note: Councillor Les Kew was absent for consideration of this Item in view of his declared interest earlier in the meeting.)

120 TREE PRESERVATION ORDER - 35 WEST HILL GARDENS, RADSTOCK

Referring to the Minutes of the Committee meeting held on 24th October 2012, the Senior Arboricultural Officer reported on this Tree Preservation Order (1) informing that it had been provisionally made on 31st October 2012 to protect a Sycamore tree which makes a contribution to the landscape and amenity of the Conservation Area; (2) stating that objections had been received from the occupiers of adjoining properties; and (3) recommending that the Order be confirmed without modification.

The Officer added that the condition of the wall had been assessed by the Council's Building Surveyor who confirmed that it was not dangerous and that the small section affected could be rebuilt. Councillor Eleanor Jackson considered that this landmark tree was worthy of retention and therefore moved the Officer recommendation which was seconded by Councillor Liz Hardman. The motion was put to the vote.

RESOLVED to confirm the Tree Preservation Order entitled "Bath and North East Somerset Council (35 West Hill Gardens, Radstock No 29A) Tree Preservation Order 2012" without modification

Voting: 10 in favour and 0 against with 2 abstentions (Note: Councillor Bryan Organ was absent from the meeting for this Item in view of his earlier declared interest.)

121 TREE PRESERVATION ORDER - 17 THE LINLEYS, BATH

The Committee considered the report of the Senior Arboricultural Officer which (1) informed that this Tree Preservation Order had been provisionally made on 11th October 2012 to protect an Ash tree which makes a contribution to the landscape

and amenity of the area; (2) indicated that objections had been received from occupiers of the adjoining property; and (3) recommended that the Order be confirmed without modification.

Members discussed the matter. It was felt that the tree was worthy of retention. It was therefore moved by Councillor Eleanor Jackson and seconded by Councillor Neil Butters that the Officer recommendation be approved. The motion was put to the vote.

RESOLVED that the Tree Preservation Order entitled “Bath and North East Somerset Council (17 The Linleys, Bath No 279) Tree Preservation Order 2012” be confirmed without modification

(Voting: Unanimously in favour)

122 NEW PLANNING APPEALS LODGED, DECISIONS RECEIVED AND DATES OF FORTHCOMING HEARINGS/INQUIRIES

After some comments by Members, the Committee noted the report.

123 FORMER FULLERS EARTHWORKS, COMBE HAY, BATH

The Development Manager reported that the appeal documents were on the Council’s website and that the appellants would be applying for costs against the Council.

The Committee noted.

The meeting ended at 5.45 pm

Chair(person) .....

Date Confirmed and Signed .....

Prepared by Democratic Services

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BATH AND NORTH EAST SOMERSET COUNCIL

Development Control Committee

16th January 2013

OBSERVATIONS RECEIVED SINCE THE PREPARATION OF THE MAIN AGENDA

ITEM 10

ITEMS FOR PLANNING PERMISSION

Item No.	Application No.	Address
2	12/04296/FUL	16-18 George Street, Bath

One further representation has been received. The comments are from the new owner of the adjoining public house who has highlight concerns regarding the development of residential units next to a licensed premise and therefore the risk that this may lead to confrontation in the future from residents regarding noise etc.

Officer comments:

The points raised by the third party are noted, but do not outweigh the conclusion reached within the Committee report. The development is within a city centre location where a degree of noise and disturbance is to be expected. There are a number of established commercial units within this area including public houses and clubs. The area also comprises a number of residential units and in this city centre location, these uses are considered to be compatible. Any future occupiers would be aware of the context of the site, in terms of the uses surrounding the site. The development is not considered to result in unsatisfactory living conditions for the future occupiers of the proposed flats.

Item No.	Application No.	Address
2 & 3	12/04296/FUL &12/04297/LBA	16-18 George Street, Bath

A further letter has been received from the agents making the following comments;

Factual inaccuracies

The current scheme deletes six partitions compared to the refused scheme.

The number of units has been reduced from 9 at pre application stage to 7 units.

Significant changes in the sub division are proposed compared to the refused scheme.

Officer comment – the report identifies the key changes between the schemes.

Viability

- The applicant is adamant that a scheme of less than 7 units would not be viable.
- A dilapidations survey has indicated repair work costing £196,290.80 (inclusive of fees).

Conclusion

- The reason for refusal is not well founded. The proposals are for a sensitive conversion scheme.
- The work to the third floor should be acknowledged as uncontentious.
- Following expiry of the ground floor lease and administration of the basement restaurant the applicant could be left with an empty building.

Item No.	Application No.	Address
4	12/04456/FUL	2 Silver Street, Midsomer Norton

Summary of Consultation/Representations:

CONTAMINATED LAND: The application has been submitted with a Phase 1 Desk Study report by Hydrock Consulting Limited Dated July 2009.

The Desk Study report made the following conclusions and recommendations:

- "The possible pollution linkages…. are defined as potentially unacceptable risks in line with guidelines published in CLR 11. These require further consideration, either in the subsequent tiers of risk assessment against generic or site-specific assessment criteria, or by proceeding directly to some form of risk management strategy (including possible remedial actions)."

- "Should existing structures present on the site require demolition, consideration should be given to a pre-demolition asbestos survey."

- "An intrusive ground investigation with associated laboratory testing should be undertaken to determine the underlying ground conditions and provide sufficient information to allow development at the site."

-

On the basis of the conclusions and recommendations made within the desk study report and due to the sensitive nature of the development I recommend that the conditions be applied.

OTHER REPRESENTATIONS:

A total of 2 additional objections have been received since the main Committee Report was written. The letters raise the following concerns:

- Impact on neighbouring property (party wall)
- Loss of parking provision within the town centre

- Impact on highway safety
- Loss of land that should be retained for commercial uses

Officer Assessment:

Contaminated Land: The comments from the Contaminated Land Officer, and the conclusions of the submitted Phase 1 Desk Study, indicate that the site is likely to be subject to some contamination. Therefore the suggested conditions are considered appropriate and have been attached at the end of this report.

Local Representations: The additional objection letters raise no new issues that are not already covered in the main report.

Other amendments: The wording of the recommendation for the proposed development has been amended slightly for reasons of clarity and accuracy although the recommendation of Delegate to Permit remains the same.

Recommendation:

Delegate to PERMIT

A) Upon receipt of an acceptable Unilateral Undertaking to secure a contribution of £7,387.55 for Education Services, authorise the Development Manager to permit the application subject to the following conditions:

As the main report with the following additional conditions:

11 Site Characterisation - An investigation and risk assessment, in addition to any assessment provided with the planning application, must be completed in accordance with a scheme to assess the nature and extent of any contamination on the site, whether or not it originates on the site. The contents of the scheme are subject to the approval in writing of the Local Planning Authority. The investigation and risk assessment must be undertaken by competent persons and a written report of the findings must be produced. The written report is subject to the approval in writing of the Local Planning Authority. The report of the findings must include:

(i) a survey of the extent, scale and nature of contamination;

(ii) an assessment of the potential risks to:

- human health,
- property (existing or proposed) including buildings, crops, livestock, pets, woodland and service lines and pipes,
- adjoining land,
- groundwaters and surface waters,
- ecological systems,
- archaeological sites and ancient monuments;

(iii) an appraisal of remedial options, and proposal of the preferred option(s).

This must be conducted in accordance with DEFRA and the Environment Agency's *'Model Procedures for the Management of Land Contamination, CLR 11'.*

Reason: To ensure that risks from land contamination to the future users of the land and neighbouring land are minimised, together with those to controlled waters, property and ecological systems, and to ensure that the development can be carried out safely without unacceptable risks to workers, neighbours and other offsite receptors.

12 Submission of Remediation Scheme - A detailed remediation scheme to bring the site to a condition suitable for the intended use by removing unacceptable risks to human health, buildings and other property and the natural and historical environment must be prepared, and is subject to the approval in writing of the Local Planning Authority. The scheme must include all works to be undertaken, proposed remediation objectives and remediation criteria, timetable of works and site management procedures. The scheme must ensure that the site will not qualify as contaminated land under Part 2A of the Environmental Protection Act 1990 in relation to the intended use of the land after remediation.

Reason: To ensure that risks from land contamination to the future users of the land and neighbouring land are minimised, together with those to controlled waters, property and ecological systems, and to ensure that the development can be carried out safely without unacceptable risks to workers, neighbours and other offsite receptors.

13 Implementation of Approved Remediation Scheme - The approved remediation scheme must be carried out in accordance with its terms prior to the commencement of development other than that required to carry out remediation, unless otherwise agreed in writing by the Local Planning Authority. The Local Planning Authority must be given two weeks written notification of commencement of the remediation scheme works.

Following completion of measures identified in the approved remediation scheme, a verification report that demonstrates the effectiveness of the remediation carried out must be produced, and is subject to the approval in writing of the Local Planning Authority.

Reason: To ensure that risks from land contamination to the future users of the land and neighbouring land are minimised, together with those to controlled waters, property and ecological systems, and to ensure that the development can be carried out safely without unacceptable risks to workers, neighbours and other offsite receptors.

14 Reporting of Unexpected Contamination - In the event that contamination is found at any time when carrying out the approved development that was not previously identified it must be reported in writing immediately to the Local Planning Authority. An investigation and risk assessment must be undertaken in accordance with the requirements of condition 11, and where remediation is necessary a remediation scheme must be prepared in accordance with the requirements of condition 12, which is subject to the approval in writing of the Local Planning Authority.

Following completion of measures identified in the approved remediation scheme a verification report must be prepared, which is subject to the approval in writing of the Local Planning Authority in accordance with condition 13.

Reason: To ensure that risks from land contamination to the future users of the land

and neighbouring land are minimised, together with those to controlled waters, property and ecological systems, and to ensure that the development can be carried out safely without unacceptable risks to workers, neighbours and other offsite receptors.

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SPEAKERS LIST
BATH AND NORTH EAST SOMERSET COUNCIL

MEMBERS OF THE PUBLIC ETC WHO MADE A STATEMENT AT THE MEETING OF THE DEVELOPMENT CONTROL COMMITTEE ON WEDNESDAY 16TH JANUARY 2013

SITE/REPORT	NAME/REPRESENTING	FOR/AGAINST
PLANS LIST – REPORT 10		
Former Bath Press, Lower Bristol Road, Bath (Item 1, Pages 50-75)	Mark Felgate, Peter Brett Associates (Agents for Co-op Group) AND Robin Kerr (Fobra) AND Andrea Robinson Ann Bartaby, TOR Ltd (Applicants' Agents) AND Sophie Akokhia, Corporate Affairs Manager, Tesco (Applicants)	Against – To share up to 6 minutes For – To share up to 6 minutes
17 George Street, Bath (Items 2&3, Pages 76-87)	Chris Beaver, GL Hearn (Applicants' Agents)	For – Up to 6 minutes
Lloyds TSB Bank, 2 Silver Street, Midsomer Norton (Item 4, Pages 88-96)	Jane Lewis, Midsomer Norton Town Council Patricia Flagg, Midsomer Norton Society Clare Spearman, CSJ Planning (Applicants' Agents)	Against Against For
Beechen Cliff School, Kipling Avenue, Bear Flat, Bath (Item 5, Pages 97-104)	Sue Kinchin-Smith Andrew Davies, Headmaster	Against For
Old Coal Yard, Marsh Lane, Clutton (Item 6, Pages 105-110)	Ian Myatt, Clutton Parish Council Nick Towens (Applicant)	Against For

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BATH AND NORTH EAST SOMERSET COUNCIL

DEVELOPMENT CONTROL COMMITTEE
16th January 2013
DECISIONS

Item No:	01
Application No:	12/01999/EFUL
Site Location:	Former Bath Press Premises, Lower Bristol Road, Westmoreland, Bath
Ward: Westmoreland	**Parish:** N/A **LB Grade:** N/A
Application Type:	Full Application with an EIA attached
Proposal:	Mixed-use redevelopment comprising 6,300sqm of retail (Class A1), 4,580sqm of creative work space (Class B1), 2,610sqm of offices (Class B1), 220sqm of community space (class D1/D2), 10 residential houses, basement car park, landscape and access (including realignment of Brook Road)
Constraints:	Agric Land Class 3b,4,5, , Flood Zone 2, Forest of Avon, General Development Site, Hazards & Pipelines, Hotspring Protection, Tree Preservation Order, World Heritage Site,
Applicant:	Tesco Stores Limited
Expiry Date:	3rd September 2012
Case Officer:	Sarah James

DECISION REFUSE

1 The proposed development would give rise to a potential danger to human lives by virtue of its proximity to the nearby operational gasholder site contrary to planning policies ES9 and ES13 of the adopted Bath and North East Somerset Local Plan and contrary to the advice of the Health and Safety Executive.

2 The applicant has failed to justify trip generation, parking demand and trip distribution assumptions made in their Transport Assessment and analysis. Insufficient information has been submitted in respect of these issues and all other modelling input data to enable the soundness of the analysis to be verified. Therefore, the applicant has failed to demonstrate that the proposed development includes satisfactory provision for access from the public highway, car parking and servicing. The site is located at a critical point on the strategic highway network where the existing junction is frequently operating at capacity. The development would therefore be prejudicial to highway capacity and safety. The proposed development is, therefore, contrary to Policies T1, T3, T5, T16, T24 and T26 of the adopted Bath and North East Somerset Local Plan, including minerals and waste policies and paragraph 32 of the NPPF and having regard to additional developments already committed in this part of Bath

3 The proposed development is not in accordance with the requirements of the sequential approach to development contrary to the Bath and North East Somerset adopted Local Plan Policy S4, Joint Replacement Structure Plan Policy 40, Regional Planning Guidance Policy EC6 and paragraphs 24 and 27 of the NPPF. The development would as a result generate unsustainable travel patterns contrary to paragraph 30 and 32 of the NPPF and be harmful to the Council's retail strategy.

4 The proposed development would give rise to an unacceptable and significant adverse impact on the vitality and viability of the Moorland Road District Shopping Centre contrary to Policies S1 and S4, of the adopted Bath and North East Somerset Local Plan, Joint Replacement Structure Plan Policies 40 and 41 and Regional Planning Guidance Policy EC6 and paragraph 27 of the NPPF.

PLANS LIST:
Plans list - 011 GD04398 ISSUE 02 (sheets 1-4), 030 GD04398 ISSUE 02 040, GD04398 ISSUE 01, 4664/001 REVISION NUMBER P, 4664/002 REVISION K, 4664/003 REVISION I, 4664/004 REVISION H, 4664/005 REVISION I , PN0500 REV NO. 00, PN0501 REV NO. 00, PN0502 REV NO.00, PN0503 REV NO.00 , PN0504 REV NO.00, PN0505 REV NO.00, PN2009 REV NO.00, PN2010 REV NO.00, PN2011 REV NO.00, PN2012 REV NO.00, PN2013 REV NO.00, PN2110 REV NO.00, PN2121 REV NO.00, PN2122 REV NO.00, PN2123 REV NO.00, PN2124 REV NO.00, PN2200 REV NO.00, PN2201 REV NO.00, PN2202 REV NO.00, PN2610 REV NO.00, PN2620 REV NO.00, PN2621 REV NO.00, PN2630 REV NO.00, PN2640 REV NO.00

ADVISE NOTE:
In determining this application the Local Planning Authority considers it has complied with the aims of paragraphs 186 and 187 of the National Planning Framework. Notwithstanding the protracted discussions that have taken place in relation to this site with the applicant in connection with two previous proposals of a similar nature raising similar issues of principle that have resulted in those applications being rejected by the Local Planning Authority and subsequently meetings that took place in connection with this current application at pre-application stage and discussions in relation to the issues arising during the consideration of the current planning application whereby the unacceptable nature of the proposals have been clearly conveyed to the applicant, the applicant has chosen to pursue the development in its current form and has chosen not to withdraw the application. The applicant has requested that the application is reported to the planning committee at the earliest opportunity for a determination to be made and having regard to the need to avoid unnecessary delay the Local Planning Authority has moved forward and issued its decision.

Item No:	02
Application No:	12/04296/FUL
Site Location:	17 George Street, City Centre, Bath, Bath And North East Somerset
Ward: Abbey	**Parish:** N/A **LB Grade:** II
Application Type:	Full Application
Proposal:	Change of use of upper floors from offices (Use Class B1) to 7no. residential units (Use Class C3) and associated works (Resubmission)
Constraints:	Agric Land Class 3b,4,5, Article 4, Bath Core Office Area, Conservation Area, Forest of Avon, Hotspring Protection, Listed Building, World Heritage Site,
Applicant:	Rannoch Investments Ltd
Expiry Date:	23rd November 2012
Case Officer:	Tessa Hampden

DECISION PERMIT

1 The development hereby permitted shall be begun before the expiration of three years from the date of this permission.

Reason: As required by Section 91 of the Town and Country Planning Act 1990 (as amended) and to avoid the accumulation of unimplemented planning permissions.

2 On completion of the works but prior to any occupation of the approved residential development, the applicant shall submit to and have approved in writing by the Local Planning Authority, an assessment from a competent person to demonstrate that the development has been constructed to provide sound attenuation against external noise in accordance with BS8233:1999. The following levels shall be achieved: Maximum internal noise levels of 30dBLAeq,T for living rooms and bedrooms. For bedrooms at night individual noise events (measured with F time weighting) shall not (normally) exceed 45dBLAmax.

Reason: To ensure that future occupiers benefit from satisfactory living conditions

3 The development/works hereby permitted shall only be implemented in accordance with the plans as set out in the plans list below.

Reason: To define the terms and extent of the permission.

PLANS LIST:

Drawings 11164(L)101A (site location plan), 11164(L)102A (site plan), 11164(L)105A (existing street level), 11164(L)106A (existing ground floor), 11164(L)107A (existing first floor), 11164(L)108A (existing second floor) 11164(L)109A (existing third floor),11164(L)110A (existing section A-A), 11164(L)112A (existing roof plan), 11164(L)120B (proposed ground floor plan), 11164(L)121B (proposed first floor plan),

11164(L)122B (proposed second floor plan), 11164(L)123B (proposed first floor plan), 11164(L)124B (proposed roof plan), 11164(L)125B (proposed section), 11164(D)101A (detail secondary glazing),11164(D)102A (detail glazed junction with wall/cornice), survey photographs, Heritage Statement, Design and Access Statement date stamped: 28th September 2102

Financial Appraisal date stamped: 6th November 2012

Drawings 11164(SK)017 (third floor thermal and acoustic upgrade), 11164(SK)018A (proposed drainage layout) date stamped: 9th November 2012

Drawing 11164(SK)015B (external wall/intermediate floor upgrade), 11164(SK)016B (thin party wall intermediate floor upgrade), 11164(SK)019B (proposed MVHR layout for first second and third floors), 11164(SK)020A (fireplace/intermediate floor acoustic upgrade), 011164(SK)021A (panelling/intermediate floor acoustic upgrade) date stamped: 22nd November 2012

REASONS FOR GRANTING APPROVAL:

The proposed residential development is acceptable within this sustainable location. The number of residential units proposed is considered to be at an acceptable level and will not result in significant harm to the historic fabric of the listed building. No other significant harm has been identified.

The decision to grant approval has taken account of the Development Plan, relevant emerging Local Plans and approved Supplementary Planning Guidance. This is in accordance with the Policies set out below.

A Bath & North East Somerset Local Plan including minerals and waste policies - adopted October 2007

D.2: General design and public realm considerations
D.4: Townscape considerations
BH.1: Impact of development on World Heritage Site of Bath or its setting.
BH.2: Listed buildings and their settings
Bh4 Change of use of a listed building
BH.6: Development within or affecting Conservation Areas
HG1 residential development in the urban areas
HG.12: Residential development involving dwelling subdivision, conversion of non-residential buildings, re-use of buildings for multiple occupation and re-use of empty dwellings
ET.1: Employment Land Overview
ET.2: Office development
T26 On site parking and servicing provision

Bath and North East Somerset Submission Core Strategy (May 2011) is out at inspection stage and therefore will only be given limited weight for development management purposes.

The NPPF was published in March 2012 but is not considered to directly conflict with the above policies

Decision Making Statement:

In determining this application the Local Planning Authority considers it has complied with the aims of paragraphs 186 and 187 of the National Planning Framework. The Committee Members considered the advice put before them and a positive view of the submitted proposals was taken and permission was granted.

Item No:	03
Application No:	12/04297/LBA
Site Location:	17 George Street, City Centre, Bath, Bath And North East Somerset
Ward: Abbey	**Parish:** N/A **LB Grade:** II
Application Type:	Listed Building Consent (Alts/exts)
Proposal:	Internal and external alterations to enable conversion of upper floors to residential, and associated internal access alterations at ground floor level.
Constraints:	Agric Land Class 3b,4,5, Article 4, Conservation Area, Forest of Avon, Hotspring Protection, Listed Building, World Heritage Site,
Applicant:	Rannoch Investments Ltd
Expiry Date:	23rd November 2012
Case Officer:	Caroline Waldron

DECISION CONSENT

1 The works hereby approved shall be begun before the expiration of three years from the date of this consent

Reason: To comply with Section 18 of the Planning (Listed Buildings and Conservation Areas) Act 1990 (as amended).

2 The development/works hereby permitted shall only be implemented in accordance with the plans as set out in the plans list below.

Reason: To define the terms and extent of the permission.

PLANS LIST:

Drawings 11164(L)101A (site location plan), 11164(L)102A (site plan), 11164(L)105A (existing street level), 11164(L)106A (existing ground floor), 11164(L)107A (existing first floor), 11164(L)108A (existing second floor) 11164(L)109A (existing third floor),11164(L)110A (existing section A-A), 11164(L)112A (existing roof plan), 11164(L)120B (proposed ground floor plan), 11164(L)121B (proposed first floor plan),

11164(L)122B (proposed second floor plan), 11164(L)123B (proposed first floor plan), 11164(L)124B (proposed roof plan), 11164(L)125B (proposed section), 11164(D)101A (detail secondary glazing),11164(D)102A (detail glazed junction with wall/cornice), survey photographs, Heritage Statement, Design and Access Statement date stamped: 28th September 2102

Financial Appraisal date stamped: 6th November 2012

Drawings 11164(SK)017 (third floor thermal and acoustic upgrade), 11164(SK)018A (proposed drainage layout) date stamped: 9th November 2012

Drawing 11164(SK)015B (external wall/intermediate floor upgrade), 11164(SK)016B (thin party wall intermediate floor upgrade), 11164(SK)019B (proposed MVHR layout for first second and third floors), 11164(SK)021A (fireplace/intermediate floor acoustic upgrade), 011164(SK)021A (panelling/intermediate floor acoustic upgrade) date stamped: 22nd November 2012

Reasons for granting consent:

The decision to grant consent subject to conditions has been made in accordance with relevant legislation, The National Planning Policy Framework and in light of views of third parties. The Council regards that the revised proposals because of their location, design, detailing and use of materials, will preserve the building, its setting and its features of special architectural or historic interest and will preserve or enhance the character and appearance of the Conservation Area.

Decision-taking Statement:

In determining the application the Local Planning Authority considers it has complied with the aims of the paragraphs 186 and 187 of the National Planning Framework. The Committee Members considered the advice put before them and a positive view of the submitted proposals was taken and consent granted.

Item No:	04
Application No:	12/04456/FUL
Site Location:	Lloyds Tsb Bank Plc, 2 Silver Street, Midsomer Norton, BA3 2HB
Ward: Midsomer Norton Redfield	**Parish:** Midsomer Norton **LB Grade:** N/A
Application Type:	Full Application
Proposal:	Erection of 4no. terraced dwellings on land to the North East of No. 2 Silver Street.
Constraints:	Agric Land Class 1,2,3a, City/Town Centre Shopping Areas, Coal - Standing Advice Area, Conservation Area, Forest of Avon, Housing Development Boundary,
Applicant:	Linhope Properties Limited
Expiry Date:	26th December 2012
Case Officer:	Rachel Tadman

DECISION REFUSE

1 The proposed development is of a poor quality design and layout that does not adequately reflect the character of this part of the Midsomer Norton Conservation Area and would have a detrimental impact on the street scene and represent overdevelopment of the site. Overall the development would have an unacceptable detrimental impact on the street scene and the character and appearance of this part of the Midsomer Norton Conservation Area. This is contrary to Policy D2, D4 and BH6 of the Bath & North East Somerset Local Plan including minerals & waste policies adopted 2007.

2 The proposed development, due to the location of the access onto the highway and the size of the proposed off street parking area, would have poor manoeuvrability for vehicles using the parking spaces resulting in users reversing onto the highway close to an existing junction. This would have a harmful impact on highway safety and would be contrary to Policy T24 of the Bath & North East Somerset Local Plan including minerals & waste policies adopted 2007.

PLANS LIST:

The application relates to drawing nos (TP)001, (TP)010 Rev B, (TP)011 Rev B, (TP)012 Rev B, (TP)022 Rev A, (TP)024 Rev A, (TP)030 Rev A.

The Local Planning Authority has, as far as possible and respecting the democratic process, complied with the requirements of paragraphs 186 and `87 of the National Planning Policy Statement.

In accordance with the Local Planning Authority's scheme of delegation the application was referred to the Development Control Committee and Members resolved that the proposed development was unacceptable and contrary Policies within the Local Plan. The Development Control Committee resolved to refuse the application.

The Local Planning Authority has listed the reasons why the Development Control Committee resolved to refuse the application but would still offer advice, by entering into

pre-application discussions, on how the reasons for refusal maybe overcome within a revised submission.

Item No:	05
Application No:	12/04515/FUL
Site Location:	Beechen Cliff School, Kipling Avenue, Bear Flat, Bath
Ward: Widcombe	**Parish:** N/A **LB Grade:** N/A
Application Type:	Full Application
Proposal:	Alterations and extension to existing Sixth Form Block to form a new Student Accommodation and Classroom Block
Constraints:	Agric Land Class 3b,4,5, Article 4, Conservation Area, Forest of Avon, Hotspring Protection, World Heritage Site,
Applicant:	Mr Andrew Davies
Expiry Date:	21st December 2012
Case Officer:	Alice Barnes

DECISION PERMIT

1 The development hereby permitted shall be begun before the expiration of three years from the date of this permission.

Reason: As required by Section 91 of the Town and Country Planning Act 1990 (as amended) and to avoid the accumulation of unimplemented planning permissions.

2 No development shall commence until a schedule of materials and finishes, and samples of the materials to be used in the construction of the external surfaces, including roofs, have been submitted to and approved in writing by the Local Planning Authority. The development shall thereafter be carried out only in accordance with the details so approved.

Reason: In the interests of the appearance of the development and the surrounding area.

3 Prior to the commencement of the development, a Construction Management Plan shall be submitted to and approved in writing by the Local Planning Authority and shall include details of construction access, deliveries (including storage arrangements and timings), contractor parking, traffic management, signing, etc. Thereafter, the development shall not be constructed other than in full accordance with that approved plan.

Reason: To ensure the safe operation of the highway

4 The development/works hereby permitted shall only be implemented in accordance with the plans as set out in the plans list below.

Reason: To define the terms and extent of the permission.

PLANS LIST:

Site location plan 00
Existing block plan 01
Existing ground floor plan 02
Existing first floor plan 03
Existing north and south elevation 04
Existing east and west elevation 05
Existing site for proposed staff parking 10
Existing site for proposed visitor parking 11
Proposed staff parking 110
Proposed visitor parking 111
Proposed ground floor plan 102 rev A
Proposed FF plan 103 rev A
Proposed roof plan 105
Proposed north and south elevations 106 rev A
Proposed east and west elevations 107 rev A
Proposed sections 108 rev A

REASONS FOR GRANTING APPROVAL:

1. The proposed development would not have an adverse impact upon the streetscene or the amenity of the surrounding residential occupiers. Due to the use of appropriate materials and built form the proposed development will preserve the character of the Conservation Area in both close and long range views. The proposed development will provide adequate on site parking and will not cause harm to highway safety.

2. The decision to grant approval has taken account of the Development Plan, relevant emerging Local Plans and approved Supplementary Planning Guidance. This is in accordance with the Policies set out below at A.

A.

D2, D4, Bh.1, Bh.6 and T.24 of the Bath & North East Somerset Local Plan including minerals and waste policies - adopted October 2007

Decision taking statement:

In determining this application the Local Planning Authority considers it has complied with the aims of paragraphs 186 and 187 of the National Planning Framework. For the reasons given, and expanded upon in a related case officer's report, a positive view of the revised proposals was taken and consent was granted.

Item No:	06
Application No:	12/05093/FUL
Site Location:	Old Coal Yard, Marsh Lane, Clutton, Bristol
Ward: Clutton	**Parish:** Clutton **LB Grade:** N/A
Application Type:	Full Application
Proposal:	Erection of steel framed building with external cladding to roof rear and two sides, front elevation to remain as open portal
Constraints:	Agric Land Class 1,2,3a, Coal - Standing Advice Area, Core Employment Area, Forest of Avon, Hazards & Pipelines,
Applicant:	Towens Of Weston Ltd
Expiry Date:	23rd January 2013
Case Officer:	Tessa Hampden

DECISION PERMIT

1 The development hereby permitted shall be begun before the expiration of three years from the date of this permission.

Reason: As required by Section 91 of the Town and Country Planning Act 1990 (as amended) and to avoid the accumulation of unimplemented planning permissions.

2 Before the development is commenced, a plan indicating the areas for parking, turning and external storage on the site shall be submitted to and approved in writing by the Local Planning Authority. The areas shall subsequently be maintained for those purposes only.

Reason: In the interests of highway safety.

3 The development/works hereby permitted shall only be implemented in accordance with the plans as set out in the plans list below.

Reason: To define the terms and extent of the permission.

PLANS LIST:
TOWENS/MARSH/001, TOWENS/MARSH/002, dated 19th November 2012, TOWENS/MARSH/003 dated 28th November 2012

REASONS FOR GRANTING APPROVAL:

The proposed building is acceptable in this Core Employment Site. It is of an acceptable design, scale and siting within this existing industrial site. There will be no undue harm to the residential amenity of the neighbouring occupiers or to highway safety, and no other significant issues have arisen as a result of this planning application.

The decision to grant approval has taken account of the Development Plan, relevant emerging Local Plans and approved Supplementary Planning Guidance. This is in accordance with the Policies set out below.

Bath and North East Somerset Local Plan (including minerals and waste policies) 2007

D2 - Design, public realm and residential amenity.
D4 - Townscape
ET4 - Core Employment Sites
NE1 - Landscape character
NE5 Forest of Avon
NE4 Tree and Woodland Conservation
ES14 Unstable land
ES15 - Contaminated Land
T24 - General development control and access policy
T26 On site parking and service provision

SUBMISSION CORE STRATEGY, MAY 2011
Bath and North East Somerset Submission Core Strategy (May 2011) is out at inspection stage and therefore will only be given limited weight for development management purposes.

National Planning Policy Framework - March 2012 - is not considered to conflict with the above policies

Decision Taking Statement:

In determining this application the Local Planning Authority considers it has complied with the aims of paragraphs 186 and 187 of the National Planning Framework. For the reasons given, and expanded upon in a related case officer's report, a positive view of the submitted proposals was taken and permission was granted.

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Bath & North East Somerset Council

MEETING:	**Development Control Committee**	AGENDA ITEM NUMBER
MEETING DATE:	**13th February 2013**	
RESPONSIBLE OFFICER:	Lisa Bartlett, Development Manager, Planning & Transport Development (Telephone: 01225 477281)	
TITLE:	**APPLICATIONS FOR PLANNING PERMISSION**	
WARDS:	ALL	
BACKGROUND PAPERS:		

AN OPEN PUBLIC ITEM

BACKGROUND PAPERS

List of background papers relating to this report of the Development Manager, Planning and Transport Development about applications/proposals for Planning Permission etc. The papers are available for inspection online at http://planning.bathnes.gov.uk/PublicAccess/.

[1] Application forms, letters or other consultation documents, certificates, notices, correspondence and all drawings submitted by and/or on behalf of applicants, Government Departments, agencies or Bath and North East Somerset Council in connection with each application/proposal referred to in this Report.

[2] Department work sheets relating to each application/proposal as above.

[3] Responses on the application/proposals as above and any subsequent relevant correspondence from:

(i) Sections and officers of the Council, including:

Building Control
Environmental Services
Transport Development
Planning Policy, Environment and Projects, Urban Design (Sustainability)

(ii) The Environment Agency
(iii) Wessex Water
(iv) Bristol Water
(v) Health and Safety Executive
(vi) British Gas
(vii) Historic Buildings and Monuments Commission for England (English Heritage)
(viii) The Garden History Society
(ix) Royal Fine Arts Commission
(x) Department of Environment, Food and Rural Affairs
(xi) Nature Conservancy Council
(xii) Natural England
(xiii) National and local amenity societies
(xiv) Other interested organisations
(xv) Neighbours, residents and other interested persons
(xvi) Any other document or correspondence specifically identified with an application/proposal

[4] The relevant provisions of Acts of Parliament, Statutory Instruments or Government Circulars, or documents produced by the Council or another statutory body such as the Bath and North East Somerset Local Plan (including waste and minerals policies) adopted October 2007

The following notes are for information only:-

[1] "Background Papers" are defined in the Local Government (Access to Information) Act 1985 do not include those disclosing "Exempt" or "Confidential Information" within the meaning of that Act. There may be, therefore, other papers relevant to an

application which will be relied on in preparing the report to the Committee or a related report, but which legally are not required to be open to public inspection.

[2] The papers identified or referred to in this List of Background Papers will only include letters, plans and other documents relating to applications/proposals referred to in the report if they have been relied on to a material extent in producing the report.

[3] Although not necessary for meeting the requirements of the above Act, other letters and documents of the above kinds received after the preparation of this report and reported to and taken into account by the Committee will also be available for inspection.

[4] Copies of documents/plans etc. can be supplied for a reasonable fee if the copyright on the particular item is not thereby infringed or if the copyright is owned by Bath and North East Somerset Council or any other local authority.

INDEX

ITEM NO.	APPLICATION NO. & TARGET DATE:	APPLICANTS NAME/SITE ADDRESS and PROPOSAL	WARD:	OFFICER:	REC:
01	05/00723/VAR 3 September 2009	Hinton Organics (Wessex) Limited Hinton Organics Ltd, Charlton Field Lane, Queen Charlton, BS31 2TN, Variation of condition 13 and 16 of Planning Permission: 97/02626/MINW dated 02/12/1998 to allow permanent recycling of cardboard waste and increase in truck movements.	Farmborough	Anthea Hoey	REFUSE
02	05/01993/FUL 3 September 2009	Hinton Organics (Wessex) Ltd Hinton Organics Ltd, Charlton Field Lane, Queen Charlton, BS31 2TN, Increase size of concrete storage area and variation of condition 13 of planning permission 97/02626/MINW to accept wood waste.	Farmborough	Anthea Hoey	REFUSE
03	11/00022/VAR 2 March 2011	Hinton Organics Ltd Parcel 5319, Charlton Field Lane, Queen Charlton, Bristol, Bath And North East Somerset Variation of conditions 13,16 and 19 of permission no. 97/02626/MINW to extend composting operations, increase vehicle movements and permit cardboard and wood recycling (Temporary use of land for 10 years for manufacture of organic green compost as amended by revised drawings received 14th April 1998 at land formerly Queen Charlton Quarry)	Farmborough	Anthea Hoey	REFUSE
04	12/04932/FUL 15 January 2013	Mr J Hill Fir Tree Inn, 140 Frome Road, Radstock, Bath And North East Somerset, BA3 3LL Erection of 2 no. residential dwellings with associated amenity space and parking.	Radstock	Heather Faulkner	PERMIT

REPORT OF THE DEVELOPMENT MANAGER OF PLANNING AND TRANSPORT DEVELOPMENT ON APPLICATIONS FOR DEVELOPMENT

Item No: 01
Application No: 05/00723/VAR
Site Location: Hinton Organics Ltd Charlton Field Lane Queen Charlton BS31 2TN

Ward: Farmborough **Parish:** Compton Dando **LB Grade:** N/A
Ward Members: Councillor S Davis
Application Type: Application for Variation of Condition
Proposal: Variation of condition 13 and 16 of Planning Permission: 97/02626/MINW dated 02/12/1998 to allow permanent recycling of cardboard waste and increase in truck movements.
Constraints: Greenbelt,
Applicant: Hinton Organics (Wessex) Limited

Expiry Date:	3rd September 2009
Case Officer:	Anthea Hoey

COMMITTEE REPORT

Planning Applications

05/00723/VAR, Variation of condition 13 and 16 of Planning Permission: 97/02626/MINW dated 02/12/1998 to allow permanent recycling of cardboard waste and increase in truck movements.

05/01993/FUL - Increase size of concrete storage area and variation of condition 13 of planning permission 97/02626/MINW to accept wood waste.

11/00022/VAR Variation of conditions 13, 16 and 19 of permission no. 97/02626/MINW to extend composting operations, increase vehicle movements and permit cardboard and wood recycling (Temporary use of land for 10 years for manufacture of organic green compost as amended by revised drawings received 14th April 1998 at land formerly Queen Charlton Quarry)

Case Officer: Anthea Hoey

Details of location and proposal and Relevant History:

Charlton Field Lane, Queen Charlton, Nr Keynsham, Bristol, BS31 2TN

1. Reason for Reporting Application to Committee

Because of the complexity of the planning history of the site. Also because of legal challenges by third parties which led to the quashing of the original planning permissions granted to the two applications dating from 2005. The challenge resulted in a requirement to screen the applications. This position was referred to the committee on 17 February 2010. The Secretary of State has subsequently made a screening direction to the effect that all three applications are for EIA development.

2. Description of the site and proposed development

The site is an existing composting facility, which is located off Charlton Field lane, between Queen Charlton and Keynsham. The site was previously used as the processing works for the adjacent former Queen Charlton Quarry, now in the final stages of restoration by inert landfilling.

The applications seek variations to conditions on the planning permission granted in 1998 for the temporary use of the site for 10 years for the manufacture of organic green compost. The composting use actually commenced on 31 January 2001.

The site is in the Green Belt and is part of the Forest of Avon.

The details of the proposals in each application are as follows:-

Application 05/00723:-
05/00723/VAR, Variation of condition 13 and 16 of Planning Permission: 97/02626/MINW dated 02/12/1998 to allow permanent recycling of cardboard waste and increase in truck movements.

Conditions 13 and 16 of planning permission 97/02626 state:
"13 No material other than green garden and parks waste (and no kitchen or animal waste) shall be imported to the site without the prior written approval of the Local Planning Authority."

"16 No more than five heavy goods vehicles shall enter the site on any day. From the date of this permission the site operators shall maintain daily records of vehicle movements and make them available to the Local Planning Authority at any reasonable time upon request."

These conditions were temporarily varied under planning permission 04/00105/VAR granted on the 15 March 2004 to allow the composting of cardboard waste and to allow 82 HGV movements a week between March 2004 and October 2004 and 60 HGV movements a week between November 2004 and February 2005.

Application 05/00723 seeks authorisation to retain those changes until the completion of composting operations permitted under 97/02626.

The site has in fact continued to receive cardboard waste and to operate to the higher limits of HGV movements since March 2005.

05/01993/FUL - Increase size of concrete storage area and variation of condition 13 of planning permission 97/02626/MINW to accept wood waste.

This application seeks authorisation for an increase in the size of the concrete hardstanding from 2048 square metres to 4082 square metres and for a further variation of condition 13 (quoted above) to allow the receipt of wood waste.

The increase in the size of the hardstanding was applied for retrospectively, and due to the earlier granting of the proposals sought in the application, the site has received wood waste since November 2006.

11/00022/VAR Variation of conditions 13, 16 and 19 of permission no. 97/02626/MINW to extend composting operations, increase vehicle movements and permit cardboard and wood recycling

This application incorporates the proposals to allow composting of cardboard and of wood waste, and to increase the number of HGV movements from both the above applications, and in addition seeks a variation of condition 19 of permission no. 97/02626/MINW.

Condition 19 of permission no. 97/02626/MINW states:-
"The green waste composting operations authorised by this permission shall cease not later than 10 years from the commencement of composting operations."

The variation sought is to allow operations to continue for a period of 18 months from the determination of the application. The application was submitted in January 2011, less than a month before the original 1998 permission expired.

3. Relevant background

The first judicial review was against the Council's view that the two 2005 applications did not require to be screened under the 1999 EIA Regulations. The Court held that Council's understanding of the Regulations was correct, that the Regulations failed to implement the relevant EU Directive properly and that the Directive required the applications to be screened. The Council promptly screened the applications, negatively. However in January 2010 the Secretary of State intervened and took upon himself the responsibility for screening the applications. He then spent over two years doing this. By the time he made a screening direction, on 9 March 2012, application 11/00022 had also been submitted and the Secretary of State screened this also.

The Secretary of State directed that each application was for EIA development because the development was likely to have significant effects on the environment because of the possibility of unacceptable odours originating from the operations and because of the likelihood of a release of nitrogen rich effluent into the Nitrogen Vulnerable Zone (NVZ). The possible sources for the release of nitrogen rich effluent were a leak of leachate and the spreading of non PAS 100 compost/waste onto the NVZ.

In response to the screening direction Officers made it clear to local objectors that they would give the applicant an opportunity to submit an environmental statement and stated that –

> 'Officers accept that, if Hinton does not avail itself of the opportunity to submit an environmental statement, the Council will be obliged to serve an enforcement notice requiring the complete cessation of all activities on the Composting Site and the restoration of the Site.'

This was a correct statement of the legal position.

Despite this statement objectors started a third judicial review against the Council, challenging its failure to take immediate enforcement action. Permission has not yet been granted for the judicial review and Officers consider that the proceedings lack any merit. A 'rolled-up' hearing of the judicial review proceedings will take place in the High Court in Bristol on 21 and 22 February 2013.

To assist the applicant Officers made a scoping opinion on 17 April 2012, setting out the matters to be covered in the environmental statement. They imposed a deadline of 17 July for the submission of an environmental statement.

The applicant sent a document which purported to be an environmental statement to the Council on 17 July 2013. However it failed to comply with most of the legal requirements for the 'submission' of an environmental statement set out in the EIA Regulations and Officers had to explain these to the applicant in some detail. The requirements for submission were only satisfied on 14 September 2012.

Upon scrutiny it was found that the applicant's document failed to satisfy the requirements for an environmental statement in numerous respects. In these circumstances the Council was obliged to serve a notice under r19 of the Regulations, identifying the deficiencies and requiring them to be remedied. Officers sent a r19 notice to the applicant on 31 October 2012. They imposed a deadline of 17 December for the submission of the information.

A volume of information was submitted on 17 December. However on examination this too was found to be significantly deficient (see further below).

The Regulations do not provide for repeated r19 notices. R3 states that a local planning authority cannot grant an application for EIA development if there has been no environmental statement. It follows that, if Members determine the applications, they must refuse them. If Members do this, the question of enforcement action will obviously arise. This is s subject of a second report.

Members should note that, if an enforcement notice is served and appealed, the enforcement notice will be suspended and the applicant will be given a further opportunity to submit an environmental statement by the Secretary of State. (This is the result of r36 of the 2011 EIA Regulations, which will apply to any enforcement notice served in this case. The determination of the three outstanding planning applications is governed by the 1999 EIA Regulations and the references to Regulations in this report are, unless otherwise stated, to the 1999 Regulations). This is so even though the local planning authority (i) has already given abundant opportunity for this, (ii) has served a r19 notice, (iii) has no further power itself to require an environmental statement and (iv) has been forced by r3 to refuse planning permission.

4. Summary of Consultation/Representations:

PUBLOW AND PENSFORD PARISH COUNCIL. Requested that additional time be given to provide a response. The comments will be reported verbally at the meeting.

COMPTON DANDO PARISH COUNCIL
The Parish Council received the consultation request on the Reg 19 response too late to be considered at the January meeting and the next meeting is not until 19 February.

The Parish Council has asked for its original comments on the applications to be reported instead and advise that the Parish Council been invited to the liaison group meetings with local residents, and this has been a positive move. However, complaints are still received about mud on road, lorry movements, smell etc

The previous responses are:-

11/00022/VAR –
Response dated April 2012

Compton Dando Parish Council would like to raise the following comments on the above application :

- The Parish Council supports the cessation of operations in July 2012;
- The Parish Council requests that consideration be given to the proposed clause 5 of the Joint Waste Strategy Policy 8 (Landfill);
- It is noted that an Environmental Impact Assessment is required at the site;
- It is strongly recommended that scientific monitoring of the operating procedures at this site be undertaken.

Response dated March 2011

The Parish Council recommend that this application goes to committee as the Parish Council feel there is insufficient scientific monitoring, they have reservations with regard to the proposed increase of lorry movements, they are concerned about the visual impact of the site, they have received complaints that the conditions of the original application are not being adhered to, they have received complaints that there are inaccuracies within the application documentation in respect of the distance from the compost site to the nearest receptor.
Copies of letters from a local resident – (reported separately in this report) and from Council officers were attached together with an extract from the Joint Waste Core Strategy Pre-Submission Document:

05/00723/VAR and 05/01993/FUL
Response dated July 2009,
Due to insufficient information the Council are not clear on what they are being asked to comment on but would remind you of their previous comments which was that they had reservations, Hinton Organics have not needed the number of lorries specified so the limit should be reduced. Permission should only be granted for another 12 months and reviewed annually. There is strong feeling that there is insufficient scientific monitoring of the operating procedures and the Council still receive complaints/concerns regarding the operation.

WHITCHURCH PARISH COUNCIL :
Any comments will be reported verbally at the meeting.

KEYNSHAM TOWN COUNCIL:
The Town Council supports all the applications.

ENVIRONMENT AGENCY:
The EA responses to the different applications are:-

05/00723

The Environment Agency has no objection to the variation of conditions 13 and 16 to allow permanent recycling of cardboard waste and truck movements.

05/01993
The Environment Agency has no objection to the variation of condition to increase the concrete pad area. The Operator must comply with its Environmental Permit with regard to the amounts of waste stored onsite at any one time, which at this time is 800 tonnes.

Drainage from this area runs to a slurry lagoon. Please note that this slurry lagoon is only permitted to reach up to 90% full, with any excess required to be tankered away. Otherwise there will be a breach of the Environmental Permit.

11/00022/VAR
The Environment Agency has no objection to the variation of conditions 13, 16 and 19, for this proposal.

However, as a matter of completeness, and to make corrections to the accompanying documentation, wish to make the following comments:

Previous correspondence regarding this application sent on the 9th Feb 2011should be taken into consideration. Since Feb 2011 the site then operating under the name Hinton Organics (Wessex) Limited were prosecuted for three offences for breaches of their permit, relating directly to odour control and waste acceptance criteria. A post conviction plan was provided and accepted. The site permit was transferred to Reorganics Limited on the 16th November 2012.

Reorganics Limited currently holds permit number EPR/LB3339RK. They do not hold any other Environment Agency permits or exemptions.

The following points should be noted:

The previous company in charge of this permitted facility Hinton Organics (Wessex) Limited, had a long history of non-compliance and enforcement history from the Environment Agency. Reorganics have not yet had a routine inspection for compliance. The Compliance Rating of a site shows the total Compliance Classification Scheme (CCS) score during that calendar year. All sites start the calendar year with no breaches and hence a Band A Compliance Rating. As the year progresses breaches may be recorded against permit requirements, points are accrued and band ratings go down.

Information provided under Point 2, the odour management plan.
The Odour Management plan provided by the site is not yet accepted by the Environment Agency as further improvements have been suggested. We are in the process of providing feedback for improvements to this document.

Information provided under Point 13 of the documents provided states that the Environment Agency tests the leachate lagoon. This has been done on one occasion, which indicated that the results were within the working plan limits, that was in place at the time. The EA does not regularly test the leachate in the lagoon.

Information provided under Point 15 of the documents provided states that it is not uncommon for the lagoon to run dry, and that leachate is recirculated if the lagoon reaches 90%. The Environmental Permit allows for leachate to be recirculated during the sanitisation phase only and only if the compost requires moisture. It does not allow the recirculation of leachate in order to lower the lagoon levels. An annual inspection of the lagoon liner is required by the environmental permit. Inspecting Environment Agency Officers have not noted any other occasion when the lagoon has run dry.

Information not received for incidents:

Incident information was sent to Jo Downes on the 18th Dec. The EA attached a document detailing odour related incidents for which enforcement action was taken. This information is also available on the public register at http://epr.environment-agency.gov.uk/ePRInternet/SearchRegisters.aspx

Reorganics refers to an odour report carried out in 2007 stating in several places that the level of odour was insignificant. The attached information listed incidences of enforcement action taken for breaches of the Environmental Permit with regard to Odour.

The Environment Agency does hold rainfall data for a number of rain gauges. To calculate predicted effect from climate change various scenarios are available on the UKCIP website. http://www.ukcip.org.uk/bacliat/

Please refer to the current environment agency position statement on permitting of Open Windrow Composting sites which is:
http://www.environment-agency.gov.uk/research/library/position/41211.aspx

The initial response to application 11/00022 dated 9 February 2011 raised no objection in principle to the proposal but wish the following to be taken into consideration:

Advice to Planning Authority/Applicant:
The site currently operates to Permit Number EPR / DP349LJ. The closest residential property is approximately 150m from the site boundary.
On 30 November 2009 the permit was varied to require Bioaerosol Monitoring to be undertaken. The most recent report submitted as part of the Planning Statement is a draft version; the accepted final version is available through the Environment Agency's public register if required by the LPA.

The permit outlines the cardboard and wood waste streams which the site is permitted to accept.

Information was provided regarding the rules set out in the permit for the use of the compost from the site in the restoration of the adjacent inert landfilling site

The EA advised that the assertion in the planning statement that '*there have been no issues with in terms of any pollution to air, land or water over that period' i*s not considered to be accurate, and a reference was given to records of past complaints pursued by the EA.

The response also gave a reference to the Environment Agency's position statement on sites which operate composting operations within 250 metres of a 'sensitive receptor' (typically a dwelling or workplace).

HIGHWAY DEVELOPMENT OFFICER:
05/00723, 05/01993 and 11/00022/VAR
Response dated 10th January 2013
The highway response remains one of NO OBJECTION, subject to the conditions set out in the response to 11/00022 dated February 2011.

11/00022/VAR
14th February 2011
In highway terms, this application is broadly the same as 05/00723/VAR and 05/01993/FUL, to which no highway objections were raised.
Charlton Lane is subject to a local 7.5 tonne environmental weight restriction to the north of the site, commencing at the Redlynch Lane junction. Vehicles exceeding this weight limit are not permitted to pass through the area of restriction, so it is likely all HGV's accessing and egressing the site will need to do so via Woollard Lane and A37. Drivers should be informed of this restriction.

Expressed concern about the lack of a wheel wash as required by condition 11 of 97/02626/MINW. This all the more importance given the proposed increase in vehicles

Bearing the above in mind, the highway response is one of NO OBJECTION, subject to the following conditions;
1. Vehicles carrying material to or from the site shall not exceed in size an eight wheel tipper lorry and be restricted in number to a maximum of 100 vehicles (200 movements) per seven day week.
Reason: To control the size and movement of vehicles in the interests of highway safety.

2. Each vehicle attending the site shall be properly logged with the load recorded in cubic metres (for preference). A certified summary of the records shall be submitted in writing to the Local Planning Authority on a bi-monthly basis within 10 working days of the end of each second month.

Reason: To maintain and overview of the traffic conditioned above.

3. All vehicles leaving the site shall be inspected to ensure that they are in a condition not to emit dust or deposit mud, slurry or other debris on the highway, and wheel cleaning facilities shall be installed prior to the commencement of works, in accordance with details to be submitted to and approved in writing by the Local Planning Authority. Thereafter, the wheel wash facilities shall be maintained in operation at all times during the life of the planning permission.

Reason: In the interests of highway safety.

4. The deposit of materials or slurry from the site on the public highway shall be treated as an emergency and will be cleared regularly by a vacuum/road sweeper and/or hand picked in the case of litter. Visual inspections of the site access road will be carried out daily and staff will report any problems with mud on the site surface immediately to the site manager. Vehicles will be visually inspected before exit to check that loads are safe and that no mud is carried on the wheels or body of the vehicle.

Reason: In the interests of highway safety.

ENVIRONMENTAL HEALTH OFFICER:
Any comments will be reported verbally at the meeting.

COUNCIL ECOLOGIST:
Any comments will be reported verbally at the meeting.

PLANNING POLICY SECTION OF BANES PLANNING
No comment.

NATURAL ENGLAND:
'Natural England does not consider that these applications pose any likely or significant risk to those features of the natural environment for which we would otherwise provide a more detailed consultation response and so does not wish to make specific comment on the details of this consultation' The features requiring more detailed consideration include SSSIs, Natura 2000 site, National Park, Area of Outstanding Natural Beauty or a large population of a protected species which may affect a significant quantity of habitat across the country.
The lack of case specific comment from NE should not be interpreted as a statement that there are no impacts on the natural environment.
In particular, NE would expect the LPA in determining the applications to assess and consider the possible impacts resulting from this proposal on Protected species and Local wildlife sites, and to consider the scope for biodiversity enhancements

Initial response dated April 2012 was written on the basis that the development was not EIA development. NE raised no objections but asked to be consulted again if any changes to the application were made.

ENGLISH HERITAGE
Do not consider that it is necessary for these applications to be referred to EH.

OTHER REPRESENTATIONS/THIRD PARTIES:
39 letters have been received from 16 different local residents and a solicitor acting on behalf of one of them.
The letters raise objections on the grounds of

- impact on health,
- inaccuracies in the information submitted re distances to nearest receptors, this should include adjacent farmland, which retains permitted use rights fort changes to their current grazing use. Live stock should also be included as sensitive receptors.
- impact from odour and air pollution from bio-aerosols,
- impact from noise,
- impact on traffic safety, mud on roads unsuitable roads leading to the site and damage to surface and verges,
- impact on Green Belt,
- proximity to houses, the site is in the wrong place and should be restored to agriculture
- impact on wildlife,
- impact from fly tipping/litter,
- failure to comply with existing conditions and limits, including a compound on adjacent land.
- The supporting information does not satisfy the requirements for an Environmental Statement.
- The unauthorised sale of wood from the site
- Suspicion at the applicant's change of name.

Several of the respondents requested that enforcement action be taken to ensure the use of the site is discontinued.

5. The purported environmental statement

The background to this case is that the composting of cardboard and wood and the increase in lorry movements were all originally approved in 2005 and 2006 and the site has been operating under these variations in the conditions to this effect since. The increase in the size of the hardstanding has been in place since before then, but was originally approved in 2006.

The NVZ was introduced by legislation that came into force on 1 January 2009.

The proposal for the extension of time was submitted before expiration of the original 10 year period commencing in January 2001.

However, in accordance with the rulings by the High Court and by the Secretary of State, the continued operation of the site is EIA development and the Council is prohibited from granting planning permission without first considering environmental information, i.e. an environmental statement.

The information submitted by the applicants in July and December is not considered to constitute an environmental statement for a number of reasons. These are set out below:-

Presentation
There is no correct list of contents, nor is there a proper Non Technical Summary of the second submission. A Non Technical Summary is one of the items of information that is required as a minimum as part of an Environmental Statement.

Content
The following information is considered lacking for the reasons given:-

Restoration and after care. Restoration and after care is a relevant aspect of the development that is to be described in the ES. The submission includes a copy of the wording of the original condition requiring submission of a restoration scheme and states that a variation will be sought to this, but does not specify

what the variation will be, nor its objectives in terms of afteruse. As the application only seeks a further 18 months operation, this is considered a material deficiency.

Physical measures for mitigation of environmental effects. These are also relevant aspects of the development. The submission does not address the important question of the adequacy of capacity of the lagoon, which is considered a key feature in the control of the risk of leaks of leachate into the NVZ. Other elements necessary for the control of odour such as misting systems, and weather stations are also not described. Views on the adequacy of the submitted information are awaited from the Council's Environmental Health Officer.

Impact on the NVZ. Information on the impact of the NVZ if effluent enters it from the site, and also if non PAS compost is spread on it. Views on the adequacy of the submitted information are awaited from the EA and the Council's ecologist.

Water balance calculation. This is an assessment of the quantity of leachate that would be generated in a 1 in 100 year storm and allowance for climate change. This is an important factor in assessing the risk of a leak of leachate from the site onto the NVZ. The submission states that it is not possible to assess this information without information on the duration of the storm. However this calculation, often referred to as a 'water balance', is standard practice in the design of surface water drainage systems for a wide range of developments, including composting hardstandings and lagoons. The submission does include a list of three factors relating to the management and operation of the composting process that are also relevant in the control of leachate. It also states that the lagoon is monitored and managed to ensure that it does not exceed 90% capacity. However as the size of the hardstanding was almost doubled in area without any increase in the size of the original lagoon the lack of a proper water balance calculation is considered to be a material deficiency.

Odour management. Views on the adequacy of the submitted information are awaited from the EA and the Council's ecologist.

Cumulative impact. The cumulative impact of the proposals with that of 'other development' is one of the considerations to be taken account of in the decision on a screening opinion. The composting site has been operating alongside the inert infilling of the adjacent site. Although the permission for the inert infilling had expired when the information was submitted, an appeal against refusal of permission for an extension of time was pending at the time, which has since been allowed. In any case, the sites have been operating alongside each other in the past. The submitted information includes consideration of the potential for cumulative impact from noise and odour, but does not mention the numbers of lorry movements, nor does it compare them to permitted movements. Whilst combined lorry movements are not likely to be significant, and the highways officer has not raised any objection, nevertheless this information was included in the Council's screening opinion and would have been easy to provide.

Counsel's opinion
The advice of counsel is attached. He agrees with the above and makes a further point about the lack of assessment of non-PAS 100 compost/waste.

These deficiencies are considered sufficiently material to mean that the applications have not been accompanied by a proper Environmental Statement; therefore irrespective of the merits of the application, the Council may not approve the applications.

6. Determining the applications

The first issue before Members is whether to determine the applications now (by refusing them). If Members determine the applications, a second issue, enforcement action, arises. This is the subject of a separate report.

Officers consider that there are no considerations which suggest that the applications should not be determined now and that all relevant considerations suggest that they should be determined now, viz -

Two of the applications were made over 7 years ago. The third was made 2 years ago.

The applicant has been given abundant opportunity to submit the information required to empower the Council to grant the applications but has failed to do so, in significant ways.

The Regulations do not empower the Council to make further demands for information.

The Council is undoubtedly under an obligation to determine planning applications made to it, despite the existence of the right of appeal against non-determination.

The Council is banned from granting planning permission for this development. However the development is actually taking place and not determining the applications is tantamount to permitting it to continue. It will not be possible to take enforcement action until the applications have been determined.

There are justifications for the non-determination of the applications in the period up to 13 February 2013. However none of these justifications apply to the future.

As has been pointed out, the Council faces a hearing in the judicial review proceedings on 21 February. The fact of this imminent hearing is not relevant to the above issue. The judicial review is a challenge to past actions by the Council.

7. PLANNING POLICY

In the determination of the applications regard should also be had to the provisions of the development plan and to any other material considerations.

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.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.
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.

The West of England Joint Waste Core Strategy was adopted in March 2011 (JWCS).

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.

Overall the JWCS seeks to increase the capacity for recycling and composting available within the sub region by an additional 800,000 tonnes per annum. The Plan does not identify sites where this might take place, but Policy 3 sets out the approach to open windrow composting. The supporting text explains that open windrow composting has different land use implications to other waste management facilities least because it generally requires minimal support buildings. The operations are comparable to agricultural activities and may therefore be appropriate to locate in the open countryside.

Policy 3 states:-
Planning permissions for open windrow composting, with sufficient distance, as defined in Environment Agency guidance, from any sensitive receptor will be granted, subject to development management policy:
1. on existing or proposed waste management sites, subject in the case of landfill and landraising sites or other temporary facilities, to the waste use being limited to the life of the landfill, landraising or other temporary facility;
2 . on sites in the countryside which constitute previously developed land, or redundant agricultural and forestry buildings and their curtilages for proposals for the composting of waste and;
3. sites in agricultural use proposing composting of waste for use within that agricultural unit.
(12) Policy 405_07, Policy Position composting and potential health effects from bioareosols. Environment Agency, 2007.

There is no indication in the development plan that the use of the site for open windrow composting is not acceptable in principle, and in addition it is material that continuation of the use would contribute to maintaining the available capacity for composting in the sub region. The key is that it is important to also determine that the environmental impact is acceptable.

The Secretary of State's screening opinion referred to above identified particular aspects of the potential impact which needed to be addressed in an Environmental Statement, which as explained above have not been adequately addressed. This has not enabled a full evaluation of the significance of these potential impacts to be undertaken.

Thus the Council is unable to form a full opinion on the implications of the proposal, which has led to the recommendation that the applications should be refused for lack of information.

RECOMMENDATION: REFUSE

REASONS(S) FOR REFUSAL

The applications be refused for the following reason:-

05/00723/VAR, Variation of condition 13 and 16 of Planning Permission: 97/02626/MINW dated 02/12/1998 to allow permanent recycling of cardboard waste and increase in truck movements.

05/01993/FUL - Increase size of concrete storage area and variation of condition 13 of planning permission 97/02626/MINW to accept wood waste.

11/00022/VAR Variation of conditions 13, 16 and 19 of permission no. 97/02626/MINW to extend composting operations, increase vehicle movements and permit cardboard and wood recycling (Temporary

use of land for 10 years for manufacture of organic green compost as amended by revised drawings received 14th April 1998 at land formerly Queen Charlton Quarry)

1 The application is for EIA development and should have been accompanied by an Environmental Statement. The information submitted in support the application is not considered to constitute an Environmental Statement within the terms of Regulation 2 of the Town and Country Planning (Environmental Impact etc) Regulations 1999 in particular because it fails to address the risk of pollution of the NVZ, fails to give information on restoration of the site, fails to give information on cumulative impacts and fails to include a Non Technical Summary. Therefore in accordance with Regulation 3 of the Town and Country Planning (Environmental Impact etc) Regulations 1999 the application must be refused.

PLANS LIST
FOOTNOTE: This decision relates to Drawing Nos. 503/01B, 503/02A, 503/03A and 503/04B date stamped 14 April 1998.

The advice of counsel is attached. He agrees with the above and makes a further point about the lack of assessment of non-PAS 100 compost/waste.

These deficiencies are considered sufficiently material to mean that the applications have not been accompanied by a proper Environmental Statement; therefore irrespective of the merits of the application, the Council may not approve the applications.

Determining the applications

The first issue before Members is whether to determine the applications now (by refusing them). If Members determine the applications, a second issue, enforcement action, arises. This is the subject of a separate report.

Officers consider that there are no considerations which suggest that the applications should not be determined now and that all relevant considerations suggest that they should be determined now, viz -

Two of the applications were made over 7 years ago. The third was made 2 years ago.

The applicant has been given abundant opportunity to submit the information required to empower the Council to grant the applications but has failed to do so, in significant ways.

The Regulations do not empower the Council to make further demands for information.

The Council is undoubtedly under an obligation to determine planning applications made to it, despite the existence of the right of appeal against non-determination.

The Council is banned from granting planning permission for this development. However the development is actually taking place and not determining the applications is tantamount to permitting it to continue. It will not be possible to take enforcement action until the applications have been determined.

There are justifications for the non-determination of the applications in the period up to 13 February 2013. However none of these justifications apply to the future.

As has been pointed out, the Council faces a hearing in the judicial review proceedings on 21 February. The fact of this imminent hearing is not relevant to the above issue. The judicial review is a challenge to past actions by the Council

Item No: 02

Application No: 05/01993/FUL

Site Location: Hinton Organics Ltd Charlton Field Lane Queen Charlton BS31 2TN

Ward: Farmborough **Parish:** Compton Dando **LB Grade:** N/A

Ward Members:

Application Type: Full Application

Proposal: Increase size of concrete storage area and variation of condition 13 of planning permission 97/02626/MINW to accept wood waste.

Constraints: Greenbelt,

Applicant: Hinton Organics (Wessex) Ltd

Expiry Date: 3rd September 2009

Case Officer: Anthea Hoey

COMMITTEE REPORT

Planning Applications

05/00723/VAR, Variation of condition 13 and 16 of Planning Permission: 97/02626/MINW dated 02/12/1998 to allow permanent recycling of cardboard waste and increase in truck movements.

05/01993/FUL - Increase size of concrete storage area and variation of condition 13 of planning permission 97/02626/MINW to accept wood waste.

11/00022/VAR Variation of conditions 13, 16 and 19 of permission no. 97/02626/MINW to extend composting operations, increase vehicle movements and permit cardboard and wood recycling (Temporary use of land for 10 years for manufacture of organic green compost as amended by revised drawings received 14th April 1998 at land formerly Queen Charlton Quarry)

Case Officer: Anthea Hoey

Details of location and proposal and Relevant History:

Charlton Field Lane, Queen Charlton, Nr Keynsham, Bristol, BS31 2TN

8. Reason for Reporting Application to Committee

Because of the complexity of the planning history of the site. Also because of legal challenges by third parties which led to the quashing of the original planning permissions granted to the two applications dating from 2005. The challenge resulted in a requirement to screen the applications. This position was referred to the committee on 17 February 2010. The Secretary of State has subsequently made a screening direction to the effect that all three applications are for EIA development.

9. Description of the site and proposed development

The site is an existing composting facility, which is located off Charlton Field lane, between Queen Charlton and Keynsham. The site was previously used as the processing works for the adjacent former Queen Charlton Quarry, now in the final stages of restoration by inert landfilling.

The applications seek variations to conditions on the planning permission granted in 1998 for the temporary use of the site for 10 years for the manufacture of organic green compost. The composting use actually commenced on 31 January 2001.

The site is in the Green Belt and is part of the Forest of Avon.

The details of the proposals in each application are as follows:-

Application 05/00723:-
05/00723/VAR, Variation of condition 13 and 16 of Planning Permission: 97/02626/MINW dated 02/12/1998 to allow permanent recycling of cardboard waste and increase in truck movements.

Conditions 13 and 16 of planning permission 97/02626 state:
"13 No material other than green garden and parks waste (and no kitchen or animal waste) shall be imported to the site without the prior written approval of the Local Planning Authority."

"16 No more than five heavy goods vehicles shall enter the site on any day. From the date of this permission the site operators shall maintain daily records of vehicle movements and make them available to the Local Planning Authority at any reasonable time upon request."

These conditions were temporarily varied under planning permission 04/00105/VAR granted on the 15 March 2004 to allow the composting of cardboard waste and to allow 82 HGV movements a week between March 2004 and October 2004 and 60 HGV movements a week between November 2004 and February 2005.

Application 05/00723 seeks authorisation to retain those changes until the completion of composting operations permitted under 97/02626.

The site has in fact continued to receive cardboard waste and to operate to the higher limits of HGV movements since March 2005.

05/01993/FUL - Increase size of concrete storage area and variation of condition 13 of planning permission 97/02626/MINW to accept wood waste.

This application seeks authorisation for an increase in the size of the concrete hardstanding from 2048 square metres to 4082 square metres and for a further variation of condition 13 (quoted above) to allow the receipt of wood waste.

The increase in the size of the hardstanding was applied for retrospectively, and due to the earlier granting of the proposals sought in the application, the site has received wood waste since November 2006.

11/00022/VAR Variation of conditions 13, 16 and 19 of permission no. 97/02626/MINW to extend composting operations, increase vehicle movements and permit cardboard and wood recycling

This application incorporates the proposals to allow composting of cardboard and of wood waste, and to increase the number of HGV movements from both the above applications, and in addition seeks a variation of condition 19 of permission no. 97/02626/MINW.

Condition 19 of permission no. 97/02626/MINW states:-
"The green waste composting operations authorised by this permission shall cease not later than 10 years from the commencement of composting operations."

The variation sought is to allow operations to continue for a period of 18 months from the determination of the application. The application was submitted in January 2011, less than a month before the original 1998 permission expired.

10. Relevant background

The first judicial review was against the Council's view that the two 2005 applications did not require to be screened under the 1999 EIA Regulations. The Court held that Council's understanding of the Regulations was correct, that the Regulations failed to implement the relevant EU Directive properly and that the Directive required the applications to be screened. The Council promptly screened the applications, negatively. However in January 2010 the Secretary of State intervened and took upon himself the responsibility for screening the applications. He then spent over two years doing this. By the time he made a screening direction, on 9 March 2012, application 11/00022 had also been submitted and the Secretary of State screened this also.

The Secretary of State directed that each application was for EIA development because the development was likely to have significant effects on the environment because of the possibility of unacceptable odours originating from the operations and because of the likelihood of a release of nitrogen rich effluent into the Nitrogen Vulnerable Zone (NVZ). The possible sources for the release of nitrogen rich effluent were a leak of leachate and the spreading of non PAS 100 compost/waste onto the NVZ.

In response to the screening direction Officers made it clear to local objectors that they would give the applicant an opportunity to submit an environmental statement and stated that –

> 'Officers accept that, if Hinton does not avail itself of the opportunity to submit an environmental statement, the Council will be obliged to serve an enforcement notice requiring the complete cessation of all activities on the Composting Site and the restoration of the Site.'

This was a correct statement of the legal position.

Despite this statement objectors started a third judicial review against the Council, challenging its failure to take immediate enforcement action. Permission has not yet been granted for the judicial review and Officers consider that the proceedings lack any merit. A 'rolled-up' hearing of the judicial review proceedings will take place in the High Court in Bristol on 21 and 22 February 2013.

To assist the applicant Officers made a scoping opinion on 17 April 2012, setting out the matters to be covered in the environmental statement. They imposed a deadline of 17 July for the submission of an environmental statement.

The applicant sent a document which purported to be an environmental statement to the Council on 17 July 2013. However it failed to comply with most of the legal requirements for the 'submission' of an environmental statement set out in the EIA Regulations and Officers had to explain these to the applicant in some detail. The requirements for submission were only satisfied on 14 September 2012.

Upon scrutiny it was found that the applicant's document failed to satisfy the requirements for an environmental statement in numerous respects. In these circumstances the Council was obliged to serve a notice under r19 of the Regulations, identifying the deficiencies and requiring them to be remedied. Officers sent a r19 notice to the applicant on 31 October 2012. They imposed a deadline of 17 December for the submission of the information.

A volume of information was submitted on 17 December. However on examination this too was found to be significantly deficient (see further below).

The Regulations do not provide for repeated r19 notices. R3 states that a local planning authority cannot grant an application for EIA development if there has been no environmental statement. It follows that, if Members determine the applications, they must refuse them. If Members do this, the question of enforcement action will obviously arise. This is s subject of a second report.

Members should note that, if an enforcement notice is served and appealed, the enforcement notice will be suspended and the applicant will be given a further opportunity to submit an environmental statement by the Secretary of State. (This is the result of r36 of the 2011 EIA Regulations, which will apply to any enforcement notice served in this case. The determination of the three outstanding planning applications is governed by the 1999 EIA Regulations and the references to Regulations in this report are, unless otherwise stated, to the 1999 Regulations). This is so even though the local planning authority (i) has already given abundant opportunity for this, (ii) has served a r19 notice, (iii) has no further power itself to require an environmental statement and (iv) has been forced by r3 to refuse planning permission.

11. Summary of Consultation/Representations:

PUBLOW AND PENSFORD PARISH COUNCIL. Requested that additional time be given to provide a response. The comments will be reported verbally at the meeting.

COMPTON DANDO PARISH COUNCIL
The Parish Council received the consultation request on the Reg 19 response too late to be considered at the January meeting and the next meeting is not until 19 February.

The Parish Council has asked for its original comments on the applications to be reported instead and advise that the Parish Council been invited to the liaison group meetings with local residents, and this has been a positive move. However, complaints are still received about mud on road, lorry movements, smell etc

The previous responses are:-

11/00022/VAR –
Response dated April 2012

Compton Dando Parish Council would like to raise the following comments on the above application :

- The Parish Council supports the cessation of operations in July 2012;
- The Parish Council requests that consideration be given to the proposed clause 5 of the Joint Waste Strategy Policy 8 (Landfill);
- It is noted that an Environmental Impact Assessment is required at the site;
- It is strongly recommended that scientific monitoring of the operating procedures at this site be undertaken.

Response dated March 2011

The Parish Council recommend that this application goes to committee as the Parish Council feel there is insufficient scientific monitoring, they have reservations with regard to the proposed increase of lorry movements, they are concerned about the visual impact of the site, they have received complaints that the conditions of the original application are not being adhered to, they have received complaints that there are inaccuracies within the application documentation in respect of the distance from the compost site to the nearest receptor.
Copies of letters from a local resident – (reported separately in this report) and from Council officers were attached together with an extract from the Joint Waste Core Strategy Pre-Submission Document:

05/00723/VAR and 05/01993/FUL
Response dated July 2009,
Due to insufficient information the Council are not clear on what they are being asked to comment on but would remind you of their previous comments which was that they had reservations, Hinton Organics have not needed the number of lorries specified so the limit should be reduced. Permission should only be granted for another 12 months and reviewed annually. There is strong feeling that there is insufficient scientific monitoring of the operating procedures and the Council still receive complaints/concerns regarding the operation.

WHITCHURCH PARISH COUNCIL :
Any comments will be reported verbally at the meeting.

KEYNSHAM TOWN COUNCIL:
The Town Council supports all the applications.

ENVIRONMENT AGENCY:
The EA responses to the different applications are:-

05/00723
The Environment Agency has no objection to the variation of conditions 13 and 16 to allow permanent recycling of cardboard waste and truck movements.

05/01993

The Environment Agency has no objection to the variation of condition to increase the concrete pad area. The Operator must comply with its Environmental Permit with regard to the amounts of waste stored onsite at any one time, which at this time is 800 tonnes.

Drainage from this area runs to a slurry lagoon. Please note that this slurry lagoon is only permitted to reach up to 90% full, with any excess required to be tankered away. Otherwise there will be a breach of the Environmental Permit.

11/00022/VAR
The Environment Agency has no objection to the variation of conditions 13, 16 and 19, for this proposal.

However, as a matter of completeness, and to make corrections to the accompanying documentation, wish to make the following comments:

Previous correspondence regarding this application sent on the 9th Feb 2011should be taken into consideration. Since Feb 2011 the site then operating under the name Hinton Organics (Wessex) Limited were prosecuted for three offences for breaches of their permit, relating directly to odour control and waste acceptance criteria. A post conviction plan was provided and accepted. The site permit was transferred to Reorganics Limited on the 16th November 2012.

Reorganics Limited currently holds permit number EPR/LB3339RK. They do not hold any other Environment Agency permits or exemptions.

The following points should be noted:

The previous company in charge of this permitted facility Hinton Organics (Wessex) Limited, had a long history of non-compliance and enforcement history from the Environment Agency. Reorganics have not yet had a routine inspection for compliance. The Compliance Rating of a site shows the total Compliance Classification Scheme (CCS) score during that calendar year. All sites start the calendar year with no breaches and hence a Band A Compliance Rating. As the year progresses breaches may be recorded against permit requirements, points are accrued and band ratings go down.

Information provided under Point 2, the odour management plan.
The Odour Management plan provided by the site is not yet accepted by the Environment Agency as further improvements have been suggested. We are in the process of providing feedback for improvements to this document.

Information provided under Point 13 of the documents provided states that the Environment Agency tests the leachate lagoon. This has been done on one occasion, which indicated that the results were within the working plan limits, that was in place at the time. The EA does not regularly test the leachate in the lagoon.

Information provided under Point 15 of the documents provided states that it is not uncommon for the lagoon to run dry, and that leachate is recirculated if the lagoon reaches 90%. The Environmental Permit allows for leachate to be recirculated during the sanitisation phase only and only if the compost requires moisture. It does not allow the recirculation of leachate in order to lower the lagoon levels. An annual inspection of the lagoon liner is required by the environmental permit. Inspecting Environment Agency Officers have not noted any other occasion when the lagoon has run dry.

Information not received for incidents:
Incident information was sent to Jo Downes on the 18th Dec. The EA attached a document detailing odour related incidents for which enforcement action was taken. This information is also available on the public register at http://epr.environment-agency.gov.uk/ePRInternet/SearchRegisters.aspx

Reorganics refers to an odour report carried out in 2007 stating in several places that the level of odour was insignificant. The attached information listed incidences of enforcement action taken for breaches of the Environmental Permit with regard to Odour.

The Environment Agency does hold rainfall data for a number of rain gauges. To calculate predicted effect from climate change various scenarios are available on the UKCIP website. http://www.ukcip.org.uk/bacliat/

Please refer to the current environment agency position statement on permitting of Open Windrow Composting sites which is:
http://www.environment-agency.gov.uk/research/library/position/41211.aspx

The initial response to application 11/00022 dated 9 February 2011 raised no objection in principle to the proposal but wish the following to be taken into consideration:

Advice to Planning Authority/Applicant:
The site currently operates to Permit Number EPR / DP349LJ. The closest residential property is approximately 150m from the site boundary.
On 30 November 2009 the permit was varied to require Bioaerosol Monitoring to be undertaken. The most recent report submitted as part of the Planning Statement is a draft version; the accepted final version is available through the Environment Agency's public register if required by the LPA.

The permit outlines the cardboard and wood waste streams which the site is permitted to accept.

Information was provided regarding the rules set out in the permit for the use of the compost from the site in the restoration of the adjacent inert landfilling site

The EA advised that the assertion in the planning statement that '*there have been no issues with in terms of any pollution to air, land or water over that period' i*s not considered to be accurate, and a reference was given to records of past complaints pursued by the EA.

The response also gave a reference to the Environment Agency's position statement on sites which operate composting operations within 250 metres of a 'sensitive receptor' (typically a dwelling or workplace).

HIGHWAY DEVELOPMENT OFFICER:
05/00723, 05/01993 and 11/00022/VAR
Response dated 10th January 2013
The highway response remains one of NO OBJECTION, subject to the conditions set out in the response to 11/00022 dated February 2011.

11/00022/VAR
14th February 2011
In highway terms, this application is broadly the same as 05/00723/VAR and 05/01993/FUL, to which no highway objections were raised.
Charlton Lane is subject to a local 7.5 tonne environmental weight restriction to the north of the site, commencing at the Redlynch Lane junction. Vehicles exceeding this weight limit are not permitted to pass through the area of restriction, so it is likely all HGV's accessing and egressing the site will need to do so via Woollard Lane and A37. Drivers should be informed of this restriction.

Expressed concern about the lack of a wheel wash as required by condition 11 of 97/02626/MINW. This all the more importance given the proposed increase in vehicles

Bearing the above in mind, the highway response is one of NO OBJECTION, subject to the following conditions;
1. Vehicles carrying material to or from the site shall not exceed in size an eight wheel tipper lorry and be restricted in number to a maximum of 100 vehicles (200 movements) per seven day week.
Reason: To control the size and movement of vehicles in the interests of highway safety.

2. Each vehicle attending the site shall be properly logged with the load recorded in cubic metres (for preference). A certified summary of the records shall be submitted in writing to the Local Planning Authority on a bi-monthly basis within 10 working days of the end of each second month.

Reason: To maintain and overview of the traffic conditioned above.

3. All vehicles leaving the site shall be inspected to ensure that they are in a condition not to emit dust or deposit mud, slurry or other debris on the highway, and wheel cleaning facilities shall be installed prior to the commencement of works, in accordance with details to be submitted to and approved in writing by the Local Planning Authority. Thereafter, the wheel wash facilities shall be maintained in operation at all times during the life of the planning permission.

Reason: In the interests of highway safety.

4. The deposit of materials or slurry from the site on the public highway shall be treated as an emergency and will be cleared regularly by a vacuum/road sweeper and/or hand picked in the case of litter. Visual inspections of the site access road will be carried out daily and staff will report any problems with mud on the site surface immediately to the site manager. Vehicles will be visually inspected before exit to check that loads are safe and that no mud is carried on the wheels or body of the vehicle.

Reason: In the interests of highway safety.

ENVIRONMENTAL HEALTH OFFICER:
Any comments will be reported verbally at the meeting.

COUNCIL ECOLOGIST:
Any comments will be reported verbally at the meeting.

PLANNING POLICY SECTION OF BANES PLANNING
No comment.

NATURAL ENGLAND:
'Natural England does not consider that these applications pose any likely or significant risk to those features of the natural environment for which we would otherwise provide a more detailed consultation response and so does not wish to make specific comment on the details of this consultation' The features requiring more detailed consideration include SSSIs, Natura 2000 site, National Park, Area of Outstanding Natural Beauty or a large population of a protected species which may affect a significant quantity of habitat across the country.
The lack of case specific comment from NE should not be interpreted as a statement that there are no impacts on the natural environment.
In particular, NE would expect the LPA in determining the applications to assess and consider the possible impacts resulting from this proposal on Protected species and Local wildlife sites, and to consider the scope for biodiversity enhancements

Initial response dated April 2012 was written on the basis that the development was not EIA development. NE raised no objections but asked to be consulted again if any changes to the application were made.

ENGLISH HERITAGE
Do not consider that it is necessary for these applications to be referred to EH.

OTHER REPRESENTATIONS/THIRD PARTIES:
39 letters have been received from 16 different local residents and a solicitor acting on behalf of one of them.
The letters raise objections on the grounds of

- impact on health,
- inaccuracies in the information submitted re distances to nearest receptors, this should include adjacent farmland, which retains permitted use rights fort changes to their current grazing use. Live stock should also be included as sensitive receptors.
- impact from odour and air pollution from bio-aerosols,
- impact from noise,
- impact on traffic safety, mud on roads unsuitable roads leading to the site and damage to surface and verges,
- impact on Green Belt,
- proximity to houses, the site is in the wrong place and should be restored to agriculture
- impact on wildlife,
- impact from fly tipping/litter,
- failure to comply with existing conditions and limits, including a compound on adjacent land.
- The supporting information does not satisfy the requirements for an Environmental Statement.
- The unauthorised sale of wood from the site
- Suspicion at the applicant's change of name.

Several of the respondents requested that enforcement action be taken to ensure the use of the site is discontinued.

12. The purported environmental statement

The background to this case is that the composting of cardboard and wood and the increase in lorry movements were all originally approved in 2005 and 2006 and the site has been operating under these variations in the conditions to this effect since. The increase in the size of the hardstanding has been in place since before then, but was originally approved in 2006.

The NVZ was introduced by legislation that came into force on 1 January 2009.

The proposal for the extension of time was submitted before expiration of the original 10 year period commencing in January 2001.

However, in accordance with the rulings by the High Court and by the Secretary of State, the continued operation of the site is EIA development and the Council is prohibited from granting planning permission without first considering environmental information, i.e. an environmental statement.

The information submitted by the applicants in July and December is not considered to constitute an environmental statement for a number of reasons. These are set out below:-

Presentation
There is no correct list of contents, nor is there a proper Non Technical Summary of the second submission. A Non Technical Summary is one of the items of information that is required as a minimum as part of an Environmental Statement.

Content
The following information is considered lacking for the reasons given:-

Restoration and after care. Restoration and after care is a relevant aspect of the development that is to be described in the ES. The submission includes a copy of the wording of the original condition requiring submission of a restoration scheme and states that a variation will be sought to this, but does not specify what the variation will be, nor its objectives in terms of afteruse. As the application only seeks a further 18 months operation, this is considered a material deficiency.

Physical measures for mitigation of environmental effects. These are also relevant aspects of the development. The submission does not address the important question of the adequacy of capacity of the lagoon, which is considered a key feature in the control of the risk of leaks of leachate into the NVZ. Other elements necessary for the control of odour such as misting systems, and weather stations are also not described. Views on the adequacy of the submitted information are awaited from the Council's Environmental Health Officer.

Impact on the NVZ. Information on the impact of the NVZ if effluent enters it from the site, and also if non PAS compost is spread on it. Views on the adequacy of the submitted information are awaited from the EA and the Council's ecologist.

Water balance calculation. This is an assessment of the quantity of leachate that would be generated in a 1 in 100 year storm and allowance for climate change. This is an important factor in assessing the risk of a leak of leachate from the site onto the NVZ. The submission states that it is not possible to assess this information without information on the duration of the storm. However this calculation, often referred to as a 'water balance', is standard practice in the design of surface water drainage systems for a wide range of developments, including composting hardstandings and lagoons. The submission does include a list of three factors relating to the management and operation of the composting process that are also relevant in the control of leachate. It also states that the lagoon is monitored and managed to ensure that it does not exceed 90% capacity. However as the size of the hardstanding was almost doubled in area without any increase in the size of the original lagoon the lack of a proper water balance calculation is considered to be a material deficiency.

Odour management. Views on the adequacy of the submitted information are awaited from the EA and the Council's ecologist.

Cumulative impact. The cumulative impact of the proposals with that of 'other development' is one of the considerations to be taken account of in the decision on a screening opinion. The composting site has been operating alongside the inert infilling of the adjacent site. Although the permission for the inert infilling had expired when the information was submitted, an appeal against refusal of permission for an extension of time was pending at the time, which has since been allowed. In any case, the sites have been operating alongside each other in the past. The submitted information includes consideration of the potential for cumulative impact from noise and odour, but does not mention the numbers of lorry movements, nor does it

compare them to permitted movements. Whilst combined lorry movements are not likely to be significant, and the highways officer has not raised any objection, nevertheless this information was included in the Council's screening opinion and would have been easy to provide.

Counsel's opinion
The advice of counsel is attached. He agrees with the above and makes a further point about the lack of assessment of non-PAS 100 compost/waste.

These deficiencies are considered sufficiently material to mean that the applications have not been accompanied by a proper Environmental Statement; therefore irrespective of the merits of the application, the Council may not approve the applications.

13. Determining the applications

The first issue before Members is whether to determine the applications now (by refusing them). If Members determine the applications, a second issue, enforcement action, arises. This is the subject of a separate report.

Officers consider that there are no considerations which suggest that the applications should not be determined now and that all relevant considerations suggest that they should be determined now, viz -

> Two of the applications were made over 7 years ago. The third was made 2 years ago.
>
> The applicant has been given abundant opportunity to submit the information required to empower the Council to grant the applications but has failed to do so, in significant ways.
>
> The Regulations do not empower the Council to make further demands for information.
>
> The Council is undoubtedly under an obligation to determine planning applications made to it, despite the existence of the right of appeal against non-determination.
>
> The Council is banned from granting planning permission for this development. However the development is actually taking place and not determining the applications is tantamount to permitting it to continue. It will not be possible to take enforcement action until the applications have been determined.

There are justifications for the non-determination of the applications in the period up to 13 February 2013. However none of these justifications apply to the future.

As has been pointed out, the Council faces a hearing in the judicial review proceedings on 21 February. The fact of this imminent hearing is not relevant to the above issue. The judicial review is a challenge to past actions by the Council.

14. PLANNING POLICY

In the determination of the applications regard should also be had to the provisions of the development plan and to any other material considerations.

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.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.
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.

The West of England Joint Waste Core Strategy was adopted in March 2011 (JWCS).

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.

Overall the JWCS seeks to increase the capacity for recycling and composting available within the sub region by an additional 800,000 tonnes per annum. The Plan does not identify sites where this might take place, but Policy 3 sets out the approach to open windrow composting. The supporting text explains that open windrow composting has different land use implications to other waste management facilities least because it generally requires minimal support buildings. The operations are comparable to agricultural activities and may therefore be appropriate to locate in the open countryside.

Policy 3 states:-
Planning permissions for open windrow composting, with sufficient distance, as defined in Environment Agency guidance, from any sensitive receptor will be granted, subject to development management policy:
1. on existing or proposed waste management sites, subject in the case of landfill and landraising sites or other temporary facilities, to the waste use being limited to the life of the landfill, landraising or other temporary facility;
2 . on sites in the countryside which constitute previously developed land, or redundant agricultural and forestry buildings and their curtilages for proposals for the composting of waste and;
3. sites in agricultural use proposing composting of waste for use within that agricultural unit.
(12) Policy 405_07, Policy Position composting and potential health effects from bioareosols. Environment Agency, 2007.

There is no indication in the development plan that the use of the site for open windrow composting is not acceptable in principle, and in addition it is material that continuation of the use would contribute to maintaining the available capacity for composting in the sub region. The key is that it is important to also determine that the environmental impact is acceptable.

The Secretary of State's screening opinion referred to above identified particular aspects of the potential impact which needed to be addressed in an Environmental Statement, which as explained above have not been adequately addressed. This has not enabled a full evaluation of the significance of these potential impacts to be undertaken.

Thus the Council is unable to form a full opinion on the implications of the proposal, which has led to the recommendation that the applications should be refused for lack of information.

RECOMMENDATION: REFUSE

REASON(S) FOR REFUSAL

The applications be refused for the following reason:-

05/00723/VAR, Variation of condition 13 and 16 of Planning Permission: 97/02626/MINW dated 02/12/1998 to allow permanent recycling of cardboard waste and increase in truck movements.

05/01993/FUL - Increase size of concrete storage area and variation of condition 13 of planning permission 97/02626/MINW to accept wood waste.

11/00022/VAR Variation of conditions 13, 16 and 19 of permission no. 97/02626/MINW to extend composting operations, increase vehicle movements and permit cardboard and wood recycling (Temporary use of land for 10 years for manufacture of organic green compost as amended by revised drawings received 14th April 1998 at land formerly Queen Charlton Quarry

1 The application is for EIA development and should have been accompanied by an Environmental Statement. The information submitted in support the application is not considered to constitute an Environmental Statement within the terms of Regulation 2 of the Town and Country Planning (Environmental Impact etc) Regulations 1999 in particular because it fails to address the risk of pollution of the NVZ, fails to give information on restoration of the site, fails to give information on cumulative impacts and fails to include a Non Technical Summary. Therefore in accordance with Regulation 3 of the Town and Country Planning (Environmental Impact etc) Regulations 1999 the application must be refused.

PLANS LIST
FOOTNOTE This decision relates to drawing Nos 503/01B, 503/02A, 503/03A and 503/04B date stamped 14th April 1998

The advice of counsel is attached. He agrees with the above and makes a further point about the lack of assessment of non-PAS 100 compost/waste.

These deficiencies are considered sufficiently material to mean that the applications have not been accompanied by a proper Environmental Statement; therefore irrespective of the merits of the application, the Council may not approve the applications.

Determining the applications

The first issue before Members is whether to determine the applications now (by refusing them). If Members determine the applications, a second issue, enforcement action, arises. This is the subject of a separate report.

Officers consider that there are no considerations which suggest that the applications should not be determined now and that all relevant considerations suggest that they should be determined now, viz -

Two of the applications were made over 7 years ago. The third was made 2 years ago.

The applicant has been given abundant opportunity to submit the information required to empower the Council to grant the applications but has failed to do so, in significant ways.

The Regulations do not empower the Council to make further demands for information.

The Council is undoubtedly under an obligation to determine planning applications made to it, despite the existence of the right of appeal against non-determination.

The Council is banned from granting planning permission for this development. However the development is actually taking place and not determining the applications is tantamount to permitting it to continue. It will not be possible to take enforcement action until the applications have been determined.

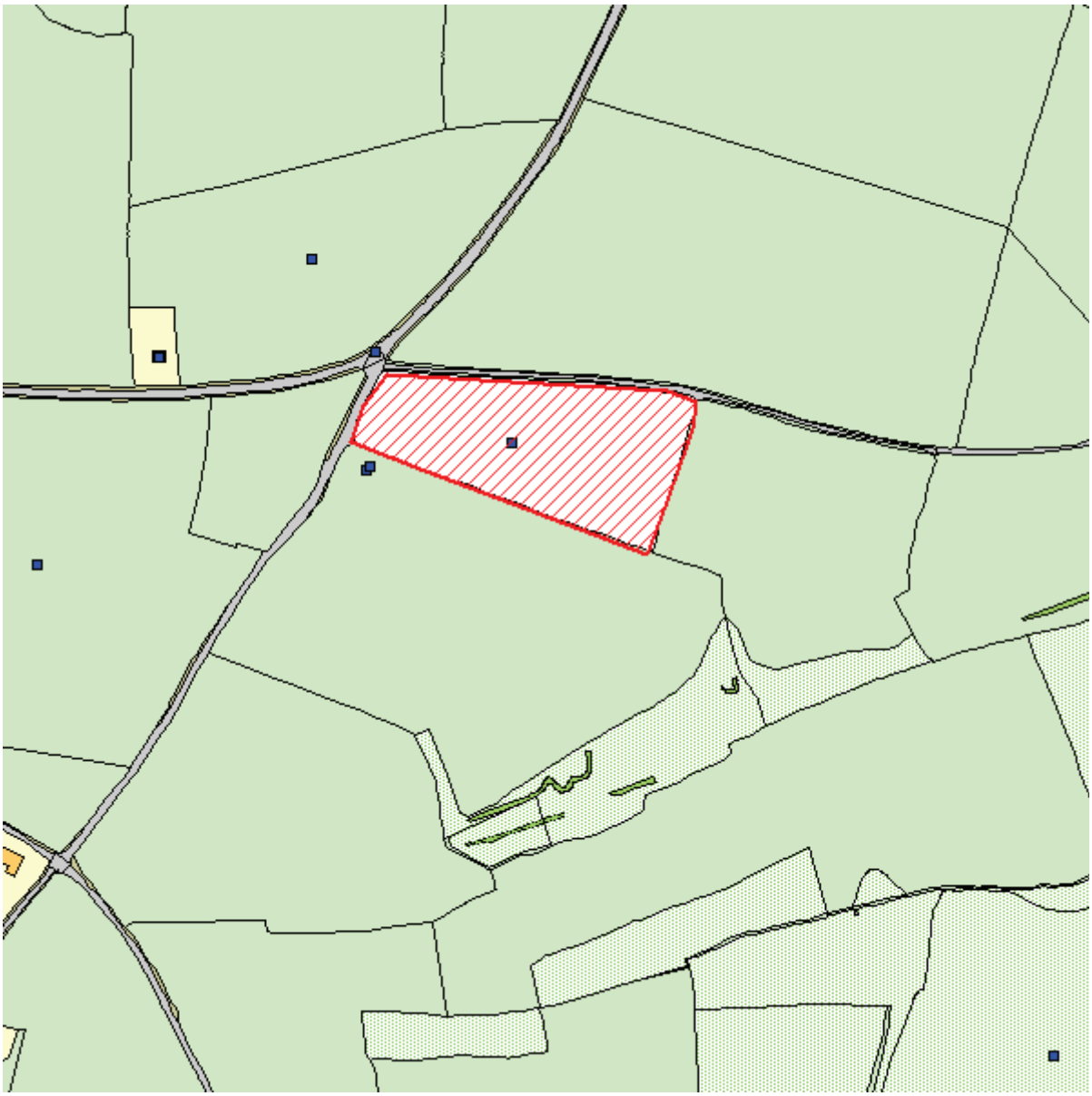
There are justifications for the non-determination of the applications in the period up to 13 February 2013. However none of these justifications apply to the future.

As has been pointed out, the Council faces a hearing in the judicial review proceedings on 21 February. The fact of this imminent hearing is not relevant to the above issue. The judicial review is a challenge to past actions by the Council

Item No: 03

Application No: 11/00022/VAR

Site Location: Parcel 5319 Charlton Field Lane Queen Charlton Bristol Bath And North East Somerset



Ward: Farmborough **Parish:** Compton Dando **LB Grade:** N/A

Ward Members: Councillor S Davis

Application Type: Application for Variation of Condition

Proposal: Variation of conditions 13,16 and 19 of permission no. 97/02626/MINW to extend composting operations, increase vehicle movements and permit cardboard and wood recycling (Temporary use of land for 10 years for manufacture of organic green compost as amended by revised drawings received 14th April 1998 at land formerly Queen Charlton Quarry)

Constraints: Agric Land Class 1,2,3a, Forest of Avon, Greenbelt,

Applicant:	Hinton Organics Ltd
Expiry Date:	2nd March 2011
Case Officer:	Anthea Hoey

COMMITTEE REPORT

Planning Applications

05/00723/VAR, Variation of condition 13 and 16 of Planning Permission: 97/02626/MINW dated 02/12/1998 to allow permanent recycling of cardboard waste and increase in truck movements.

05/01993/FUL - Increase size of concrete storage area and variation of condition 13 of planning permission 97/02626/MINW to accept wood waste.

11/00022/VAR Variation of conditions 13, 16 and 19 of permission no. 97/02626/MINW to extend composting operations, increase vehicle movements and permit cardboard and wood recycling (Temporary use of land for 10 years for manufacture of organic green compost as amended by revised drawings received 14th April 1998 at land formerly Queen Charlton Quarry)

Case Officer: Anthea Hoey

Details of location and proposal and Relevant History:

Charlton Field Lane, Queen Charlton, Nr Keynsham, Bristol, BS31 2TN

15. Reason for Reporting Application to Committee

Because of the complexity of the planning history of the site. Also because of legal challenges by third parties which led to the quashing of the original planning permissions granted to the two applications dating from 2005. The challenge resulted in a requirement to screen the applications. This position was referred to the committee on 17 February 2010. The Secretary of State has subsequently made a screening direction to the effect that all three applications are for EIA development.

16. Description of the site and proposed development

The site is an existing composting facility, which is located off Charlton Field lane, between Queen Charlton and Keynsham. The site was previously used as the processing works for the adjacent former Queen Charlton Quarry, now in the final stages of restoration by inert landfilling.

The applications seek variations to conditions on the planning permission granted in 1998 for the temporary use of the site for 10 years for the manufacture of organic green compost. The composting use actually commenced on 31 January 2001.

The site is in the Green Belt and is part of the Forest of Avon.

The details of the proposals in each application are as follows:-

Application 05/00723:-
05/00723/VAR, Variation of condition 13 and 16 of Planning Permission: 97/02626/MINW dated 02/12/1998 to allow permanent recycling of cardboard waste and increase in truck movements.

Conditions 13 and 16 of planning permission 97/02626 state:

"13 No material other than green garden and parks waste (and no kitchen or animal waste) shall be imported to the site without the prior written approval of the Local Planning Authority."

"16 No more than five heavy goods vehicles shall enter the site on any day. From the date of this permission the site operators shall maintain daily records of vehicle movements and make them available to the Local Planning Authority at any reasonable time upon request."

These conditions were temporarily varied under planning permission 04/00105/VAR granted on the 15 March 2004 to allow the composting of cardboard waste and to allow 82 HGV movements a week between March 2004 and October 2004 and 60 HGV movements a week between November 2004 and February 2005.

Application 05/00723 seeks authorisation to retain those changes until the completion of composting operations permitted under 97/02626.

The site has in fact continued to receive cardboard waste and to operate to the higher limits of HGV movements since March 2005.

05/01993/FUL - Increase size of concrete storage area and variation of condition 13 of planning permission 97/02626/MINW to accept wood waste.

This application seeks authorisation for an increase in the size of the concrete hardstanding from 2048 square metres to 4082 square metres and for a further variation of condition 13 (quoted above) to allow the receipt of wood waste.

The increase in the size of the hardstanding was applied for retrospectively, and due to the earlier granting of the proposals sought in the application, the site has received wood waste since November 2006.

11/00022/VAR Variation of conditions 13, 16 and 19 of permission no. 97/02626/MINW to extend composting operations, increase vehicle movements and permit cardboard and wood recycling

This application incorporates the proposals to allow composting of cardboard and of wood waste, and to increase the number of HGV movements from both the above applications, and in addition seeks a variation of condition 19 of permission no. 97/02626/MINW.

Condition 19 of permission no. 97/02626/MINW states:-
"The green waste composting operations authorised by this permission shall cease not later than 10 years from the commencement of composting operations."

The variation sought is to allow operations to continue for a period of 18 months from the determination of the application. The application was submitted in January 2011, less than a month before the original 1998 permission expired.

17. **Relevant background**

The first judicial review was against the Council's view that the two 2005 applications did not require to be screened under the 1999 EIA Regulations. The Court held that Council's understanding of the Regulations was correct, that the Regulations failed to implement the relevant EU Directive properly and that the Directive required the applications to be screened. The Council promptly screened the applications, negatively. However in January 2010 the Secretary of State intervened and took upon himself the responsibility for screening the applications. He then spent over two years doing this. By the time he made

a screening direction, on 9 March 2012, application 11/00022 had also been submitted and the Secretary of State screened this also.

The Secretary of State directed that each application was for EIA development because the development was likely to have significant effects on the environment because of the possibility of unacceptable odours originating from the operations and because of the likelihood of a release of nitrogen rich effluent into the Nitrogen Vulnerable Zone (NVZ). The possible sources for the release of nitrogen rich effluent were a leak of leachate and the spreading of non PAS 100 compost/waste onto the NVZ.

In response to the screening direction Officers made it clear to local objectors that they would give the applicant an opportunity to submit an environmental statement and stated that –

> 'Officers accept that, if Hinton does not avail itself of the opportunity to submit an environmental statement, the Council will be obliged to serve an enforcement notice requiring the complete cessation of all activities on the Composting Site and the restoration of the Site.'

This was a correct statement of the legal position.

Despite this statement objectors started a third judicial review against the Council, challenging its failure to take immediate enforcement action. Permission has not yet been granted for the judicial review and Officers consider that the proceedings lack any merit. A 'rolled-up' hearing of the judicial review proceedings will take place in the High Court in Bristol on 21 and 22 February 2013.

To assist the applicant Officers made a scoping opinion on 17 April 2012, setting out the matters to be covered in the environmental statement. They imposed a deadline of 17 July for the submission of an environmental statement.

The applicant sent a document which purported to be an environmental statement to the Council on 17 July 2013. However it failed to comply with most of the legal requirements for the 'submission' of an environmental statement set out in the EIA Regulations and Officers had to explain these to the applicant in some detail. The requirements for submission were only satisfied on 14 September 2012.

Upon scrutiny it was found that the applicant's document failed to satisfy the requirements for an environmental statement in numerous respects. In these circumstances the Council was obliged to serve a notice under r19 of the Regulations, identifying the deficiencies and requiring them to be remedied. Officers sent a r19 notice to the applicant on 31 October 2012. They imposed a deadline of 17 December for the submission of the information.

A volume of information was submitted on 17 December. However on examination this too was found to be significantly deficient (see further below).

The Regulations do not provide for repeated r19 notices. R3 states that a local planning authority cannot grant an application for EIA development if there has been no environmental statement. It follows that, if Members determine the applications, they must refuse them. If Members do this, the question of enforcement action will obviously arise. This is s subject of a second report.

Members should note that, if an enforcement notice is served and appealed, the enforcement notice will be suspended and the applicant will be given a further opportunity to submit an environmental statement by the Secretary of State. (This is the result of r36 of the 2011 EIA Regulations, which will apply to any enforcement notice served in this case. The determination of the three outstanding planning applications is governed by the 1999 EIA Regulations and the references to Regulations in this report are, unless otherwise stated, to the 1999 Regulations). This is so even though the local planning authority (i) has already given abundant opportunity for this, (ii) has served a r19 notice, (iii) has no further power itself to require an environmental statement and (iv) has been forced by r3 to refuse planning permission.

18. Summary of Consultation/Representations:

PUBLOW AND PENSFORD PARISH COUNCIL. Requested that additional time be given to provide a response. The comments will be reported verbally at the meeting.

COMPTON DANDO PARISH COUNCIL
The Parish Council received the consultation request on the Reg 19 response too late to be considered at the January meeting and the next meeting is not until 19 February.

The Parish Council has asked for its original comments on the applications to be reported instead and advise that the Parish Council been invited to the liaison group meetings with local residents, and this has been a positive move. However, complaints are still received about mud on road, lorry movements, smell etc

The previous responses are:-

11/00022/VAR –
Response dated April 2012

Compton Dando Parish Council would like to raise the following comments on the above application :

- The Parish Council supports the cessation of operations in July 2012;
- The Parish Council requests that consideration be given to the proposed clause 5 of the Joint Waste Strategy Policy 8 (Landfill);
- It is noted that an Environmental Impact Assessment is required at the site;
- It is strongly recommended that scientific monitoring of the operating procedures at this site be undertaken.

Response dated March 2011

The Parish Council recommend that this application goes to committee as the Parish Council feel there is insufficient scientific monitoring, they have reservations with regard to the proposed increase of lorry movements, they are concerned about the visual impact of the site, they have received complaints that the conditions of the original application are not being adhered to, they have received complaints that there are inaccuracies within the application documentation in respect of the distance from the compost site to the nearest receptor.
Copies of letters from a local resident – (reported separately in this report) and from Council officers were attached together with an extract from the Joint Waste Core Strategy Pre-Submission Document:

05/00723/VAR and 05/01993/FUL
Response dated July 2009,
Due to insufficient information the Council are not clear on what they are being asked to comment on but would remind you of their previous comments which was that they had reservations, Hinton Organics have not needed the number of lorries specified so the limit should be reduced. Permission should only be granted for another 12 months and reviewed annually. There is strong feeling that there is insufficient scientific monitoring of the operating procedures and the Council still receive complaints/concerns regarding the operation.

WHITCHURCH PARISH COUNCIL :
Any comments will be reported verbally at the meeting.

KEYNSHAM TOWN COUNCIL:
The Town Council supports all the applications.

ENVIRONMENT AGENCY:
The EA responses to the different applications are:-

05/00723
The Environment Agency has no objection to the variation of conditions 13 and 16 to allow permanent recycling of cardboard waste and truck movements.

05/01993
The Environment Agency has no objection to the variation of condition to increase the concrete pad area. The Operator must comply with its Environmental Permit with regard to the amounts of waste stored onsite at any one time, which at this time is 800 tonnes.

Drainage from this area runs to a slurry lagoon. Please note that this slurry lagoon is only permitted to reach up to 90% full, with any excess required to be tankered away. Otherwise there will be a breach of the Environmental Permit.

11/00022/VAR
The Environment Agency has no objection to the variation of conditions 13, 16 and 19, for this proposal.

However, as a matter of completeness, and to make corrections to the accompanying documentation, wish to make the following comments:

Previous correspondence regarding this application sent on the 9th Feb 2011should be taken into consideration. Since Feb 2011 the site then operating under the name Hinton Organics (Wessex) Limited were prosecuted for three offences for breaches of their permit, relating directly to odour control and waste acceptance criteria. A post conviction plan was provided and accepted. The site permit was transferred to Reorganics Limited on the 16th November 2012.

Reorganics Limited currently holds permit number EPR/LB3339RK. They do not hold any other Environment Agency permits or exemptions.

The following points should be noted:

The previous company in charge of this permitted facility Hinton Organics (Wessex) Limited, had a long history of non-compliance and enforcement history from the Environment Agency. Reorganics have not yet had a routine inspection for compliance. The Compliance Rating of a site shows the total Compliance Classification Scheme (CCS) score during that calendar year. All sites start the calendar year with no breaches and hence a Band A Compliance Rating. As the year progresses breaches may be recorded against permit requirements, points are accrued and band ratings go down.

Information provided under Point 2, the odour management plan.
The Odour Management plan provided by the site is not yet accepted by the Environment Agency as further improvements have been suggested. We are in the process of providing feedback for improvements to this document.

Information provided under Point 13 of the documents provided states that the Environment Agency tests the leachate lagoon. This has been done on one occasion, which indicated that the results were within the working plan limits, that was in place at the time. The EA does not regularly test the leachate in the lagoon.

Information provided under Point 15 of the documents provided states that it is not uncommon for the lagoon to run dry, and that leachate is recirculated if the lagoon reaches 90%. The Environmental Permit allows for leachate to be recirculated during the sanitisation phase only and only if the compost requires moisture. It does not allow the recirculation of leachate in order to lower the lagoon levels. An annual inspection of the lagoon liner is required by the environmental permit. Inspecting Environment Agency Officers have not noted any other occasion when the lagoon has run dry.

Information not received for incidents:
Incident information was sent to Jo Downes on the 18th Dec. The EA attached a document detailing odour related incidents for which enforcement action was taken. This information is also available on the public register at http://epr.environment-agency.gov.uk/ePRInternet/SearchRegisters.aspx

Reorganics refers to an odour report carried out in 2007 stating in several places that the level of odour was insignificant. The attached information listed incidences of enforcement action taken for breaches of the Environmental Permit with regard to Odour.

The Environment Agency does hold rainfall data for a number of rain gauges. To calculate predicted effect from climate change various scenarios are available on the UKCIP website. http://www.ukcip.org.uk/bacliat/

Please refer to the current environment agency position statement on permitting of Open Windrow Composting sites which is:
http://www.environment-agency.gov.uk/research/library/position/41211.aspx

The initial response to application 11/00022 dated 9 February 2011 raised no objection in principle to the proposal but wish the following to be taken into consideration:

Advice to Planning Authority/Applicant:
The site currently operates to Permit Number EPR / DP349LJ. The closest residential property is approximately 150m from the site boundary.
On 30 November 2009 the permit was varied to require Bioaerosol Monitoring to be undertaken. The most recent report submitted as part of the Planning Statement is a draft version; the accepted final version is available through the Environment Agency's public register if required by the LPA.

The permit outlines the cardboard and wood waste streams which the site is permitted to accept.

Information was provided regarding the rules set out in the permit for the use of the compost from the site in the restoration of the adjacent inert landfilling site

The EA advised that the assertion in the planning statement that '*there have been no issues with in terms of any pollution to air, land or water over that period' i*s not considered to be accurate, and a reference was given to records of past complaints pursued by the EA.

The response also gave a reference to the Environment Agency's position statement on sites which operate composting operations within 250 metres of a 'sensitive receptor' (typically a dwelling or workplace).

HIGHWAY DEVELOPMENT OFFICER:
05/00723, 05/01993 and 11/00022/VAR
Response dated 10th January 2013
The highway response remains one of NO OBJECTION, subject to the conditions set out in the response to 11/00022 dated February 2011.

11/00022/VAR
14th February 2011
In highway terms, this application is broadly the same as 05/00723/VAR and 05/01993/FUL, to which no highway objections were raised.
Charlton Lane is subject to a local 7.5 tonne environmental weight restriction to the north of the site, commencing at the Redlynch Lane junction. Vehicles exceeding this weight limit are not permitted to pass through the area of restriction, so it is likely all HGV's accessing and egressing the site will need to do so via Woollard Lane and A37. Drivers should be informed of this restriction.

Expressed concern about the lack of a wheel wash as required by condition 11 of 97/02626/MINW. This all the more importance given the proposed increase in vehicles

Bearing the above in mind, the highway response is one of NO OBJECTION, subject to the following conditions;
1. Vehicles carrying material to or from the site shall not exceed in size an eight wheel tipper lorry and be restricted in number to a maximum of 100 vehicles (200 movements) per seven day week.
Reason: To control the size and movement of vehicles in the interests of highway safety.

2. Each vehicle attending the site shall be properly logged with the load recorded in cubic metres (for preference). A certified summary of the records shall be submitted in writing to the Local Planning Authority on a bi-monthly basis within 10 working days of the end of each second month.

Reason: To maintain and overview of the traffic conditioned above.

3. All vehicles leaving the site shall be inspected to ensure that they are in a condition not to emit dust or deposit mud, slurry or other debris on the highway, and wheel cleaning facilities shall be installed prior to the commencement of works, in accordance with details to be submitted to and approved in writing by the Local Planning Authority. Thereafter, the wheel wash facilities shall be maintained in operation at all times during the life of the planning permission.

Reason: In the interests of highway safety.

4. The deposit of materials or slurry from the site on the public highway shall be treated as an emergency and will be cleared regularly by a vacuum/road sweeper and/or hand picked in the case of litter. Visual inspections of the site access road will be carried out daily and staff will report any problems with mud on the site surface immediately to the site manager. Vehicles will be visually inspected before exit to check that loads are safe and that no mud is carried on the wheels or body of the vehicle.

Reason: In the interests of highway safety.

ENVIRONMENTAL HEALTH OFFICER:
Any comments will be reported verbally at the meeting.

COUNCIL ECOLOGIST:
Any comments will be reported verbally at the meeting.

PLANNING POLICY SECTION OF BANES PLANNING
No comment.

NATURAL ENGLAND:
'Natural England does not consider that these applications pose any likely or significant risk to those features of the natural environment for which we would otherwise provide a more detailed consultation response and so does not wish to make specific comment on the details of this consultation' The features requiring more detailed consideration include SSSIs, Natura 2000 site, National Park, Area of Outstanding Natural Beauty or a large population of a protected species which may affect a significant quantity of habitat across the country.
The lack of case specific comment from NE should not be interpreted as a statement that there are no impacts on the natural environment.
In particular, NE would expect the LPA in determining the applications to assess and consider the possible impacts resulting from this proposal on Protected species and Local wildlife sites, and to consider the scope for biodiversity enhancements

Initial response dated April 2012 was written on the basis that the development was not EIA development. NE raised no objections but asked to be consulted again if any changes to the application were made.

ENGLISH HERITAGE
Do not consider that it is necessary for these applications to be referred to EH.

OTHER REPRESENTATIONS/THIRD PARTIES:
39 letters have been received from 16 different local residents and a solicitor acting on behalf of one of them.
The letters raise objections on the grounds of

- impact on health,
- inaccuracies in the information submitted re distances to nearest receptors, this should include adjacent farmland, which retains permitted use rights fort changes to their current grazing use. Live stock should also be included as sensitive receptors.
- impact from odour and air pollution from bio-aerosols,
- impact from noise,
- impact on traffic safety, mud on roads unsuitable roads leading to the site and damage to surface and verges,
- impact on Green Belt,
- proximity to houses, the site is in the wrong place and should be restored to agriculture
- impact on wildlife,
- impact from fly tipping/litter,

- failure to comply with existing conditions and limits, including a compound on adjacent land.
- The supporting information does not satisfy the requirements for an Environmental Statement.
- The unauthorised sale of wood from the site
- Suspicion at the applicant's change of name.

Several of the respondents requested that enforcement action be taken to ensure the use of the site is discontinued.

19. The purported environmental statement

The background to this case is that the composting of cardboard and wood and the increase in lorry movements were all originally approved in 2005 and 2006 and the site has been operating under these variations in the conditions to this effect since. The increase in the size of the hardstanding has been in place since before then, but was originally approved in 2006.

The NVZ was introduced by legislation that came into force on 1 January 2009.

The proposal for the extension of time was submitted before expiration of the original 10 year period commencing in January 2001.

However, in accordance with the rulings by the High Court and by the Secretary of State, the continued operation of the site is EIA development and the Council is prohibited from granting planning permission without first considering environmental information, i.e. an environmental statement.

The information submitted by the applicants in July and December is not considered to constitute an environmental statement for a number of reasons. These are set out below:-

Presentation
There is no correct list of contents, nor is there a proper Non Technical Summary of the second submission. A Non Technical Summary is one of the items of information that is required as a minimum as part of an Environmental Statement.

Content
The following information is considered lacking for the reasons given:-

Restoration and after care. Restoration and after care is a relevant aspect of the development that is to be described in the ES. The submission includes a copy of the wording of the original condition requiring submission of a restoration scheme and states that a variation will be sought to this, but does not specify what the variation will be, nor its objectives in terms of afteruse. As the application only seeks a further 18 months operation, this is considered a material deficiency.

Physical measures for mitigation of environmental effects. These are also relevant aspects of the development. The submission does not address the important question of the adequacy of capacity of the lagoon, which is considered a key feature in the control of the risk of leaks of leachate into the NVZ. Other elements necessary for the control of

odour such as misting systems, and weather stations are also not described. Views on the adequacy of the submitted information are awaited from the Council's Environmental Health Officer.

Impact on the NVZ. Information on the impact of the NVZ if effluent enters it from the site, and also if non PAS compost is spread on it. Views on the adequacy of the submitted information are awaited from the EA and the Council's ecologist.

Water balance calculation. This is an assessment of the quantity of leachate that would be generated in a 1 in 100 year storm and allowance for climate change. This is an important factor in assessing the risk of a leak of leachate from the site onto the NVZ. The submission states that it is not possible to assess this information without information on the duration of the storm. However this calculation, often referred to as a 'water balance', is standard practice in the design of surface water drainage systems for a wide range of developments, including composting hardstandings and lagoons. The submission does include a list of three factors relating to the management and operation of the composting process that are also relevant in the control of leachate. It also states that the lagoon is monitored and managed to ensure that it does not exceed 90% capacity. However as the size of the hardstanding was almost doubled in area without any increase in the size of the original lagoon the lack of a proper water balance calculation is considered to be a material deficiency.

Odour management. Views on the adequacy of the submitted information are awaited from the EA and the Council's ecologist.

Cumulative impact. The cumulative impact of the proposals with that of 'other development' is one of the considerations to be taken account of in the decision on a screening opinion. The composting site has been operating alongside the inert infilling of the adjacent site. Although the permission for the inert infilling had expired when the information was submitted, an appeal against refusal of permission for an extension of time was pending at the time, which has since been allowed. In any case, the sites have been operating alongside each other in the past. The submitted information includes consideration of the potential for cumulative impact from noise and odour, but does not mention the numbers of lorry movements, nor does it compare them to permitted movements. Whilst combined lorry movements are not likely to be significant, and the highways officer has not raised any objection, nevertheless this information was included in the Council's screening opinion and would have been easy to provide.

Counsel's opinion
The advice of counsel is attached. He agrees with the above and makes a further point about the lack of assessment of non-PAS 100 compost/waste.

These deficiencies are considered sufficiently material to mean that the applications have not been accompanied by a proper Environmental Statement; therefore irrespective of the merits of the application, the Council may not approve the applications.

20. Determining the applications

The first issue before Members is whether to determine the applications now (by refusing them). If Members determine the applications, a second issue, enforcement action, arises. This is the subject of a separate report.

Officers consider that there are no considerations which suggest that the applications should not be determined now and that all relevant considerations suggest that they should be determined now, viz -

> Two of the applications were made over 7 years ago. The third was made 2 years ago.
>
> The applicant has been given abundant opportunity to submit the information required to empower the Council to grant the applications but has failed to do so, in significant ways.
>
> The Regulations do not empower the Council to make further demands for information.
>
> The Council is undoubtedly under an obligation to determine planning applications made to it, despite the existence of the right of appeal against non-determination.
>
> The Council is banned from granting planning permission for this development. However the development is actually taking place and not determining the applications is tantamount to permitting it to continue. It will not be possible to take enforcement action until the applications have been determined.

There are justifications for the non-determination of the applications in the period up to 13 February 2013. However none of these justifications apply to the future.

As has been pointed out, the Council faces a hearing in the judicial review proceedings on 21 February. The fact of this imminent hearing is not relevant to the above issue. The judicial review is a challenge to past actions by the Council.

21. PLANNING POLICY

In the determination of the applications regard should also be had to the provisions of the development plan and to any other material considerations.

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.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.
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.

The West of England Joint Waste Core Strategy was adopted in March 2011 (JWCS).

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.

Overall the JWCS seeks to increase the capacity for recycling and composting available within the sub region by an additional 800,000 tonnes per annum. The Plan does not identify sites where this might take place, but Policy 3 sets out the approach to open windrow composting. The supporting text explains that open windrow composting has different land use implications to other waste management facilities least because it generally requires minimal support buildings. The operations are comparable to agricultural activities and may therefore be appropriate to locate in the open countryside.

Policy 3 states:-
Planning permissions for open windrow composting, with sufficient distance, as defined in Environment Agency guidance, from any sensitive receptor will be granted, subject to development management policy:
1. on existing or proposed waste management sites, subject in the case of landfill and landraising sites or other temporary facilities, to the waste use being limited to the life of the landfill, landraising or other temporary facility;
2 . on sites in the countryside which constitute previously developed land, or redundant agricultural and forestry buildings and their curtilages for proposals for the composting of waste and;
3. sites in agricultural use proposing composting of waste for use within that agricultural unit.
(12) Policy 405_07, Policy Position composting and potential health effects from bioareosols. Environment Agency, 2007.

There is no indication in the development plan that the use of the site for open windrow composting is not acceptable in principle, and in addition it is material that continuation of the use would contribute to maintaining the available capacity for composting in the sub

region. The key is that it is important to also determine that the environmental impact is acceptable.

The Secretary of State's screening opinion referred to above identified particular aspects of the potential impact which needed to be addressed in an Environmental Statement, which as explained above have not been adequately addressed. This has not enabled a full evaluation of the significance of these potential impacts to be undertaken.

Thus the Council is unable to form a full opinion on the implications of the proposal, which has led to the recommendation that the applications should be refused for lack of information.

RECOMMENDATION: REFUSE

REASON(S) FOR REFUSAL

The applications be refused for the following reason:-

05/00723/VAR, Variation of condition 13 and 16 of Planning Permission: 97/02626/MINW dated 02/12/1998 to allow permanent recycling of cardboard waste and increase in truck movements.

05/01993/FUL - Increase size of concrete storage area and variation of condition 13 of planning permission 97/02626/MINW to accept wood waste.

11/00022/VAR Variation of conditions 13, 16 and 19 of permission no. 97/02626/MINW to extend composting operations, increase vehicle movements and permit cardboard and wood recycling (Temporary use of land for 10 years for manufacture of organic green compost as amended by revised drawings received 14th April 1998 at land formerly Queen Charlton Quarry)

PLANS LIST:

1 The application is for EIA development and should have been accompanied by an Environmental Statement. The information submitted in support the application is not considered to constitute an Environmental Statement within the terms of Regulation 2 of the Town and Country Planning (Environmental Impact etc) Regulations 1999 in particular because it fails to address the risk of pollution of the NVZ, fails to give information on restoration of the site, fails to give information on cumulative impacts and fails to include a Non Technical Summary. Therefore in accordance with Regulation 3 of the Town and Country Planning (Environmental Impact etc) Regulations 1999 the application must be refused.

PLANS LIST
FOOTNOTE The decision relates to drawings No's 2159/1093/01, and 2159/1093/03 date stamped 5th January 2011 and 2159/1093 Rev A date stamped 19th October 2012

The advice of counsel is attached. He agrees with the above and makes a further point about the lack of assessment of non-PAS 100 compost/waste.

These deficiencies are considered sufficiently material to mean that the applications have not been accompanied by a proper Environmental Statement; therefore irrespective of the merits of the application, the Council may not approve the applications.

Determining the applications

The first issue before Members is whether to determine the applications now (by refusing them). If Members determine the applications, a second issue, enforcement action, arises. This is the subject of a separate report.

Officers consider that there are no considerations which suggest that the applications should not be determined now and that all relevant considerations suggest that they should be determined now, viz -

Two of the applications were made over 7 years ago. The third was made 2 years ago.

The applicant has been given abundant opportunity to submit the information required to empower the Council to grant the applications but has failed to do so, in significant ways.

The Regulations do not empower the Council to make further demands for information.

The Council is undoubtedly under an obligation to determine planning applications made to it, despite the existence of the right of appeal against non-determination.

The Council is banned from granting planning permission for this development. However the development is actually taking place and not determining the applications is tantamount to permitting it to continue. It will not be possible to take enforcement action until the applications have been determined.

There are justifications for the non-determination of the applications in the period up to 13 February 2013. However none of these justifications apply to the future.

As has been pointed out, the Council faces a hearing in the judicial review proceedings on 21 February. The fact of this imminent hearing is not relevant to the above issue. The judicial review is a challenge to past actions by the Council

Item No:	04
Application No:	12/04932/FUL
Site Location:	Fir Tree Inn 140 Frome Road Radstock Bath And North East Somerset BA3 3LL

Ward: Radstock **Parish:** Radstock **LB Grade:**

Ward Members: Councillor E Jackson Councillor S Allen

Application Type: Full Application

Proposal: Erection of 2 no. residential dwellings with associated amenity space and parking.

Constraints: Agric Land Class 3b,4,5, Coal fields, Forest of Avon,

Applicant: Mr J Hill

Expiry Date: 15th January 2013

Case Officer: Heather Faulkner

REPORT

REASON FOR REPORTING APPLICATION TO COMMITTEE

Radstock Town Council objected to the application on the basis of concerns regarding access and egress and drainage concerns. The Chair of the Committee has agreed that this application should be considered by Committee.

DETAILS OF LOCATION AND PROPOSAL AND RELEVANT HISTORY

This is a full planning application for the development of land to the south of the Fir Tree Inn, the development proposes the construction of a pair of semi-detached dwellings each with four bedrooms.

The Fir Tree Inn is Grade II Listed and has planning permission to be converted into 9 dwellings.

The development site itself has access from Knobsbury Lane and would be adjacent to the access to the Writhlington School and Sports Centre which is to the south and west of the site. Opposite the site is agricultural fields.

The site is situated outside of the housing development boundary but is in close proximity to the built up area of this part of Writhlington with an immediate catchment that can access its facilities on foot. It has good public transport access links to the centre of Radstock.

Revised drawings were submitted on the 24th December which made changes to the access to the buildings and provided additional information on drainage.

PLANNING HISTORY:

DC - 11/00285/FUL - Change of use of former public house to form 9no. one and two bedroom dwellings and associated external and internal works to the building and formation of 9no. parking spaces - PERMITTED 23.08.2011

DC - 11/00286/LBA Internal and external alterations for the change of use of former public house to form 9no. one and two bedroom dwellings and associated external and internal works to the building and formation of 9no. parking spaces

3543 - New canopy and elevational alterations - Permission 26/04/90

SUMMARY OF CONSULTATIONS/REPRESENTATIONS

Neighbouring properties were consulted in respect of this development and no responses were recieveved. Comments were recieved from the ward councillor in support of the development.

CHILDREN'S SERVICES - no requirement for a contribution on a development of this size

ENVIRONMENTAL HEALTH - no observation

HIGHWAYS - no objection to the principle of the development as it is in a sustainable location. Initially there were objections to the access as cars would need to reverse out onto Knobsbury Lane. Revised drawings were submitted to allow for turning space and this is acceptable subject to condition.

DRAINAGE -following the provision of additional information the drainage situtaion is now considered to be acceptable subject to condition.

LISTED BUILDINGS - I have visited the site and consider that the proposed development is acceptable in terms of the setting of the listed building. It is sufficiently distant from the flank wall of the historic building to avoid encroaching on or causing any significant harm to its character or appearance. The traditional design approach for the new houses is acceptable in this location. I would request that the repair and reuse of the listed building is linked to and guaranteed as part of the planning permission for the new enabling development, to avoid it remaining empty and at risk.

RADSTOCK TOWN COUNCIL - Objection - access and egress issues and high rainfall, concerns with water runoff.

POLICIES/LEGISLATION
The following policies are material considerations:

IMP1 Planning Obligations
D2 General design and public realm considerations
D4 Townscape considerations
CF1 Protection of land and buildings used for commercial purposes
CF7 Loss of public houses
HG1 Meeting the District housing requirement
HG4 Residential development in the urban areas and R1 settlements
HG7 Minimum residential density
HG10 Housing outside settlements
BH2 Listed buildings and their settings
BH4 Change of use of a listed building
NE14 Flood Risk
T1 Overarching Access Policy
T24 General development control and access policy
T26 On-site parking and servicing provision

of the Bath and North East Somerset Local Plan, including minerals and waste policies, adopted October 2007.

Bath and North East Somerset Submission Core Strategy (May 2011) is out at inspection stage and therefore will only be given limited weight for development management purposes.

The National Planning Policy Framework was published in March 2012 and will be given full consideration.

OFFICER ASSESSMENT
Principle of the development:

The application site whilst currently a vacant was previously land which was part of the carpark and garden of the public house. Planning permission 11/00285/FUL granted consent for the change of use of the public house to housing and therefore there is no objection to the change of the use of the land on this basis.

Policy HG.4 of the Local Plan states that residential development in the urban areas will be permitted if it is within the defined Housing Development Boundary. The application site is located outside of the defined Housing Development Boundary and in such cases Policy HG.4 states that residential development will be permitted if it forms an element of either a comprehensive scheme for a major mixed use site defined in Policy GDS.1 (not applicable in this case) or a scheme coming forward under Policies ET.2(2&3), ET.3(3). In addition the development must be appropriate to the scale of the settlement in terms of the availability of facilities and employment opportunities and accessibility to public transport.

The application site lies close to the housing development boundary (which runs along Frome Road to the north) as well as adjacent to the vacant public house which has recently gained consent for residential use. The Draft Core Strategy Policy SV1 - Somer Valley Spatial Strategy priorities development on previously developed land. The Policy aims to enable up to 2700 new homes to be built at Midsomer Norton, Radstock, Westfield, Paulton and Peasesdown St John. This Policy ensures that any new housing above the existing commitment of 2,200 dwellings is within the Housing Development Boundary. The Housing Development Boundary will be reviewed accordingly to enable delivery of the overall scale of development directed towards the Somer Valley Area.

However, this needs to be set against the priorities set out in the National Planning Policy Framework (NPPF). The NPPF states that there is a presumption in favour of sustainable development and highlights the importance of boosting significantly the supply of housing, encouraging the effective use of land by re-using land previously developed/brownfield land provided that it is not of high environmental value.

Paragraph 49 of the National Planning Policy Framework (NPPF) states that "housing applications should be considered in the context of the presumption in favour of sustainable development" and that "relevant policies for the supply of housing should not be considered up-to-date if the local planning authority cannot demonstrate a five-year land supply of deliverable housing". Furthermore, in order to boost the supply of housing, paragraph 47 makes it clear that where there has been a record of persistent under delivery an additional buffer of 20% to this supply of deliverable sites should be identified to ensure choice and competition in the market for land.

Para 14 of the NPPF states that "where the development plan is absent, silent or the relevant policies are out of date" the local authority should grant permission unless there are any adverse impacts in doing so that would "significantly or demonstrably outweigh the benefits of the scheme".

It has been publicised through the Core Strategy process that Bath and North East Somerset Council does not have an up-to-date five year land supply. In light of the NPPF the relevant local plan policies cannot be considered up-to-date. The Local Plan was produced under the auspices of the Town and Country Planning Act 1990 and in accordance with paragraph 215 of the NPPF where there is a conflict between existing

policies, in this case housing supply policies, and those outlined in the NPPF significant weight should be attached to the NPPF in decision making despite a conflict with adopted Local Plan policy.

Whilst it remains the case that the site is outside any defined housing development boundary, and therefore the development is contrary to Policy HG.4, there is clear evidence that the Secretary of State and the Planning Inspectorate are giving precedence to guidance set out in the NPPF especially where local authorities are unable to demonstrate a five-year land supply. In this case, it is therefore not considered that the application could be solely refused on the grounds that it falls outside of any Housing Development Boundary.

Impact on the Listed Building and Design:

The Council's Conservation Officer has stated no objection to the proposal. The proposed houses are set a reasonable distance away from the Listed Building so that they so they do not harm its setting.

The houses are set back from the road by a reasonable distance which gives the site a more spacious layout and works reasonably well with the building line formed by the public house building.

The proposed design and layout of the houses are fairly simple however the features used are in keeping with the character of the surrounding area. For example the gable front projections are similar to those found on Frome Road. The use of a mixture of stone and render is also appropriate given the mix of similar materials in near locality. The layout of the front of the properties contains a reasonable amount of hard standing and the materials used for this and the landscaping would help to soften the appearance. It will therefore be necessary to condition these details.

Overall the appearance of the development and the impact on the adjacent Listed Building is considered to be acceptable.

Impact on neighbouring properties:

The closest residents to the proposed dwellings will be those in the public house once it is converted. Other residential properties are a reasonable distance from the site and the development would only have limited impact on the adjacent school.

The unit (4) closest to the site within the Fir Tree Inn would be most affected by the proposed development and the building would have some impact on it. There would be a more reduced outlook, and light levels to the bedrooms may be affected. The main windows to the living area would be unaffected. The impact is not overly harmful and prospective occupiers would be aware of the situation before occupying the unit.

In order to protect the privacy of the adjacent development it will be conditioned that the first floor windows in the north east side elevation are obscurely glazed and that no further windows can be added.

The proposed development would result in the loss of the communal garden for the proposed flats on the adjacent site. The private garden for unit four would remain as well as some other external space. It is regrettable that the proposed flats would be without outside space, however, it is not uncommon for flats not to have gardens and overall it is considered to be acceptable.

Amenity issues of future occupiers:

The proposed dwellings are of a reasonable size with good sized gardens. The rooms within the property would have good outlook and access to light. There may be some disturbance to the occupiers of dwelling 2 by the use of the carpark for the adjacent flats when converted, however, this would not be so severe to warrant the applications refusal.

Highway issues:

The properties have been provided with adequate parking spaces. The plans have been altered to allow for turning space on the site so that cars can leave in forward gear. There had been concerns in respect of cars reversing out onto the pavement which is heavily used by students of the school. Following the amendments to the plans there have been no further objections from the Highways Department. There are other existing access points on this part of Knobsbury Lane and the access itself is not considered to be any more dangerous than the existing accesses.

In terms of accessibility the site is located very close to a public transport route into Radstock and Frome. Therefore when taking into account that the level of parking provision has been achieved, it is within an accessible and sustainable location and there is the option of using public transport the proposal is acceptable in highway terms.

Drainage and Flooding:

Concerns have been raised by the Town Council in respect of run off from the site.

The application site is not within flood zones 2 or 3 and is not therefore considered to be at risk of flooding. This part of the site has also recently been hard surfaced which would have an effect on run off. The Drainage Team originally objected to the schemes drainage proposals. Further information was submitted to show that the drainage would be dealt with by storm water soakaways. The Drainage Team were satisfied with this approach and recommended that a condition be attached to require further information to be submitted in respect of the disposal of surface water. It is considered that subject to a sufficient drainage system being in place there will not be a significant increase in run off.

Contributions:

The Council's Education officer has confirmed that the size and number of the units proposed has not justified a request for a planning contribution.

Other:

The Listed Building Officer requested that should planning permission be granted that a condition be attached to ensure that the works to convert the pub are carried out. Whilst this is a reasonable suggestion this application is not considered to be an enabling development and each planning application for the site has been assessed and justified on its own merits. Such a condition would not be considered to be reasonable under the guidance within Circular 11/95.

Conclusion:

The proposed development is contrary to Policy HG.4 of the Local Plan, being located outside the Housing Development Boundary. However the proposals also need to be considered in the light of the NPPF which promotes sustainable development, the importance of boosting significantly the supply of housing and encouraging the effective use of land by re-using previously developed/brownfield land not of high environmental value. Given the characteristics of this site and its setting and the lack of a five year supply of housing land it is considered that on balance and subject to conditions the proposed development is acceptable.

The application has been advertised as a departure from the Development Plan as the application site is outside of the housing development boundary. The closing period for representations will end after the date of the committee, on the 21st February 2013. Subject to there being no representations that raise new issues it is recommended that the committee delegate the decision to the Development Manager to issue following the end of this time period.

RECOMMENDATION

PERMIT with condition(s)

CONDITIONS

1 The development hereby permitted shall be begun before the expiration of three years from the date of this permission.

Reason: As required by Section 91 of the Town and Country Planning Act 1990 (as amended) and to avoid the accumulation of unimplemented planning permissions.

2 The area allocated for parking and turning on the submitted plan shall be properly bound and compacted (not loose stone or gravel) in accordance with details which shall have been submitted to and approved in writing by the Local Planning, and thereafter kept clear of obstruction and shall not be used other than for the parking and turning of vehicles in connection with the development hereby permitted.

Reason: In the interests of amenity and highway safety.

3 Provision shall be made within the site for the disposal of surface water, so as to prevent its discharge onto the highway, details of which including the means of outfall shall be submitted to and approved in writing prior to construction.

Reason: In the interests of flood risk management.

4 No dwelling shall be occupied until its associated screen walls/fences or other means of enclosure have been erected in accordance with the approved plans and thereafter retained.

Reason: In the interests of privacy and/or visual amenity.

5 No development shall be commenced until a hard and soft landscape scheme has been first submitted to and approved in writing by the Local Planning Authority, such a scheme shall include details of all walls, fences, trees, hedgerows and other planting which are to be retained; details of all new walls, fences and other boundary treatment and finished ground levels; a planting specification to include numbers, density, size, species and positions of all new trees and shrubs; details of the surface treatment of the open parts of the site; and a programme of implementation.

Reason: To ensure the provision of an appropriate landscape setting to the development.

6 All hard and/or soft landscape works shall be carried out in accordance with the approved details. The works shall be carried out prior to the occupation of any part of the development or in accordance with the programme agreed in writing with the Local Planning Authority. Any trees or plants indicated on the approved scheme which, within a period of five years from the date of the development being completed, die, are removed or become seriously damaged or diseased shall be replaced during the next planting season with other trees or plants of a species and size to be first approved in writing by the Local Planning Authority. All hard landscape works shall be permanently retained in accordance with the approved details.

Reason: To ensure that the landscape scheme is implemented and maintained.

7 No development shall commence until a schedule of materials and finishes, and samples of the materials to be used in the construction of the external surfaces, including roofs, have been submitted to and approved in writing by the Local Planning Authority. The development shall thereafter be carried out only in accordance with the details so approved.

Reason: In the interests of the appearance of the development and the character and appearance of the surrounding area.

8 The development shall not be occupied until the proposed first floor window in the north east side elevation has been glazed with obscure glass and thereafter permanently retained as such.

Reason: To safeguard the amenities of adjoining occupiers from overlooking and loss of privacy.

9 Notwithstanding the provisions of the Town and Country Planning (General Permitted Development) Order 1995 (or any order revoking and re-enacting that Order with or without modification) no windows, roof lights or openings, other than those shown on the plans hereby approved, shall be formed in the north east side elevation at first floor level or above at any time unless a further planning permission has been granted.

Reason: To safeguard the amenities of adjoining occupiers from overlooking and loss of privacy.

10 The development/works hereby permitted shall only be implemented in accordance with the plans as set out in the plans list below.

Reason: To define the terms and extent of the permission.

PLANS LIST:

1 The development shall be carried out strictly in accordance with the details shown on the following drawings/documents:

Received 8th November 2012
Planning, Design and Access Statement
679/300A Existing Topographical Survey/Site Plan
679/302 Proposed Floor Plans

Received 29th November 2012
Housing Land Supply Assessment

Received 24th December 2012
679/301C Proposed Site Plan
679/303B Existing and proposed street scene
679/304B Proposed front (SE) and Side (NE) Elevations
679/305B Proposed rear (NW) and Side (SW) Elevations
679/306A Site Location Plan and Existing and Proposed Block Plans

2 REASONS FOR GRANTING APPROVAL

1 The proposed development is contrary to Policy HG.4 of the Local Plan, being located outside any Housing Development Boundary. However the proposals also need to be considered in the light of the NPPF which promotes sustainable development, the importance of boosting significantly the supply of housing and encouraging the effective use of land by re-using previously developed/brownfield land not of high environmental value. Given the characteristics of this site and its setting and the lack of a five year supply of housing land it is considered that on balance and subject to conditions the proposed development is acceptable. The development is considered not to harm the setting of the adjacent Listed Building or the character of the surrounding area. The development is not considered to have an adverse impact upon highway safety, drainage or residential amenity.

The decision to grant approval has taken account of the Development Plan, relevant emerging Local Plans and approved Supplementary Planning Guidance. This is in accordance with the Policies set out below at A.

Bath and North East Somerset Local Plan (including minerals and waste policies) adopted October 2007

IMP1 Planning Obligations
D2 General design and public realm considerations
D4 Townscape considerations
CF1 Protection of land and buildings used for commercial purposes
CF7 Loss of public houses
HG1 Meeting the District housing requirement
HG7 Minimum residential density
HG10 Housing outside settlements
BH2 Listed buildings and their settings
BH4 Change of use of a listed building
NE14 Flood Risk
T1 Overarching Access Policy
T24 General development control and access policy
T26 On-site parking and servicing provision

The National Planning Policy Framework

Bath and North East Somerset Local Plan (including minerals and waste policies) adopted October 2007

The proposed development is not fully in accordance with the Policies set out below at B, but the planning merits of the proposed development outweigh the conflict with these Policies.

B: HG4 Residential development in the urban areas and R1 settlements
of the Bath & North East Somerset Local Plan (including minerals and waste policies) 2007.

Bath and North East Somerset Submission Core Strategy (May 2011)

Decision Taking Statement

In determining this application the Local Planning Authority considers it has complied with the aims of paragraphs 186 and 187 of the National Planning Framework. Negotiations have taken place during the application process resulting in revised plans being submitted. For the reasons given, and expanded upon in a related case officer's report, a positive view of the submitted proposals was taken .

3 ADVICE NOTE:
Where a request is made to a Local Planning Authority for written confirmation of compliance with a condition or conditions attached to a planning permission or where a

request to discharge conditions is submitted a fee shall be paid to that authority. Details of the fee can be found on the "what happens after permission" pages of the Council's Website. Please send your requests to the Registration Team, Planning Services, PO Box 5006, Bath, BA1 1JG. Requests can be made using the 1APP standard form which is available from the Planning Portal at www.planningportal.gov.uk.

4 The proposed development lies within a coal mining area which may contain unrecorded mining related hazards. If any coal mining feature is encountered during development, this should be reported to the Coal Authority.

Any intrusive activities which disturb or enter any coal seams, coal mine workings or coal mine entries (shafts and adits) requires the prior written permission of the Coal Authority.

Property specific summary information on coal mining can be obtained from The Coal Authority's Property Search Service on 0845 762 6848 or at www.groundstability.com

5 Condition Information: The applicant has indicated that surface water will be disposed of via soakaways. Infiltration testing to BRE Digest 365 should be carried out and the soakaway appropriately designed. The results of the testing and the sizing of the soakaways should be submitted as part of an application to discharge the above condition.

Bath and North East Somerset Council			
MEETING: **Development Control Committee** MEETING DATE: **13 February 2013**	AGENDA ITEM NO:		
REPORT OF **David Trigwell, Divisional Director of Planning and Transport Development.** REPORT ORIGINATOR: **Ms Lisa Bartlett, Development Manager (Tel. Extension No. 7281).** DATE PREPARED: 24th January 2013			
AN OPEN PUBLIC ITEM			
BACKGROUND PAPERS: **Enforcement file 12/00372/UNAUTH**			
TITLE: Enforcement Report: **Red Hill House, Red Hill, Camerton, Bath BA2 0NY**			
WARD : **Bathavon West**			

1.0 PURPOSE OF REPORT

To seek Members view on the harm caused to highway safety with respect to the unauthorised material change of use of a single dwellinghouse to a mixed use of dwelling, daily yoga classes, weekend retreats and other associated business activities. Officers are seeking Authority from Members to issue an enforcement notice to require the use of the dwelling for business purposes, yoga classes and weekend retreats to cease.

2.0 LOCATION OF PLANNING CONTRAVENTION

Red Hill House, Red Hill, Camerton, Bath BA2 0NY ("the Property"), as outlined in bold on the attached site location plan (Appendix 1).

3.0 OUTLINE OF PLANNING CONTRAVENTION

Without planning consent the material change of use of a single dwellinghouse to a mixed use of dwelling, daily yoga classes, weekend retreats and associated business activities.

4.0 RELEVANT PLANNING HISTORY

08/00669/FUL – Conversion of car port to sun room – Permitted
08/04291/FUL- Change of use of existing sun room to provide yoga classes and creation of hardstanding for associated parking (retrospective) – Refused
09/01515/CLPU – Use of dwelling to teach yoga classes (Certificate of Lawfulness for a Proposed Use) – Refused
09/03166/CLPU – Use of dwelling to teach yoga classes (Certificate of Lawfulness for a Proposed Use) – Refused, appeal dismissed.

11/05201/FUL - Change of use from dwelling to mixed use dwelling and yoga school (Retrospective) – Refused

5.0 BACKGROUND

On 15 April 2008 planning permission was granted, reference 08/00669/FUL, for the conversion of the existing car port to a sun room. In November 2008 an application was submitted for the change of use of existing sun room to provide yoga classes and creation of hardstanding for associated parking (retrospective), reference 08/04291/FUL. It was proposed that clients would park on land opposite Red Hill House and the applicant would stand in the highway to stop traffic and see clients across the road. This application was subsequently refused on 10 February 2009 for the following reasons:

1. The proposed change of use of the residential dwelling to business use will result in an increase in pedestrian movement to and from the dwelling (when operating as a Yoga studio) both along the carriageway and to the proposed car park at a point where there is insufficient visibility to ensure the safe crossing of the highway. This is in conflict with policy T24 of the Bath and North East Somerset Local Plan.
2. The proposed change of use of the residential dwelling to business use will result in an increase in vehicular movements to and from the western and eastern side of Red Hill to the detriment of students of the Yoga studio and other road users. This is in conflict with policy T24 of the Bath and North East Somerset Local Plan.
3. The proposed creation of a formal parking area on land located on the eastern side of Red Hill within open countryside would detract from the rural character of this part of Red Hill contrary to policy D2 of the Bath and North East Somerset Local Plan.

Since this time there have been a number of applications seeking permission to operate a yoga business at this location all of which have been refused due to highway safety implications. The applicant has appealed the Council's decision on one occasion namely the decision against a refusal to grant a certificate of lawful use or development, reference 09/03166/CLPU which was refused on 11 June 2010. The Inspector in his decision letter dated 5 April 2011 stated "the vehicle movements associated with the proposed yoga classes would, as a matter of fact and degree, bring about a material change of use in the character of the use of the appeal property, compared with its use as a single dwellinghouse". The appeal was subsequently dismissed.

Since this time activity has increased, Yoga classes, workshops and retreats continue to take place at Red Hill House. The current level of activity includes at least 16 regular classes per week at various times in the day including morning, afternoon and evening. It is advertised that each class has no more than 13 students. In addition, there are occasional Saturday workshops throughout the year and additional monthly classes. There are approximately 7 instructors. A number of weekend retreats take place throughout the year. The property is also advertised as being available for rent for private classes and weekend workshops able to cater for up to 40 people seated. The main house is offered as a bed and breakfast facility with up to 6 bedrooms capable of sleeping up to 15 people.

In an attempt to overcome highway concerns the owner has suggested various alternative parking proposals. The attached plan shows the alternative parking proposals which have been considered which include parking on land on the opposite side of the road to Red Hill House, utilising parking at an existing restaurant site approximately 720m to the north of the site, and the use of an existing car park at Travis Perkins. More recently the owner has proposed parking in an adjacent field directly to the North of Red Hill House. Each of these proposals has been considered however Officers consider that none of the proposals overcome highway safety concerns. Furthermore, it is considered the proposals to create a parking area within the open countryside would detract from and have an adverse impact on the rural character of the area contrary to Policies D.2 which seeks to reduce the impact of car parking on the character of an area and NE.1 which seeks to retain and enhance local landscape character in resisting development which does not conserve or enhance the local distinctiveness of the landscape.

The Council wrote to the owner in August 2012 advising that an alternative venue should be sought. Since this time the yoga business has continued to operate. In January 2013 Officers agreed with the owner that the unauthorised business activities would cease on or before 31st March 2013.

There have been considerable amounts of correspondence with the owner attempting to seek an acceptable resolution to this situation. However, the situation has not been resolved and the use of this dwelling in connection with a yoga business remains unacceptable. Your Officers are therefore seeking authority to take appropriate action.

6.0 DEVELOPMENT PLAN

Of particular relevance to this matter is the Bath and North East Somerset Local Plan (including minerals and waste policies) adopted October 2007 (the Local Plan). Of particular relevance are T.24 and T.26 relating to highway safety and parking provision.

National Planning Policy Framework ("NPPF") was published March 2012 and is a material consideration. Local Plan policies T.24 and T.26 are consistent with national policy contained in the NPPF.

7.0 EXPEDIENCY OF ENFORCEMENT ACTION

Red Hill House is a large residential dwelling located to the north of the Camerton housing development boundary. It has seven bedrooms and stands within grounds of approximately 0.25ha.

Red Hill is a classified road of relatively limited width. The road is well used by local residents and also provides a link/short cut between the Radstock /Bath road (A367) and the Timsbury/Bath Road (B3115). The highway does not benefit from a footway in either direction to/from the application site and due to the line of the road, including bends, does not provide a safe pedestrian access to the property.

The programme of classes is currently advertised by way of a website, social media sites and local leaflet distribution. The classes are advertised as 'taking place in a

purpose built studio' (a former sun room which was granted planning permission in 2008). In addition, bed and breakfast, retreats and weekend workshops as well as private classes to all levels, ages and abilities are also advertised. The Council is of the opinion that the overall use by virtue of the number and nature of classes held (including weekend retreats); the frequency of the classes; the number of attendees; staffing levels; and the levels of associated traffic, greatly exceed that which would reasonably be expected in association with purely domestic occupation. The increased use of the sub- standard access is prejudicial to highway safety.

In the circumstances, enforcement action against the unauthorised yoga classes, weekend retreats and associated business activities is therefore considered expedient.

8.0 HUMAN RIGHTS

8.1 It is considered that Article 1 of Protocol 1 (peaceful enjoyment of possessions) and Article 8 (right to respect for private and family life, home and correspondence) of the European Convention on Human Rights may apply in this case. However, those rights must be weighed against the public interest in preserving the character and appearance of the surrounding area. Given that the unauthorised works are harmful and contrary to the Development Plan and given that there are no material considerations which outweigh the harm, it is considered that Enforcement Action would be a proportionate interference in the wider public interest.

9.0 RECOMMENDATIONS

That delegated authority be granted 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 contravention 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 Property.

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

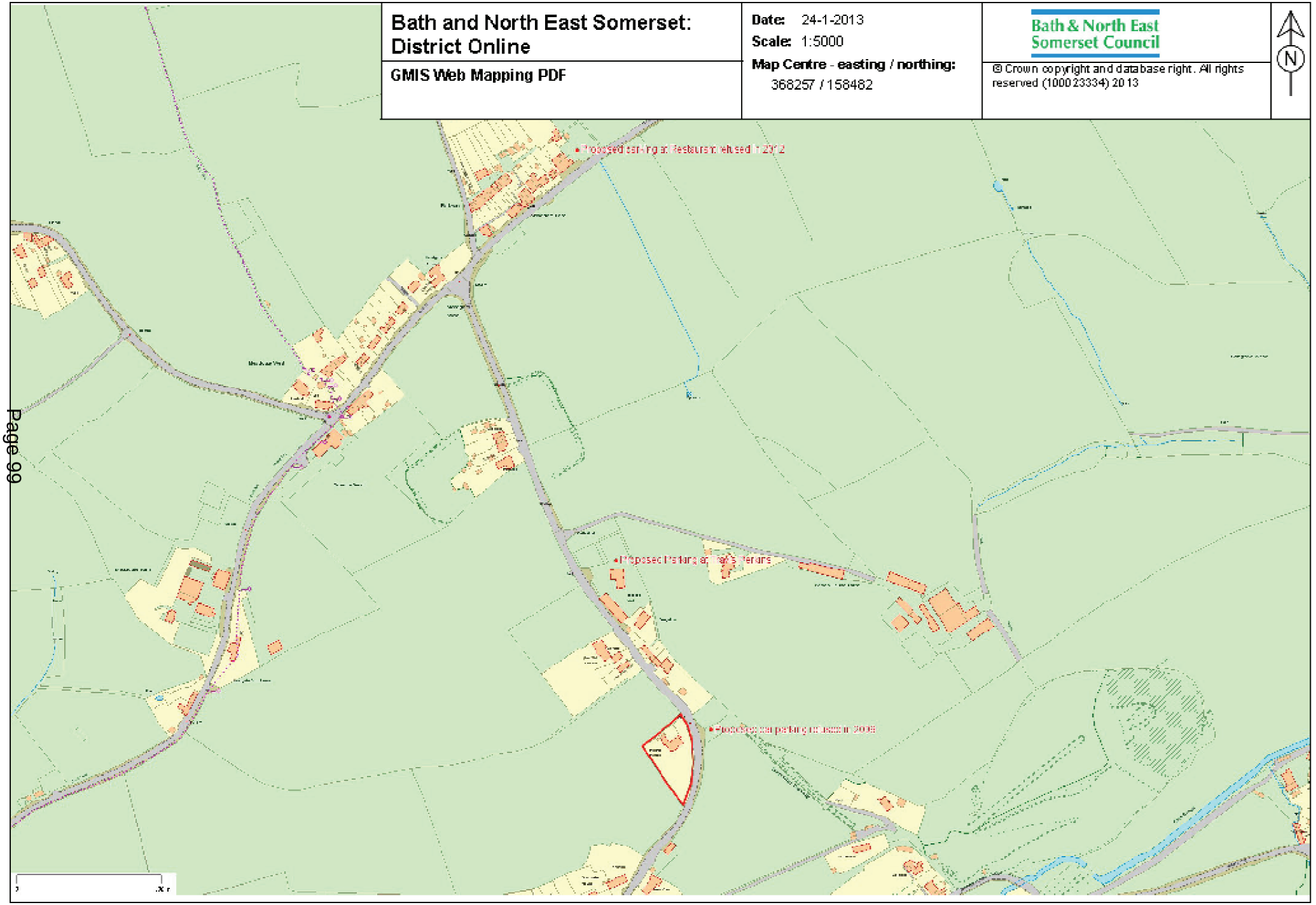
(d) maintenance of a proper record of action taken.

Bath and North East Somerset: District Online

GMIS Web Mapping PDF

Date: 24-1-2013
Scale: 1:5000
Map Centre - easting / northing: 368257 / 158482

Bath & North East Somerset Council



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Bath and North East Somerset Council			
MEETING: **Development Control Committee** MEETING DATE: **13 February 2013**	AGENDA ITEM NO:		
REPORT OF **David Trigwell, Divisional Director of Planning and Transport Development.** REPORT ORIGINATOR: **Mrs A Hoey, External Consultant** DATE PREPARED: 25 January 2013			
AN OPEN PUBLIC ITEM			
BACKGROUND PAPERS: **Planning permission 97/02626/MINW** **S73 Applications 05/00723/VAR, 05/01993/VAR and 11/00022/VAR**			
TITLE: Enforcement Report: **Parcel 5319, Charlton Field lane, Queen Charlton, Bristol, BS31 2TN**			
WARD : **Farmborough**			

1.0 PURPOSE OF REPORT

To seek Members' authority to serve an enforcement notice in the event that Members refuse planning permission for the following applications re the Composting site at Queen Charlton:-

05/00723/VAR, Variation of condition 13 and 16 of Planning Permission: 97/02626/MINW dated 02/12/1998 to allow permanent recycling of cardboard waste and increase in truck movements.

05/01993/FUL - Increase size of concrete storage area and variation of condition 13 of planning permission 97/02626/MINW to accept wood waste.

11/00022/VAR Variation of conditions 13, 16 and 19 of permission no. 97/02626/MINW to extend composting operations, increase vehicle movements and permit cardboard and wood recycling (Temporary use of land for 10 years for manufacture of organic green compost as amended by revised drawings received 14th April 1998 at land formerly Queen Charlton Quarry).

2.0 LOCATION OF PLANNING CONTRAVENTION

Parcel 5319, Charlton Field lane, Queen Charlton, Bristol, BS31 2TN ("the Property"), as outlined in bold on the attached site location plan (Appendix 1).

3.0 OUTLINE OF PLANNING CONTRAVENTION

The planning contravention is the continued use of the site for the production of compost. The above applications, which seek to legitimise the continued use of the site, are recommended for refusal in a separate report elsewhere on the agenda for this meeting.

The continued operation of the composting site has been held by the Secretary of State to be EIA development with the result that the Council is prohibited from approving the development without considering an environmental statement. No environmental statement has been provided.

4.0 RELEVANT PLANNING HISTORY

Composting operations began at the site in January 2001 under planning permission 97/0626/MINW. Condition 19 of that permission states;

The green waste composting operations authorised by this permission shall cease not later than 10 years from the commencement of composting operations.

Reason: To enable the Local Planning authority to review then impact of the development and to maintain the openness of the Green Belt.

Applications 05/000723 and 05/01993, submitted in 2005, sought to vary conditions in the 1999 permission relating to the range of materials that may be composted, and lorry movements. Application 05/01993 also sought retrospective permission for the extension of the concrete hardstanding at the site. These applications were granted in November 2006 but the two decisions were quashed in February 2009 because the court held that they required to be screened. Hence the applications require to be redetermined.

The period of use permitted by permission 97/02626 expired in January 2011.

Application 11/00022 seeks permission for a further period of use. The original application stated that the applicant sought permission to continue the use for 18 months after permission 97/02626, however in a letter dated 25 April 2012, the applicant changed this to 18 months from a favourable determination of the application.

As explained in the separate report, these applications cannot be approved because the information accompanying the applications is not considered to constitute an environmental statement.

5.0 CORRECT APPROACH TO ENFORCEMENT ACTION

<u>The law</u>

It is very important to appreciate that the purpose of the EIA Directive is to ensure that development which is likely significant effects on the environment is not allowed to take place *before* those effects have been properly assessed. Article 2(1) of the Directive states -

> 'Member States shall adopt all measures necessary to ensure that, *before consent is given*, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to an assessment with regard to their effects.'

The Directive is therefore breached if EIA development is allowed to take place at times when there has been no assessment of the likely effects. It is no answer to say that an assessment done after the development has started would be just as good, nor that the benefits of the development are so great that the unassessed impacts just have to be accepted, whatever they are.

The Directive therefore suggests that enforcement action *must* be taken in situations like the present. Since the EIA Regulations require that any application for retrospective planning permission in situations like the present must be refused, domestic law suggests the same (it is virtually impossible to envisage circumstances where it is necessary to refuse planning permission but not necessary to take enforcement action). Members should note that there is in fact no caselaw which addresses the present situation directly, presumably because no developer has been bold enough to argue that it might be proper to refrain from taking enforcement action in such a situation. However such caselaw as there is strongly indicates that the above suggestions are correct.

Wells v Secretary of State the Secretary of State
This considered a development consent for mineral working granted without the necessary environmental statement having been submitted. Enforcement action was not in issue as the development was not taking place. The ECJ held that the Directive required that environment assessment should be carried out at the earliest possible stage in the development consent process and that, if a development consent was granted without the necessary prior environmental assessment, the Member State had to consider *revoking or suspending* the consent while the assessment was carried out. If a planning permission has to be revoked or suspended while an assessment is made, it cannot be acceptable for the development to take place in the meantime. If it does, it should presumably be subject to enforcement action.

Commission v Ireland
This concerned Irish legislation on retrospective planning permissions for EIA development, which, if anything, was more restrictive than the equivalent UK legislation. Irish law allowed for EIA development started without prior environmental assessment to be legitimised by a grant of retrospective permission, with an environmental statement being considered at the time the permission was granted (ie late). The ECJ held that the legislation was inconsistent with the requirement in the Directive that a developer should not be able to start its development until after likely environmental effects had been assessed. However the ECJ did not rule out the grant of retrospective permission following late consideration of an environmental statement in exceptional circumstances.

Ardagh Glass v Chester CC
In this case the Court of Appeal endorsed the following comments by the first instance judge in relation to retrospective planning permission granted after late consideration of an environmental statement -

> "The [decision-taker] ... should also consider, in order to uphold the Directive, whether granting permission would give the developer an advantage he ought to be denied, whether the public can be given an equal opportunity to form and advance their views and whether the circumstances can be said to be exceptional. There will be no encouragement to the pre-emptive developer where the [decision-taker] ensures that he gains no improper advantage and *he knows he will be required to remove his development unless [he] can demonstrate that exceptional circumstances justify its retention*." (Italics added)

Sullivan LJ added -

> '… there is a discretion to grant retrospective planning permission conferred by section 73A and section 177, but there is no requirement that planning permission shall be granted. It is therefore perfectly possible for the decision taker to ensure that the discretion is exercised so as to conform with the ECJ's judgment [in *Ireland*] …' (Paragraph 31)

The implication is that, in unexceptional cases (presumably the majority of cases), retrospective planning permission following late consideration of an environmental statement will *not* be granted and enforcement action will be taken. If so, it is impossible to see how it could ever be right to refrain from enforcement action in a situation like the present, where there is no environmental statement at all.

Enforcement notice

There are only three enforcement measures available to the Council, an enforcement notice, a stop notice (which depends on there being an enforcement notice) and an injunction. An injunction requiring the cessation of the use of the site would have the same effect as a stop notice but would not prevent the development from acquiring immunity.

For the above reasons officers strongly recommend the service of an enforcement notice. Whether the Council should also serve a stop notice is considered below.

Expediency

It must be stressed that the reason for the service of an enforcement notice will be that the development is EIA development, that there has been no assessment of the environmental effects, and that, unless enforcement action is taken, the Council will be participating in a breach of the Directive. This is relevant to the issue of expediency. It is axiomatic in a situation like the present that the development is (at least) likely to have (at least) significant effects on the environment. Beyond this the merits of the development and the requirements of the development plan are not material. If the developer has good reason for not having produced an environmental statement, this might be relevant to issues of expediency, or at least to the timing of enforcement action in some cases. However where, as here, there are applications for retrospective planning permission, the local planning authority will already have decided to determine the applications: the reasons for the absence of an environmental statement will be taken into account in reaching this determination decision and should not be reconsidered at the stage of deciding on enforcement action.

There may be cases where it is expedient to take enforcement measures in addition to an enforcement notice for the purpose of securing effective compliance with the Directive. However it is impossible to see how considerations of effectiveness could ever make it expedient *not* to serve an enforcement notice. Only an enforcement notice prevents continuing unassessed EIA development from acquiring immunity.

Stop notice

In *Ardagh Glass* the Claimant contended that EIA development which had started without a prior assessment of environmental effects should be immediately stopped and should therefore be met with a stop notice as well as an enforcement notice. Dealing with this Sullivan LJ said -

> '… once it is accepted that retrospective planning permission for unauthorised development is permissible in principle (subject to certain conditions), there is no substance in the appellant's further submission … that the respondent was bound to issue a stop notice and not merely to issue an enforcement notice. The latter was sufficient to ensure the removal of the unauthorised EIA development if retrospective planning permission was not granted either by the respondent under section 73A, or by the Secretary of State under section 177 …'

The present case is, as matters stand, more extreme than the situation in *Ardagh Glass*, because in the present case there has been no environmental statement at all, not merely a late one. However, as has been explained in the separate report, if an enforcement notice is served, the developer will be given a further opportunity to produce an environmental statement. If it does not take this opportunity, the Secretary of State will have no choice but to uphold the enforcement notice, which will lead to the removal of the development. If, however, the developer takes this opportunity, the Secretary of State will be empowered to grant retrospective planning permission, the situation considered by Sullivan LJ. It follows that the above reasoning is in substance applicable in the present case. Further it should be noted that a stop notice could not be used to prevent the development from continuing only while there is no environmental statement: any stop notice would remain in force until the determination of the enforcement notice appeal, which might be a considerable period.

Annex 3 of Circular 10/97 advises that a stop notice should 'only prohibit what is essential to safeguard amenity or public safety in the neighbourhood or to prevent serious or irreversible harm to the environment in the surrounding area' (3.21) and that a thorough assessment of the likely consequences (benefits and costs) of serving a stop notice should be made (3.19).

In the present case, since the only purpose of a stop notice would be to prevent the continuation of unassessed EIA development, a stop notice would have to stop all composting activities. It would be illogical (and therefore wrong) to confine the stop notice to only parts of the unassessed development. There having been no proper assessment, it is not known whether any aspect of the present use is causing 'serious or irreversible harm to the environment in the surrounding area'. As for safeguarding 'amenity or public safety in the neighbourhood', the development in its present form has been operating for the best part of a decade and the Council has previously granted planning permission for it (under different EIA Regulations). It is true that there have been breaches of the environmental permit (against which enforcement action has been taken), but there is no evidence that it is necessary to stop usage of the site to protect amenity or public safety. In a recent case it was found that odour from the site was *not* causing an actionable nuisance to nearby residential properties. In any event, as has been pointed out, the cessation of use achieved by a stop notice might only be temporary.

In these circumstances service of a stop notice would not be in accordance with C10/97.

The costs inflicted by a stop notice requiring the cessation of the use of the site would be considerable, comprising :-

Loss of at least 8 full time jobs and 4 part time jobs on site
Closure of the only composting facility operating in BANES
Diversion of deliveries of material for composting to alternative facilities

Additional costs to contractors who use the facility, with possible impact on employment

Officers consider that these costs substantially outweigh the limited benefits of a stop notice.

For these reasons Officers do not recommend service of a stop notice.

6.0 HUMAN RIGHTS

It is not apparent to Officers that enforcement action will interfere with the property or possessions of any human. Even if it does, the interference with his rights under Article 1 of Protocol 1 (peaceful enjoyment of possessions) is justified by the pressing social need to comply with the requirements of the EIA Directive. Anything less than the service of an enforcement notice will not secure compliance with the Directive.

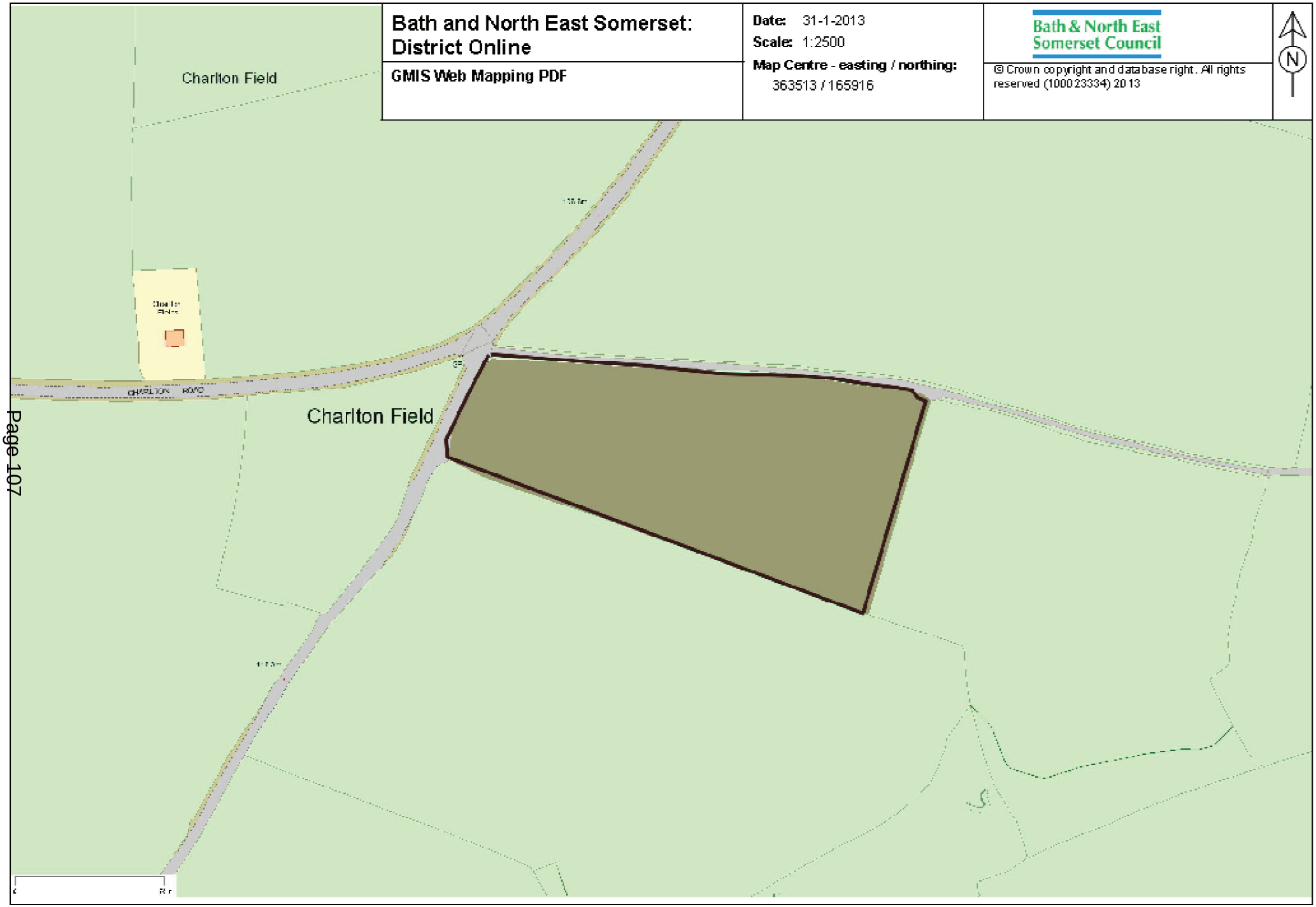
7.0 RECOMMENDATION

That delegated authority be granted to the Development Manager, in consultation with the Planning and Environmental Law Manager, to issue an enforcement notice requiring the cessation of the use of the site.

This matter will be reported back to Members in the event that it proves unnecessary to take enforcement action.

The enforcement notice will be in accordance with the Council's strategy and programme and will follow 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.

A proper record of the action taken will be made.


Bath and North East Somerset: District Online
GMIS Web Mapping PDF
Date: 31-1-2013
Scale: 1:2500
Map Centre - easting / northing:
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Bath & North East Somerset Council		
MEETING:	Development Control Committee	
MEETING DATE:	13 February 2012	**AGENDA ITEM NUMBER**
TITLE:	Quarterly Performance Report Oct - Dec 2012	
WARD:	ALL	
AN OPEN PUBLIC ITEM		
List of attachments to this report: None		

1 THE ISSUE

1.1 At the request of Members and as part of our on-going commitment to making service improvements, this report provides Members with performance information across a range of activities within the Development Management function. This report covers the period from 1 Oct – 31 Dec 2012.

2 RECOMMENDATION

2.1 Members are asked to note the contents of the performance report.

3 THE REPORT

3.1 Commentary

Members' attention is drawn to the fact that as shown in **Table 1** below, performance on 'Major' and 'Other' planning applications was below government target during Oct – Dec 2012. 'Minor' planning applications were above target during this 3 month period.

Performance on determining 'Major' applications within 13 weeks fell from 64% to 56% during Oct – Dec 2012. The fall can be mainly attributed to delays caused by the need to complete Section 106 Agreements. Officers are working with legal colleagues with a view to making this process more efficient. Through the West of England Planning Toolkit we are also working with developers to agree more heads of terms at pre-application stage. Percentage performance on determining 'Minor' applications within 8 weeks changed little from 72% to 71%. Performance on 'Other' applications within the same target time of 8 weeks rose from 71% to 73%. It is worth noting that the 2011/12

performance on planning application determination peaked and troughed but overall showed an improvement on previous performance at the end of that particular financial year.

Table 1 - Comparison of applications determined within target times

Government target for National Indicator 157	B&NES Jan - Mar 2012	B&NES Apr - Jun 2012	B&NES Jul - Sep 2012	B&NES Oct – Dec 2012
'Major' applications 60%	11/18 (61%)	7/15 (47%)	9/14 (64%)	15/27 (56%)
'Minor' applications 65%	86/111 (77%)	99/149 (66%)	112/156 (72%)	99/139 (71%)
'Other' applications 80%	256/314 (82%)	291/391 (74%)	260/368 (71%)	293/399 (73%)
Number of on hand 'Major' applications (as report was being prepared)	40	48	55	48

Note: An explanation of 'Major', 'Minor' and 'Other' categories are set out below.

'LARGE-SCALE MAJOR' DEVELOPMENTS – *Decisions to be made within 13 weeks*

- Residential – 200 or more dwellings or site area of 4Ha or more
- Other Land Uses – Floor space of more than 10,000 sq. metres or site area of more than 2Ha
- Changes of Use (including change of use or subdivision to form residential units) – criteria as above apply

'SMALL-SCALE MAJOR' DEVELOPMENTS – *Decisions to be made within 13 weeks*

- Residential – 10-199 dwellings or site area of 0.5Ha and less than 4Ha
- Other Land Uses – Floor space 1,000 sq. metres and 9,999 sq. metres or site area of 1Ha and less than 2Ha
- Changes of Use (including change of use or subdivision to form residential units) – criteria as above apply

'MINOR' DEVELOPMENTS – *Decisions to be made within 8 weeks*

- Residential – Up to 9 dwellings or site up to 0.5 Ha

- Other Land Uses – Floor space less than 1000 sq. metres or site less than 1 Ha

'OTHER' DEVELOPMENTS – *Decisions to be made within 8 weeks*

- Mineral handling applications (not County Matter applications)
- Changes of Use – All non-Major Changes of Use
- Householder Application (i.e. within the curtilage of an existing dwelling)
- Advertisement Consent
- Listed Building Consent
- Conservation Area Consent
- Certificate of Lawfulness
- Notifications

Table 2 - Recent planning application performance statistics

Application nos.	2011/12				2012/13			
	Q1	Q2	Q3	Q4	Q1	Q2	Q3	Q4
On hand at start	496	550	505	462	538	514	535	
Received	601	605	496	578	594	608	556	
Withdrawn	57	68	40	58	61	49	56	
Determined	489	579	498	443	555	538	565	
On hand at end	551	508	461	539	516	535	470	
Delegated	477	564	492	433	537	516	545	
% Delegated	97.5	97.4	98.4	97.7	96.7	95.9	96.4	
Refused	63	93	73	69	90	96	67	
% Refused	12.8	16.0	14.6	15.5	16.2	17.8	11.8	

Table 2 above shows numbers and percentages of applications received, determined, together with details of delegated levels and refusal rates.

Due to seasonal variation, quarterly figures in this report are compared with the corresponding quarter in the previous year. During the last three months, the number of new applications received and made valid rose 12% when compared with the corresponding quarter last year. This figure is also 11% up on the same period two years ago, and 6% up on three years ago.

The current delegation rate is 96% of all decisions being made at officer level against cases referred for committee decision. The last published England average was 92% (April - June 2012).

Table 3 - Planning Appeals summary

	Jan – Mar 2012	Apr – Jun 2012	Jul – Sep 2012	Oct – Dec 2012
Appeals lodged	29	24	28	34
Appeals decided	32	15	21	30
Appeals allowed	5 (17%)	6 (50%)	3 (15%)	13 (46%)
Appeals dismissed	24 (83%)	6 (50%)	17 (85%)	15 (54%)

The figures set out in **Table 3** above indicate the number of appeals lodged for the Oct - Dec 2012 quarter has risen 21% when compared with the previous quarter. Overall, total numbers received against the same four quarters a year ago has seen a rise in planning application appeals of 22%.

Members will be aware that the England average for appeals won by appellants (and therefore allowed) is approximately 35% (2011/12). Because of the relatively small numbers of appeals involved figures will fluctuate slightly each quarter, but the general trend over the last 12 months for Bath & North East Somerset Council is that of the total number of planning appeals decided approximately 30% are allowed against refusals of planning applications, which demonstrates good performance by the authority.

Table 4 - Enforcement Investigations summary

	Jan – Mar 2012	Apr – Jun 2012	Jul – Sep 2012	Oct – Dec 2012
Investigations launched	159	157	244	140
Investigations on hand	276	169	222	230
Investigations closed	146	133	318	133
Enforcement Notices issued	2	1	5	3
Planning Contravention Notices served	5	3	2	3
Breach of Condition Notices served	0	0	0	0

The figures shown in **Table 4** indicate a 43% drop in the number of investigations received this quarter, when compared with the previous quarter. Resources continue to be focused on the enforcement of planning control with 6 legal notices having been served during this quarter. In order to strengthen the enforcement team function, two posts were filled in 2012 and as such a Principal Enforcement Officer and an Implementation Manager have been in place for the last 6 months. The recruitment of these positions will assist in providing an efficient and effective enforcement function which can focus more clearly on communication with customers and Members.

Tables 5 - Transactions with Customers

The planning service regularly monitors the number and nature of transactions between the Council and its planning customers. This is extremely valuable in providing management information relating to the volume and extent of communications from customers.

It remains a huge challenge to ensure that officers are able to maintain improvements to the speed and quality of determination of planning applications whilst responding to correspondence and increasing numbers of emails the service receives.

Table 5 - Number of monitored emails

	Apr – Jun 2012	Jul – Sep 2012	Oct – Dec 2012
Number of emails to 'Development Control'	1473	1646	1305
Number of emails to 'Planning Support'	1696	1999	1964
Number of emails to Team Administration within Development Management	4555	4403	4647

The volume of incoming e-mail is now substantial, and is far exceeding the volume of incoming paper-based correspondence. These figures are exclusive of emails that individual officers receive, but all require action just in the same way as hard copy documentation. The overall figure for the Oct - Dec 2012 quarter shows a high volume of electronic communications matching the previous quarter. It is worth noting that comments received on applications within the statutory 21 day consultation period are subject to some 'redacting' being applied before making them accessible for public viewing through the Council's website as part of the application process. This task alone is high volume and currently labour intensive.

Table 6 – Other areas of work

The service not only deals with formal planning applications and general enquiries, but also has formal procedures in place to deal with matters such as pre-application proposals, Householder Development Planning Questionnaires and procedures for discharging conditions on planning permissions. **Table 6** below shows the numbers of these types of procedures that require resource to action and determine.

During the last quarter there has been a 12% drop in the overall volume of these procedures received in the service. However, pre-application submissions remained the same.

Table 6	Apr – Jun 2012	Jul – Sep 2012	Oct – Dec 2012
Number of Household Development Planning Questionnaires	122	157	127
Number of pre-application proposals submitted	159	186	186
Number of 'Discharge of Condition' requests	163	161	135

Number of pre-application proposals submitted through the 'Development Team' process	5	5	6
Applications for Non-material amendments	31	33	25

Table 7 – Works to Trees

Another function that the Planning Service undertakes involves dealing with applications and notifications for works relating to trees. **Table 7** below shows the number and percentage of these applications and notifications determined. The figures show particularly an increase in notifications received (up 9%). However, during Oct - Dec 2012, performance on determining applications for works to trees subject to Tree Preservation Orders and performance on dealing with notifications for works to trees within a Conservation Area remained above 90%.

Table 7	Apr – Jun 2012	Jul – Sep 2012	Oct – Dec 2012
Number of applications for works to trees subject to a Tree Preservation Order (TPO)	18	18	18
Percentage of applications for works to trees subject to a TPO determined within 8 weeks	89%	100%	94%
Number of notifications for works to trees within a Conservation Area (CA)	135	176	191
Percentage of notifications for works to trees within a Conservation Area (CA) determined within 6 weeks	94%	97%	100%

Table 8 - Customer transactions using Council Connect

As outlined in previous performance reports, Members will be aware that since 2006, 'Council Connect' has been taking development management related 'Frequently Asked Questions' (FAQs).

Table 8 below shows a breakdown of volumes of customer phone calls to the Council Connect contact centre for the previous three quarters:

Table 8	Apr – Jun 2012	Jul – Sep 2012	Oct – Dec 2012
Planning	110	346	130

Planning Overflow	73	83	75
Planning Existing Application	911	1032	860
Planning Existing Application Overflow	532	545	432
Planning New Issues	734	738	631
Planning New Issues Overflow	392	446	342
Total number of calls	2752	3190	2470

Table 8 shows that Council Connect has consistently received approx. 2800 calls for each quarter so far this year, with very little variation. The various titles in the right hand column represent the name of the call questions the callers come through on, 'Overflow' being simply where all officers in the contact centre have been on the phone when that customer called, meaning they have been moved into a 'question' to represent this.

Table 9 - Electronic transactions

The Planning Services web pages continue to be amongst the most popular across the whole Council website, particularly 'View and Comment on Planning Applications' and 'Apply for Planning Permission'. The former is the most popular web page after the council's home page.

Around 80% of all applications are now submitted online through the Planning Portal link on the Council website, and **Table 9** below shows that the authority received **469 (77%)** Portal applications during the Oct - Dec 2012 quarter, compared with **82%** during the previous quarter. As a reminder, overall for 2010/11 online applications received stood at 54%, for 2011/12 they reached 68%. Our online submission percentage is above the national average, which currently stands at around 60%, and appears to be generally increasing. This provides good evidence of a growing online self-service by the public.

In November, the Planning Portal hosted the second of a series of free training events to encourage the remaining paper submitting agents to apply online through the portal. This also ties in with wider strategic aims to encourage greater take up of electronic self-servicing.

Table 9 - Percentage of planning applications submitted electronically (through the national Planning Portal)

	Government target	Jan – Mar 2012	Apr – Jun 2012	Jul – Sep 2012	Oct – Dec 2012
Percentage of applications submitted online	10%	70%	75%	82%	77%

Table 10 - Scanning and Indexing

As part of the move towards achieving e-government objectives and the cultural shift towards electronic working, the service also scans and indexes all documentation relating to planning and associated applications. Whilst this work is a 'back office' function it is useful to see the volume of work involved. During the Oct - Dec 2012 quarter, the service scanned over 13,000 planning documents and this demonstrates that whilst the cost of printing plans may be reduced for applicants and agents, the service needs to resource scanning and indexing documentation to make them accessible for public viewing through the Council's website. The trend for scanning actual planning applications is dropping in number as the public increases use of uploading and submitting their applications electronically through the Planning Portal (see Table 9 above). However, all documents submitted electronically still need to be manually inserted in the Document Management System by the Planning support staff. It is not possible at present to also detail the numbers of these 'insertions' in the table below.

Table 10

	Jan – Mar 2012	Apr – Jun 2012	Jul – Sep 2012	Oct – Dec 2012
Total number of images scanned	14,752	14,383	11,332	13,168
Total number of images indexed	6,152	5,712	4,525	4,450

Table 11 - Customer Complaints

During the quarter Oct - Dec 2012, the Council has received the following complaints in relation to the planning service. The previous quarter figures are shown for comparison purposes. Further work is currently underway to analyse the nature of complaints received and to implement service delivery improvements where appropriate.

Table 11

Customer Complaints	Apr – Jun 2012	Jul – Sep 2012	Oct – Dec 2012
Complaints brought forward	5	2	5
Complaints received	19	18	19
Complaint upheld	1	3	8
Complaint Not upheld	18	10	11
Complaint Partly upheld	3	2	0

Complaints carried forward	1	5	7

Table 12 - Ombudsman Complaints

The council has a corporate complaints system in place to investigate matters that customers are not happy or satisfied about in relation to the level of service that they have received from the council. However, there are circumstances where the matter has been subject to investigation by officers within the authority and the customer remains dissatisfied with the outcome of the investigation. When this happens, the customer can take their complaint to the **Local Government Ombudsman** for him to take an independent view. **Table 12** below shows a breakdown of Ombudsman complaints lodged with the Local Government Ombudsman for the previous four quarters.

Table 12

Ombudsman Complaints	Jan – Mar 12	Apr – Jun 12	Jul – Sep 12	Oct – Dec 12
Complaints brought forward	5	7	3	0
Complaints received	7	2	2	1
Complaints upheld	0	0	0	
Local Settlement				
Maladministration				
Premature complaint				
Complaints Not upheld	5	6	5	
Local Settlement	*1*	*1*	*1*	
No Maladministration				
Ombudsman's Discretion	*4*	*5*	*2*	
Outside Jurisdiction			*1*	
Premature complaint			*1*	
Complaints carried forward	7	3	0	1

Table 13 – Section 106 Agreements

Members will be aware of the Planning Obligations SPD published July 2009. Planning Services have spent the last two years compiling a database of Section 106 Agreements. This is still a work in progress, but it has now enabled the newly appointed S106 Monitoring Officer to actively progress in monitoring delivery of agreed obligations. **Table 13** below shows a breakdown of S106 Agreement sums agreed and sums received between Oct - Dec

2012. Also detailed is the outstanding balance for agreements signed between July 2009 and Dec 2012. Members should be aware that the figures are approximates because of the further work still to be completed in the S106 monitoring operation.

Table 13

Section 106 Agreements	Apr – Jun 2012	Jul – Sep 2012	Oct – Dec 2012	
Funds agreed	£2,260,850.48	£182,468.99	£828,093.41	
Funds received	£33,500.98	£56,086.17	£1,000	
Outstanding funds balance (Jul '09 – Sep '12)	£13,556,478.54	£13,259,687.19	£14,102,777.15	

Table 14 – Costs Awarded monitoring

Detailed below is a list of recent costs against the council in relation to Planning Appeals and court cases.

Table 14

Ref no. and Site Address	Background	Cost Awarded	Reason Awarded
12/00032/RF Land Rear Of Holly Farm Brookside Drive Farmborough	Planning officer recommended permit, but were 'overturned' and refused at committee. Later Allowed by the Inspectorate 03/10/2012.	£32,000 estimated	Costs of Appeal proceedings awarded ("By the end of the Hearing I remained unclear as to why the Council did not accept the advice of its officers or how it came to the conclusions that it did.")

Contact person	John Theobald, Data Technician, Planning and Transport Development 01225 477519
Background papers	CLG General Development Control statistical returns PS1 and PS2 + Planning applications statistics on the DCLG website: https://www.gov.uk/government/organisations/department-for-communities-and-local-government/series/planning-applications-statistics

Please contact the report author if you need to access this report in an alternative format

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Bath & North East Somerset Council

MEETING:	**Development Control Committee**	AGENDA ITEM NUMBER
MEETING DATE:	**13th February 2013**	
RESPONSIBLE OFFICER:	Lisa Bartlett, Development Control Manager, Planning and Transport Development (Telephone: 01225 477281)	
TITLE:	**NEW PLANNING APPEALS, DECISIONS RECEIVED AND DATES OF FORTHCOMING HEARINGS/INQUIRIES**	
WARD:	ALL	
BACKGROUND PAPERS: None		
AN OPEN PUBLIC ITEM		

APPEALS LODGED

App. Ref: 12/03052/FUL
Location: Downside 1 Copse Road Saltford BS31 3TH
Proposal: Erection of a two storey side extension following partial demolition of existing dwelling and demolition of existing outbuildings, garage and garden shed and change of use of adjoining field to domestic garden including a landscape proposal to the boundary.
Decision: REFUSE
Decision Date: 13 September 2012
Decision Level: Delegated
Appeal Lodged: 7 January 2013

App. Ref: 12/03517/FUL
Location: 15 Rosslyn Road Newbridge Bath BA1 3LQ
Proposal: Erection of a two storey side and single storey rear extension and provision of a loft conversion with rear dormer.
Decision: REFUSE
Decision Date: 10 October 2012
Decision Level: Delegated
Appeal Lodged: 14 January 2013

App. Ref: 12/03994/LBA
Location: 2 Johnstone Street Bathwick Bath BA2 4DH
Proposal: External alterations for the installation of 930 mm high timber fence to existing low stone south-east side garden wall (regularisation).
Decision: REFUSE

Decision Date: 24 December 2012
Decision Level: Delegated
Appeal Lodged: 14 January 2013

App. Ref: 12/04122/FUL
Location: Bannerdown Cottage Steway Lane Batheaston Bath
Proposal: Erection of a single storey extension with terrace above to west elevation and a garage extension to east elevation (revised resubmission).
Decision: REFUSE
Decision Date: 12 November 2012
Decision Level: Delegated
Appeal Lodged: 14 January 2013

App. Ref: 12/02973/LBA
Location: 4 Kensington Place Walcot Bath BA1 6AW
Proposal: Internal and external alterations for the conversion of existing vaults to provide bathroom and dry storage space
Decision: REFUSE
Decision Date: 14 September 2012
Decision Level: Delegated
Appeal Lodged: 22 January 2013

App. Ref: 12/02074/LBA
Location: 16 St Mark's Road Widcombe Bath BA2 4PA
Proposal: Internal alterations to form new opening at ground floor.
Decision: REFUSE
Decision Date: 12 July 2012
Decision Level: Delegated
Appeal Lodged: 23 January 2013

App. Ref: 12/03778/FUL
Location: 14 Argyle Street Bathwick Bath BA2 4BQ
Proposal: Retention of awning over external seating area on land to rear of 14/15 Argyle Street
Decision: REFUSE
Decision Date: 31 October 2012
Decision Level: Delegated
Appeal Lodged: 24 January 2013

App. Ref: 12/03779/AR
Location: Ivy Bath 15 Argyle Street Bathwick Bath BA2 4BQ
Proposal: Display of external menu board and retractable door blind to restaurant entrance (Retrospective)
Decision: REFUSE
Decision Date: 9 November 2012
Decision Level: Delegated

Appeal Lodged: 24 January 2013

App. Ref: 12/03780/LBA
Location: Ivy Bath 15 Argyle Street Bathwick Bath BA2 4BQ
Proposal: External alterations for the provision of external menu board and retractable door blind to restaurant entrance (Regularisation)
Decision: REFUSE
Decision Date: 12 November 2012
Decision Level: Delegated
Appeal Lodged: 24 January 2013

App. Ref: 12/01872/FUL
Location: 36 Dafford Street Larkhall Bath BA1 6SW
Proposal: Change of use from C3 dwellinghouse to a sui generis use (10 bed HMO). (Retrospective)
Decision: REFUSE
Decision Date: 5 July 2012
Decision Level: Delegated
Appeal Lodged: 25 January 2013

App. Ref: 12/03159/FUL
Location: 143 The Hollow Southdown Bath BA2 1NJ
Proposal: Erection of two storey extension following removal of existing conservatory and garage
Decision: REFUSE
Decision Date: 7 September 2012
Decision Level: Delegated
Appeal Lodged: 25 January 2013

App. Ref: 12/04396/FUL
Location: Upper Fosse Cottage Fosse Lane Batheaston Bath
Proposal: Erection of a second storey front extension.
Decision: REFUSE
Decision Date: 5 December 2012
Decision Level: Delegated
Appeal Lodged: 25 January 2013

App. Ref: 12/04644/FUL
Location: 11 Ayr Street Twerton Bath BA2 3RJ
Proposal: Provision of a loft conversion with rear flat roof dormer.
Decision: REFUSE
Decision Date: 11 December 2012
Decision Level: Delegated
Appeal Lodged: 28 January 2013

App. Ref:	12/03792/FUL
Location:	Sainsbury's Supermarket Limited 170 Frome Road Odd Down Bath BA2 5RF
Proposal:	Use of land as a temporary car park until 31 December 2015 and associated engineering works (Aggregate Macadam Surface) (Retrospective)
Decision:	REFUSE
Decision Date:	12 November 2012
Decision Level:	Delegated
Appeal Lodged:	29 January 2013

APPEAL DECISIONS

APP REF:	12/03041/FUL and 12/03040/FUL
LOCATION:	34 and 36 Rotcombe Lane
PROPOSAL:	Erection of a single storey front extension following demolition of existing porch.
DECISION:	Refuse
DECISION DATE:	14.09.2012
DECISION LEVEL:	Delegated
APPEAL DECISION:	Both appeals dismissed.

Summary

Two applications were submitted at the same time for front extensions to neighbouring properties which formed part of a longer terrace.

The single storey extensions would run the full width of both the front of the properties and the applications were refused as these extensions would be out of keeping with the character of the cottages.

The main issue was the appearance of the flat roof rear extension and its impact on the character of the dwelling.

The Inspector considered that the whilst the frontages of the properties within the terrace were not entirely uniform each had a clearly defined doorway and a balance in the proportion of glazing and stone. The Inspector felt that the proposed extension would change this arrangement by appearing as a continuous line of glazing. There would be no visually distinct entrance and the glazing would not be broken by any natural stone. It would therefore be out of keeping with the general character of other properties within the terrace. Considered alongside the proposed extension to the neighbouring property it would allow little visual separation between the front of the two houses as the front entrances would be incorporated within the line of glazing. The proposals was therefore considered by virtue of its design to harm the character of the terrace having an unacceptable impact and being contrary to policies D.2 and D.4 of the *Bath and North East Somerset Local Plan Adopted October 2007* which require that development is of high quality design and responds to local context. It would also be in conflict with the overarching principle of the National Planning Policy Framework to secure high quality design.

APP REF: 12/03447/FUL
LOCATION: Pump Cottage, Ashley Road, Bathford, Bath, BA1 7TS
PROPOSAL: Erection of a side extension.
DECISION: Refuse
DECISION DATE: 27.09.12
DECISION LEVEL: Delegated
APPEAL DECISION: Appeal Dismissed

Summary:

The inspector considered the size of the proposed extension in the context of the dwelling and not the whole buildings. In doing so the Inspector agreed that the proposed extension would represent a disproportionate addition to the original dwelling and would, therefore, be inappropriate and harmful to the Green Belt.

Additionally the inspector agreed that the closing of the gap between the cottage and the farm house would result in a loss of openness which would add to the harm to the Green Belt.

The inspector had no objection to the detailed design and considered there to be no impact upon the AONB, stating that these did not add to the harm.

Little weight was afforded to the proposed fall-back position and the Inspector concluded that the harm by reason of inappropriateness and loss of openness was not clearly outweighed by other considerations so as to amount to the very special circumstances necessary to justify the proposal.

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Bath & North East Somerset Council

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

AN OPEN PUBLIC ITEM

BACKGROUND PAPERS

(i) Development Control Committee Report 5 January 2012

(ii) Development Control Committee Report 30 March 2012

(iii) Development Control Committee Report 9 May 2012

(iv) Inspector's report dated 13 February 2003 and Secretary of State's Decision dated 1 August 2003

List of attachments to this report:

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

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

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

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

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

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

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

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

February 2013. Annex I – Possible revised wording for Enforcement Notices put to the Inquiry Annex J – Inspector's Note 3: Matters arising at the adjournment dated 31 January 2013.

1 COMMITTEE'S PREVIOUS DECISION

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

1.2 This Committee at its Meeting of 9 May Resolved:

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

(ii) To give an 18 month period for compliance with the Enforcement Notices(s).

1.3 Three Enforcement Notices were issued on 30 May 2012

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

2 CORRESPONDENCE AND LEGAL OPINIONS

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

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

2.2.1 States that it does not accept any of the arguments put forward in respect of the *res judicata* point

2.2.2. Raises concerns with the amount of new evidence that has been presented in the Appellants' proofs of evidence which has not been disclosed to the Council previously or third parties and seeking an adjournment to enable proper consideration to be given to this new information.

2.3. PINS had also received representations made by Third Parties supporting the arguments that *res judicata* does not apply in this case.

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

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

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

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

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

3.2.3. Revised Inquiry programme in the following terms:

"(i) Shortened formal opening of the Inquiry taking appearances but not witnesses as this may alter

(ii) Hear submissions on the form of Notice No. 1 and any corrections and/or variations that may be agreed or proposed as appropriate. Since S176(1) limits the issue of injustice to the appellant and the local planning authority I do not expect to hear submissions from Rule 6 parties on this.

(iii) Adjourn to consider the submissions and write my rulings on those matters that I need to. I would expect to adjourn on Tuesday.

(iv) Resume 10:00 Friday 1 February. I will need to reflect carefully on the submissions made and explain my reasoning clearly. Therefore I intend to allow two days. I will hand out my ruling at 10:00 or earlier if <u>everyone</u> is represented and allow a period for parties to consider it. As stated in my earlier Response I see no merit in may further submissions since it is unlikely that my ruling will be acceptable to all parties. The purpose of resuming with all parties present is so that we can then agree how to take the Inquiry forward. During the period for consideration after receiving the ruling parties are asked to resolve as appropriate: whether any appeal or notice is to be withdrawn: which witnesses may either not now need to be called or may be able to give much abbreviated evidence; which additional witnesses may need to be called; whether applications for costs are likely to be made and by whom against whom. We can then agree the number of Inquiry days required when we resume. We can also agree a date for the final submission of any new

evidence if any additional witness is to be called. Parties are therefore requested to come with a clear view of their availability over the next few months."

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

4 PUBLIC INQUIRY

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

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

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

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

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

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

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

CONCLUSION

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

Ashfords
Solicitors

Incorporating ROCHMAN LANDAU

18 January 2013

Mr O Agala
The Planning Inspectorate
Temple Quay House
2 The Square
Temple Quay
Bristol BS1 6PN

Your Ref: See below

Our Ref: JWB/GJC/173755-00002

E.Mail: j.bosworth@ashfords.co.uk

Direct Dial: 01392 33 3842
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Dear Mr Agala

ENFORCEMENT APPEALS BY GAZELLE PROPERTIES LIMITED - SITE AT THE FORMER FULLERS EARTH SITE, FOSSEWAY, COOMBE HAY, BATH
PINS REFS: APP/F0114/C/12/2179426, 2179431 AND 2179435

The Inspector will now have noted that both the Council and Interested Parties are seeking to rely very heavily on a challenge the Secretary of State's previous findings as to the extent of the lawful B2 use of the site.

We consider that (a) it is not lawful to canvass this issue again and (b) it will not be possible for the inquiry to conclude within the four days allocated, given the scope of the issues to be covered. It is therefore apparent that a great deal of evidence and inquiry time will be necessitated by revisiting this issue. A consequence of the additional inquiry time is a real risk of the costs to our client escalating considerably and therefore there is an urgent need to address whether what we consider to be an unlawful and irrelevant exercise can be obviated.

As set out in the joint opinion of Mr Elvin QC and Mr Goodman (appendix L to Mr Kendrick's evidence) at paragraphs 63-4:

> "The mischief which *res judicata* seeks to address is apparent [in this case]. The principle applies in this instance so as to prohibit, as a matter of law, the visitation of the issue of the lawful use right again.
>
> Consequently, the Appellant at the enforcement appeal should not be put to the necessity of re-proving this issue: the enforcement notices must be amended or quashed so as not to traduce the lawful use right enjoyed over the whole site."

It is our position that the Council's attempt to revisit the extent of the B2 use is unlawful and unreasonable. According to its email to the Inspectorate, the Council is apparently yet to take legal advice from its barrister on the point, albeit it states in its letter to the Inspectorate that it has considered the *res judicata* issue previously (we have not seen any document demonstrating this). As previously confirmed, these matters will be likely to form the basis of a costs application by the

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Appellant. Despite a further reminder from us yesterday afternoon we are yet to hear from the Council in response to our suggestions as to how to deal with the *res judicata* issue (despite the Council's direct response to the Inspectorate).

In order to give effect to the purpose of the *res judicata* principle, we believe that it is incumbent on the Secretary of State to prevent this issue being revisited, with all the attendant costs implications. This issue must therefore be dealt with in advance of the evidence, or the Inspectorate risks denying our client one of the principal benefits of the *res judicata* principle. We respectfully suggest that there are two practical means of doing this:

Special Case for Decision of the High Court

Firstly, section 289(3) of the Town and Country Planning Act 1990 states:

> "At any stage of the proceedings on any such appeal as is mentioned in subsection (1) [i.e. proceedings on an appeal under Part VII against an enforcement notice], the Secretary of State may state any question of law arising in the course of the proceedings in the form of a special case for the decision of the High Court."

The issues involved are matters of law. It is therefore open to the Secretary of State to state questions of law for the High Court. Although this course would cause an initial delay to the inquiry, it would have the benefit of securing an authoritative determination by the Court on a purely legal question in advance of any evidence being called. It would therefore ensure clarity as to the scope of that evidence. In the long run there is a good chance that such a course would obviate the need for High Court legal challenges to any decision of the Inspector (whether in the course of the process, by judicial review of decisions, or ultimately by challenge under section 289 of the Town and Country Planning Act 1990).

I would commend the following questions to be stated for decision of the High Court:

1. Is the Secretary of State's decision of 2003 to be read as establishing that there is an established lawful B2 use extending across the entire site
2. Is the existence of an established B2 use across the entire site now *res judicata*?

Preliminary Issue for Inspector

Alternatively, the Inspector may consider the issue for himself in advance and pursuant to any oral submissions (if there is any disagreement) on the first day of the inquiry. In that event, we would prepare a bundle of legal authorities which we would wish to file with the Inspector in advance. We would wish for a written determination of the Inspector's decision in that event.

If the Inspector's determination went against us, we shall seek judicial review of that determination (we can say this with certainty since it is a purely legal point on which we would say the Inspector's decision was erroneous). If it goes with us, then the Interested Parties or the Council may wish to challenge that decision. The Council may at least, in these circumstances, wish to reconsider its position with regard to pursuing the enforcement notices, and at the very least whether the notices will require to be amended.

We therefore expect that in that event it would therefore be necessary to adjourn the remaining part of inquiry. Furthermore, as the Inspector appears to have implied already (in seeking to ascertain the availability of parties in the week commencing 4 February) it is now clear that the Inquiry could not be concluded in the four days allocated. We see little advantage in proceeding with some, but not all, of the evidence in the circumstances. By our calculations there are at least 8 witnesses whose evidence goes to the question of the lawful use - evidence which we consider to be legally irrelevant and unnecessary.

I would therefore be grateful for an early indication of the Inspector's views as to the procedure to be adopted in relation to resolving the *res judicata* issue.

.

Yours sincerely

John Bosworth
For Ashfords LLP

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GAZELLE PROPERTIES LIMITED

FULLERS EARTH SITE

JOINT OPINION

Introduction

1. We are instructed to advise Gazelle Properties Ltd. ("**Gazelle**") whether the determination by the Secretary of State in a decision letter dated 1 August 2003 that a site comprising part of the former Fuller's Earth Works, Combe Hay, Bath extending to 3.38 hectares ("**the 2002 site**") benefits from a right to B2 use is an issue which is now *res judicata* and accordingly cannot be revisited in further enforcement proceedings either by Bath and North East Somerset Council ("**BANES**") or the Secretary of State on appeal.

2. We are asked for this advice in the context of an enforcement notice having been served which alleges a change of use of an area comparable to the 2002 site (with minor differences in extent)[1] to a mixed B2/B8 use. Neither the enforcement notice, nor the reports which preceded its authorisation, acknowledges the existing of the lawful B2 use or nor does the notice allow for reversion to B2 use across the whole site. Rather, BANES acknowledges only that an area marked "area A" is not to be the subject of enforcement.

3. In our opinion, the Secretary of State's decision of 2003 unequivocally determined that by the beginning of 1964 there was an established B2 use across the whole 3.38 hectares which was not abandoned subsequently. Consequently, use for B2 purposes across the whole 3.38 hectares is now lawful and that issue is now *res judicata* and may not now be lawfully revisited in any enforcement action[2].

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[1] The enforcement notice area includes the area of two dwellings adjacent to the 2002 site. Visibility splays marked on the application site in 2002 do not form part of the area enforced against.

[2] The acquisition and preservation of immunity by virtue of use pertaining prior to 31 December 1963 is explained in ***Panton & Farmer v Secretary of State for the Environment, Transport & the Regions and Vale of White Horse District Council*** (1999) 78 P. & C.R. 186 at 193

4. This conclusion has two significant consequences. First, the Inspector considering the forthcoming appeal against enforcement notices must use his powers within section 176 of the Town and Country Planning Act 1990 to amend the enforcement notices so as to permit reversion to B2 use across the whole of the 3.38 hectares which were the subject of the 2003 decision. Secondly, given that the question whether the established use is *res judicata* is clearly not a matter to which the Council has squarely directed its mind before, still less acknowledged in making its decision, it should consider withdrawing the enforcement notices.

5. The view expressed above may also demonstrate that the Council's action in taking enforcement action was unreasonable in that it did so without understanding or taking into account the true legal position with regard to the lawful B2 use.

6. We consider below

   (1) what the Secretary of State decided was the extent of the established B2 use in his 2003 appeal decision; and

   (2) the application of the principle of *res judicata* to the findings in that decision.

Analysis

The Secretary of State's Decision

7. The Secretary of State's decision dated 1 August 2003 ("**DL**") was a determination of a "called-in" application pursuant to section 77 of the Town and Country Planning Act 1990. The decision was to refuse the application. It departed from the recommendation of an Inspector in an Inspector's report ("**IR**") to grant planning permission subject to conditions for a scheme comprising 3,186 metres of B1 floorspace and 19 live/work units.

8. An issue decided by the Secretary of State in the DL was that the entire 3.38 hectare site benefitted from a lawful B2 use. As we explain further below, in our view that this issue was so determined is clear both on the face of the decision and when the decision is read in context. Indeed, the Council has twice been advised by counsel (including leading counsel) that this is the proper interpretation.

The Council's new interpretation

9. However, it is necessary to examine the Secretary of State's decision in some detail here because BANES' interpretation of this decision has recently changed. BANES now asserts that the Secretary of State did not take the view that a B2 use pertained over the entire site, but rather that he considered there to be a fallback B2 use over an area

of the site which was limited to the buildings and hardstanding. This area has been labelled "area A" on enforcement notices dated 30 May 2012. The enforcement notices exclude this area from enforcement on the basis that the Council accepts the activities within this area are B2 uses[3]. It is therefore apparent that BANES does not dispute the existence of a lawful B2 use, but that it disputes the geographical extent of the B2 use right and, implicitly, whether the DL finally determined that the entire 2002 site benefits from that lawful use right.

Analysis of the Secretary of State's Decision

10. In the DL, the Secretary of State (at DL 28-9) disagreed with the Inspector's recommendation that the proposal did not conflict with Green Belt policy objectives, noting that the proposed development would have an urban feel to it and would not safeguard the countryside from encroachment.

11. The Secretary of State stated at DL 30 that he agreed with the Inspector's conclusions at IR 427-436 regarding the existence of a fallback position. The Secretary of State then went on to consider whether any very special circumstances outweighed the harm to the Green Belt he had identified. At DL 35 he considered the weight to be attributed to various fallback options which had been presented by the Applicant:

> "Preclusion of the Fallback Positions: The Inspector identifies three fallback positions (IR 435) 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 (IR455-6) though he has insufficient evidence to assess the likely extent of type of B2 use...
>
> ... the Secretary of State is not satisfied on the basis of the evidence before him that the **entire site** will be used for B2 use under the fallback position" [emphasis supplied]

12. On the face of the DL, it is clear that the Secretary of State was accepting that in law it was available to a landowner to use the entire 3.38 hectare site for B2 purposes. However, he considered that to be unlikely to occur. This in our view is the only reasonable interpretation available on the face of the decision. Furthermore, it is also the only reasonable interpretation when the decision is read in the light of the Inspector's report and indeed when other contextual material is considered.

13. The reference in DL 35 back to IR 455-6 is important. Here, the Inspector, like the Secretary of State, considered what weight to attribute to possible fallback scenarios. The Inspector stated (emphases added):

> *"Preclusion of fallback position:* I have already concluded that in the event that the

[3] See BANES' statement of case paragraph 4.6

> proposal not proceeding [*sic*], there is a real prospect that the B2 use of the site would continue. The companies that have shown most interest in moving onto the site are those at the dirtier end of the range of prospective general industry uses. They include aggregate reprocessing, concrete batching and vehicle body repair businesses. Such businesses are likely to be associated with the erection of outside plant and other structures such as crushers and new silos which are likely to be visually intrusive. They are likely to be associated with the outside storage of materials and vehicles. They are also likely to give rise to a requirement for floodlighting and other outside lighting. The activities carried out by such businesses often generate noise and dust and give rise to heavy goods vehicle movements (102, 103 and 249).
>
> As there is no requirement for planning permission to be sought for the continuation of the use of the site for general industry, there would be no control over external or internal activities. There would also be no requirement for the buildings to be renovated or for the site to be tidied. The continuation of the B2 use, in my assessment would be highly damaging to the setting of the World Heritage Site and the visual amenities of the Green Belt. It would adversely affect the setting of the adjoining AONB, a matter I discuss further when I deal with the landscape impact of the proposal

14. In our opinion there is no question that the Inspector was there considering fallback scenarios relating to the whole 2002 site - i.e. the application site which was before him and not a smaller or more limited part of the 2002 site. No other interpretation is consistent with the four references to "the site".

15. Furthermore the contemplation of "outside plant and other structures" such as crushers and silos, as well as of outside storage of materials and floodlighting, is inconsistent with anything other than meaning a use of the entire site. It is in our view obvious that the Inspector was not contemplating B2 uses which were restricted to the extant buildings and the hardstanding around them. There was no disagreement between the Secretary of State and the Inspector as to the extent of the established B2 use; the disagreement was in their respective evaluations of the extent of any *prospective* B2 use. This is clarified further by DL 59 in which the Secretary of State stated -

> "the Secretary of State has considered the preclusion of the fallback position- continuing B2 use- but does not accord this much weight as he does not think the site's full return to B2 use is likely".

16. If the Secretary of State had taken the view that the entire site did not benefit from an established B2 use, he would not have had to, or logically have been able to consider the site's *full return* to B2 use even as a theoretical possibility and the question of its likelihood would have been irrelevant.

17. It is plainly necessary to distinguish (as BANES failed to do in authorising enforcement action) between the findings that:

(1) There was a lawful B2 use of the whole site; and

(2) There was not a reasonable prospect of that whole site being returned to that lawful use, which is a finding with regard to the intentions of the site owner/operator at the time (the fallback position).

18. It is also noteworthy that the inspector anticipated in the final sentence of IR 436 that he will discuss the impact of such a fallback position when he comes to deal with landscape impacts. This he did at IR 493 where he stated

> "Regard must be had to what would happen in the fallback position. There would be no requirement to remove the rusting silos or to carry out the wholesale renovation of the existing buildings. Some of the industrial uses that could come onto the site if there was a continuation of a general industrial use, such as aggregate recycling and concrete batching could lead to the erection of new silos, the introduction of tall stockpiles of materials and the introduction of tall plant and equipment. There would also be no control over lighting. It is likely that some of the uses may require the erection of floodlights to allow them to operate early in the morning or late at night"

19. The Inspector thus anticipated (presciently) that the fallback uses could result in the introduction of tall stockpiles of materials. Self-evidently tall stockpiles of materials could not build up on the "area A" which BANES now asserts was in contemplation when the fallback positions were considered. As we have noted, BANES does not properly distinguish between the issues of the fallback position and the extent of the lawful B2 use.

Contextual Material

20. The Statement of Common Ground agreed between the Council and the Applicant for the 2002 call-in inquiry stated at paragraph 1.1 that "the site is approximately 3.38 hectares in area and consists of a collection of linked buildings in various states of disrepair, open land associated with the buildings..." and at paragraph 6.1 of the SOCG it was agreed that "the existing use of the site is industrial processing which falls within Class B2..."

21. In our view there is nothing to indicate that the Secretary of State or the Inspector departed from that position of common ground, and that if they had intended to do so, that would have been expressly stated given that it was an important issue and was relevant to the fallback position.

Previous Examination of the B2 Use Issue by the Council

22. BANES has on two previous occasions obtained Counsel's advice that there is a lawful B2 use over the whole site, and such advice has expressly rejected the contention that BANES now advances that the B2 use is limited to "area A". Peter Towler's advice of 5th

May 2004 expressly rejected his previous view (in an advice of 23 December 2003) that there was an arguable case that the Secretary of State's findings were limited to a finding that the B2 use extended only to the buildings and hardstanding. He advised instead that it would be "wholly inappropriate for the Council to take enforcement action in respect of any B2 use of the site" (for the avoidance of doubt, he meant the whole 3.38 hectares).

23. The Council subsequently sought leading counsel's advice as to whether it was expedient to enforce against a B2 use. In an opinion dated 12 May 2006 Timothy Straker Q.C. explained that planning enforcement powers do not bite in relation to breaches occurring before the end of 1963. Mr Straker Q.C. advised at paragraph 17:

> "It follows that the clear sequence of events is:
>
> (i) By the early 1960s a B2 use by way of processing minerals
>
> (ii) No abandonment of the B2 use by the time of the inquiry in 2002
>
> (iii) The start of an aggregates recycling business in 2002
>
> (iv) Accordingly, any change which occurred in 2002 did not require permission as a use undertaken in 1963 and, in any event, not abandoned by 2002 was replaced by a use in the same class of the Use Classes Order"

24. His conclusion was that "*if an enforcement notice were issued on the information available to me a successful appeal could be maintained on the basis of a B2 use having occurred by 31 December 1963*". We agree.

25. For the sake of completeness, we note that BANES acted according to the advice it obtained until an unexplained change of opinion. Thus:

(1) the Council wrote to Gazelle on 21 May 2004 to confirm that the Council accepted the site had a B2 use throughout the entire site;

(2) Development Control officers confirmed to the Development Control sub committee on 2 June 2004 that "legal advice has confirmed that the fallback permission for B2 (general industrial) uses applies to the whole of the 3.38 ha site not just the original buildings and hardstandings";

(3) On 25 August 2004 Officers further advised that "It is considered that the principal activity of recycling construction and demolition waste falls within Use Class B2 and can continue in this prominent location without the need for a further grant of planning permission";

(4) on 17 June 2005, a report to the development control subcommittee again advised that "the site as a whole benefits from a Class B2 use";

(5) The Council's proof of evidence in the course of the inquiry into the local plan in 2005 stated "It is the Council's view that the B2 fallback permission applies to the entire 3.38ha site and that the text of para C4.54 should reflect that;

(6) On 27 March 2008 an Ombudsman's Report was fiercely critical of the Council, fining it for maladministration. The extent of the historic B2 use was addressed at paragraphs 80-93;

(7) Thereafter various legal action has been pursued including a successful claim for judicial review by Gazelle Properties Ltd against BANES in which the above history was explored in detail; and

(8) Correspondence from Gazelle Properties Ltd's representatives has repeatedly reminded the Council of this history (for example Ashford's letter of 27 April 2012).

26. BANES has failed to give any reasonable explanation for its change of approach or whether such approach has the support of counsel's opinion. It is possible that it was wholly an officer inspired change and was done without proper consideration for the legal issues. It is clear from the successful judicial review[4] of the earlier enforcement notices that BANES does not have a good track record in terms of properly applying the law with regard to this site and that in that instance officers took a decision without referring the issue back for proper consideration to members.

The Council's Change of Position

27. Indeed, on 9th January 2012, an officer report presaged a change of position by BANES which has led to the current enforcement proceedings. At paragraph 3.05 of that report, the issue of the extent of the B2 use was again rekindled. Officers advised:

> "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.

28. Officers then asserted (at paragraph 3.011) that it was not clear from the Inspector's findings that he was saying a lawful B2 use was established over the entire 2002 site. The officer then cited various other passages from the Inspector's report in support of the view. When turning to DL 35 (above) he commented *"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"*. It appears from the officer's use of emphasis in

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[4] ***R. (Gazelle Properties Ltd) v Bath and North East Somerset Council*** [2011] J.P.L. 702

quoting parts of paragraph 35 of the DL that he misinterpreted the Secretary of State's view as to the *likely* extent of a *prospective* B2 use as being a comment on the extent of the *existing* lawful B2 use. This was a basic confusion between the two issues we have referred to above, namely the extent of the lawful use and the existence of a fallback position which do not turn on the same considerations. It is on the basis of this misunderstanding of the decision letter that BANES has now reverted to an interpretation which is contrary to the advice it has twice been given by both junior and leading counsel and upon which it has itself acted on numerous occasions. It is not explained why officers consider themselves to be in a better position to interpret the IR and DL than counsel, given that this is a matter of law[5].

29. Ultimately, this significant change of position to the one that the Secretary of State's decision established a B2 use over only a small part of the site was one of reasons that led to the authorisation and issue of the current enforcement notices.

30. In our view this is not a case of viable rival interpretations of the DL. BANES' latest interpretation of the DL and the IR as to the extent of the lawful B2 use is wrong. We have set out the correct interpretation of the Secretary of State's decision above noting that it accords with the advice received by BANES itself.

Whether *Res Judicata* applies to the Secretary of State's Decision Letter

31. The leading case on the application of *res judicata* to determinations in enforcement appeals is ***Thrasyvoulou v. Secretary of State for the Environment*** [1989] 2 A.C. 273. The decision in ***Thrasyvoulou*** is that *res judicata* applies so as to give finality to determinations:

    (1) in enforcement appeals whenever the determination of the ground decided in favour of an appellant on an appeal against one enforcement notice can be relied on in an appeal against a second enforcement notice which is in the same terms and is directed to the same alleged development as the first (see Lord Bridge at 296B-C); and

    (2) in relation to issue estoppels arising from a successful appeal against an earlier enforcement notice which was effect to defeat the enforcement notice (per Lord Bridge at 296D).

32. Lord Bridge's judgment in ***Thrasyvoulou*** makes clear that the principle applies to a

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[5] The judgment of the Supreme Court in ***Tesco Stores Ltd. v. Dundee City Council*** [2012] 2 P. & C.R. 9 has emphasised the fact that issues of the interpretation of planning documents (even policy) are matters of law, not planning judgment.

determination by the Secretary of State of whether an existing use of land is lawful. The Secretary of State conceded before the House of Lords in ***Thrasyvoulou*** that a determination pursuant to section 88B(1)(c) of the Town and Country Planning Act 1971 was final and was effective to defeat an enforcement notice directed against a use of land resumed in reliance on the determination (see page 293E-F). Lord Bridge held that concession was rightly made (at page 294D). Section 88B(1)(c) of the 1971 Act corresponds to part of what is now section 177(1)(c) of the Town and Country Planning Act 1990 which provides that the Secretary of State may, on deciding an enforcement appeal -

> "determine whether, on the date on which the appeal was made, any existing use of the land was lawful, any operations which had been carried out in, on, over or under the land were lawful or any matter constituting a failure to comply with any condition or limitation subject to which planning permission was granted was lawful..."

33. At page 293H- 294, Lord Bridge held in ***Thrasyvoulou*** that:

> "The purpose of section 88B(1)(c) can only be understood in the light of section 23(9) of the Act of 1971 which provides:
>
> > "Where an enforcement notice has been served in respect of any development of land, planning permission is not required for the use of that land for the purpose for which (in accordance with the provisions of this Part of this Act) it could lawfully have been used if that development had not been carried out."

34. Section 23(9) of the 1971 Act has been re-enacted in the same form in section 57(4) of the Town and Country Planning Act 1990. Lord Bridge held that the effect of this provision is as follows:

> "The effect of this subsection is that when an owner or occupier of land discontinues a use of land in compliance with the requirements of an enforcement notice, it is not enough to entitle him to resume the immediately preceding use to show that, before the unauthorised change, that use was immune to enforcement procedure, having been begun before 1964; he may only resume a previous use which was itself begun lawfully, i.e. without any breach of planning control: Young v. Secretary of State for the Environment[1983] 2 A.C. 662. In these circumstances, it is obviously desirable that an owner or occupier of land who is to be required by an enforcement notice which the Secretary of State upholds to discontinue an existing use of land should be entitled to ascertain what, if any, previous use of the land he may safely resume without being subject to enforcement proceedings directed against that use. But this would not be an issue arising for determination in the appeal against the notice unless express provision authorising its determination were made, as it is, by section 88B(1)(c). It would be futile to provide for such a determination unless it was intended to protect the owner or occupier of land from enforcement proceedings when he resumed the use determined to be lawful; so the concession in this regard is rightly made. But it would surely be a bizarre result that a decision by the Secretary of State dismissing an appeal against an enforcement notice requiring discontinuance of the existing use of land and determining that a previous use might lawfully be resumed should effectively protect that use against future enforcement proceedings, but that a decision allowing

the appeal on the ground that the existing use was itself lawful should not."

35. Lord Bridge accordingly went on to hold that the same principle also applied to a determination by the Secretary of State on appeal of any of the 'legal' grounds of appeal, then set out in section 88(2)(b)-(e) of the 1971 Act.

Application of Res Judicata to the Present Appeal

36. The important matter for the present appeal is therefore that section 57(4) of the Town and Country Planning Act 1990 provides that -

> "where an enforcement notice has been issued in respect of any development of land, planning permission is not required for its use for the purpose for which (in accordance with the provisions of this Part of this Act) it could lawfully have been used if that development had not been carried out".

37. This means that the Council in issuing the enforcement notice was obliged, and the Secretary of State considering the appeal is obliged, to consider for what purpose the land could lawfully have been used but for the allegations contained in the notice (assuming those allegations of breach can be substantiated).

38. Section 177(1)(c) of the Town and Country Planning Act 1990 gives the Secretary of State power on appeal to determine what lawful purposes the land the subject of the enforcement notice is. The Secretary of State will be obliged on the forthcoming appeal to make such a determination and to make such amendments to the enforcement notice as are necessary (or to quash it) so as to ensure that the use for the purpose for which the land could lawfully have been used is not infringed. Put in this context, the Secretary of State will need to consider what the extent of the pre-1964 B2 use was and make any necessary amendments to the enforcement notices to preserve those accrued use rights.

39. In our view, for the reasons set out above, the question of the extent of the lawful B2 use right has in fact already been asked and determined by the Secretary of State in the 2003 DL. The issue is whether the matter is therefore now *res judicata.* There are a number of potential points of distinction as between the current circumstances and those under consideration in ***Thrasyvoulou*** which should be considered in reaching a conclusion.

40. First, the prior determination in 2003 was not a determination of the whole matter on the application. It was the determination of an issue which was part of the application. However, that was also the case in the Olivers' appeal considered by the House of Lords in ***Thrasyvoulou***. In that appeal, the Olivers sought to rely on the contention that the determination in an earlier enforcement appeal that the use being made of land was an

established (pre-1964) use rendered that issue *res judicata* for the purposes of a subsequent enforcement appeal. Lord Bridge held that the House was concerned not with a "cause of action estoppel", but with an *issue* estoppel, and that each was capable of giving rise to *res judicata* (see p. 296-7 of the judgment). In the Olivers' appeal, Lord Bridge held that the matter giving rise to the issue estoppel was a finding "by necessary implication" that the use at the date of service of the first enforcement notice was an established use, albeit that finding was an "essential foundation" of the first appeal decision, and not merely incidental or ancillary to it.

41. In our view, there is a close analogy between the current appeal and the Olivers' appeal. In the current appeal, the determination that there was a lawful B2 use over the whole 3.38 hectares was not a determination of the application, but it was a determination of an essential foundation of one of the issues on the application. The lawful use of the whole site was a logically prior question to be determined before the nature of the possible fallback scenarios could be determined - which were thus essential to the question whether it was appropriate to grant planning permission for the proposed scheme.

42. The context in which the B2 use issue was determined was on a 'called-in' inquiry rather than as part of an enforcement appeal (as in the ***Thrasyvoulou*** cases), and it might be argued that this is a relevant distinction. However, the specific matter for determination was not a question of planning judgment but was a question of law concerning the lawful use rights which applied in the event of planning permission being refused. It would be odd indeed if the question of *res judicata* were determined not by the substance of the issues but by the procedure applied.

43. In our opinion, therefore, the issue required a determination of the legal rights enjoyed over the land and were determinations which fall within the scope of the doctrine of *res judicata.*

44. Lord Bridge in ***Thrasyvoulou*** explained the rationale for the principle of *res judicata* at page 289C in terms which are applicable whether they arise in the first place from an enforcement determination or some other planning decision, i.e. the public interest in finality and the principle of not requiring a person to establish the same issue twice:

> "The doctrine of *res judicata* rests on the twin principles which cannot be better expressed than in terms of the two Latin maxims "interest reipublicae ut sit finis litium" and "nemo debet bis vexari pro una et eadem causa." These principles are of such fundamental importance that they cannot be confined in their application to litigation in the private law field. They certainly have their place in criminal law. In principle they must apply equally to adjudications in the field of public law. In relation to adjudications subject to a comprehensive self-contained statutory code, the

> presumption, in my opinion, must be that where the statute has created a specific jurisdiction for the determination of any issue which establishes the existence of a legal right, the principle of res judicata applies to give finality to that determination unless an intention to exclude that principle can properly be inferred as a matter of construction of the relevant statutory provisions.

45. In our opinion, the nature of the determination in this case is that the existence of a legal right was established and that the Secretary of State's decision imposes finality on that determination. The mere fact that this determination took place in the context of a decision by the Secretary of State on a planning appeal rather than in an enforcement appeal is not in our view a relevant distinction in this case. This was not simply a case where an application for planning permission was determined on the merits but a decision which also involved a finding as to existing lawful use rights. Contrast Lord Bridge in ***Thrasyvoulou*** dealing with a decision simply made on the planning merits at p. 290F-H. On the lawful use issue in 2003, there was no right for the public to object, but merely to put forward relevant factual information or to object where the planning merits were relevant.

46. The implication of our view is therefore that any enforcement action which is taken must preserve the legal right to revert to B2 use across the whole 2002 site pursuant to section 57(4) of the Town and Country Planning Act 1990. Consequently, in our view, BANES' interpretation of the extent of the B2 use established by the Secretary of State's DL is not only an erroneous premise for enforcement action, it has also resulted in enforcement notices which unlawfully fail to preserve the B2 use rights enjoyed across the 3.38 hectares considered in the 2003 DL.

47. In order to rectify this, the Inspector is in our view obliged to use his powers within section 176 of the Town and Country Planning Act 1990 to amend the notice so as to permit reversion to B2 use across the 3.38 hectares which were the subject of the 2003 decision.

48. Our analysis receives support from the decision in ***Williamson v. Mid Suffolk District Council*** [2006] EWLands LCA 73 2002. The decision is a useful illustration of the broader application of *res judicata* to a decision of a Minister of State within the field of planning, but unrelated to enforcement. The Minister's decision in question whether to confirm a discontinuance order under section 102 of the Town and Country Planning Act 1990 was a matter of judgment on the planning merits to which the principle of *res judicata* could not attach, but it was held that *res judicata* did apply to an issue of law as to the construction of a planning permission which arose as a component of the Minister's decision. The analogy with the instant case is direct: in each case the 'main' Ministerial decision from which the issue estoppel arose was one relating to planning

judgments and could not itself have given rise to an issue estoppel, but in each case an essential foundation of that main decision was a determination of a subsidiary issue of law. In each case the determination of that subsidiary issue gave rise to an issue estoppel which was binding on subsequent proceedings.

Exceptions to the *Thrasyvoulou* principle

49. We do not consider that any relevant exceptions to the ***Thrasyvoulou*** principle are applicable here, but we consider the issue for the sake of completeness.

50. In ***Watts v. Secretary of State for the Environment and South Oxfordshire District Council*** (1991) 62 P. & C.R. 366, Graham Eyre Q.C. sitting as a Deputy Judge held at 385:

> "In my judgment, in order that an earlier decision upon the evidence or admission by a party can operate as an "issue estoppel" in relation to a subsequent issue in subsequent proceedings, certain conditions should be fulfilled.
>
> 1. Where the issue involves a mixture of fact and law the whole matter must be fairly and squarely before the tribunal.
>
> 2. The tribunal must fully address that matter.
>
> 3. The tribunal must make an unequivocal decision on that matter.
>
> 4. The fact that the first three conditions are fulfilled should be clear on the face of the decision.
>
> That such conditions are fulfilled where an issue involves matters of fact and law is especially important in cases where the tribunal has no legal qualifications as is the usual situation where an inspector is appointed to determine appeals under the planning legislation"

51. The Deputy Judge's "conditions" should not in our view be treated as rigid statutory rules, but are useful in identifying whether there is any good reason to distinguish ***Thrasyvoulou***.

52. As to the first, second and fourth of these 'conditions', the extent of the established B2 use was predominantly a question of law, but also, to a limited extent one of fact. It is true to say that the issue was one upon which there was a statement of common ground between the Council and the Applicant, but is trite that a planning Inspector is not bound by a statement of common ground, and it is in our view plain on the face of the decision that considerable attention was paid to the extent of the established B2 use by the Inspector and the Secretary of State. Indeed, the lawful use of each and every building was considered in detail and the nature and extent of a fallback use was the subject of evidence and submissions from both main parties and these are summarised in the IR.

53. As to the third of these considerations, where the determination relied on as establishing res judicata is ambiguous, that may prevent the doctrine from applying: see for example ***Keevil v. Secretary of State for Communities and Local Government*** [2012] EWHC 322 (Admin). However, we have already expressed the view that the Secretary of State's decision in 2003 was unequivocal. The mere fact that the Council has advanced a different (and misconceived) interpretation does not render the decision equivocal. See also the special circumstances found in ***R. (Wandsworth LBC) v. Secretary of State for Transport Local Government and The Regions and O2 UK Ltd*** [2004] 1 P. & C.R. 32, where the information was insufficiently clear.

54. In ***R (Exmouth Marina Ltd) v. First Secretary of State*** [2004] EWHC 3166 (Admin) HHJ Rich QC considered *obiter* whether *res judicata* could arise in respect of a decision as to whether there was "a real likelihood of the fall-back permission being implemented" and it was held that if the matter had arisen, a second Inspector would have been entitled to revisit the issue notwithstanding the decision of a previous Inspector. However, this case is not comparable to the instant case: what was being considered was whether *res judicata* arose in respect of a matter of judgment as to the *likelihood* of a fallback being implemented. This in our view would obviously be something which could not be *res judicata* since the likelihood of such a matter would depend on all the circumstances pertaining at a given time and is therefore a matter requiring fact-sensitive and time-sensitive judgment. This was a decision on the second of the issues we refer to above at paragraph 17, not the first. Further, and in any event, the matter there being considered was whether *res judicata* could apply on a remitted enforcement appeal in respect of a quashed decision of the previous Inspector.

55. A further exception which has arisen is that where a determination of an enforcement appeal in an appellant's favour arose because of a failure by the local authority to provide any evidence in support of its case, no estoppel arose in respect of a subsequent enforcement notice. It was implicit in the concept of cause of action estoppel that a matter had been adjudicated not that the court or tribunal had been unable to adjudicate upon an issue because of a complete lack of information. This does not apply in these circumstances where the issue had plainly been considered and cases advanced to the Inspector and Secretary of State.

56. ***Porter and another v Secretary of State for Transport*** [1996] 3 All E.R. 693 established that res judicata cannot arise from a decision on an application under section 18 of the Land Compensation Act 1961 because such a determination was not of a type to which *res judicata* could apply: it was akin to a determination of whether to grant planning permission on the merits (as to which, see Lord Bridge in ***Thrasyvoulou*** at p. 290,

above). Furthermore, it lacked the necessary element of finality. This does not affect our view of the issue estoppel in this case which does not relate to a determination of the planning merits.

57. The principle in ***Thrasyvoulou*** is limited to establishing that *res judicata* can be raised in respect of determinations in the planning sphere. It carries no implication as to the application of other forms of estoppel to planning. The House of Lords judgment in ***R. v East Sussex CC Ex p. Reprotech (Pebsham) Ltd*** [2003] 1 W.L.R. 357 is regarded as having laid to rest the application of estoppels in planning decisions other than estoppel *per rem judicatam*. However, it casts no doubt upon the decision in ***Thrasyvoulou,*** which remains authority for the continued application of estoppel *per rem judicatam* as a distinct form of estoppel. The rationale for this distinction was explained by Moore-Bick J. (as he then was) in ***Stancliffe Stone Co Ltd v. Peak District National Park Authority*** [2005] Env. L.R. 4 at paragraph 34:

> "In seeking to confine Lord Hoffmann's comments to estoppel by representation Mr Corner relied on the fact that in the *Reprotech* case their Lordships cast no doubt on the correctness of the decision in *Thrasyvoulou v Secretary of State for the Environment* [1990] 2 A.C. 273 in which the House held that another form of estoppel, estoppel per rem judicatam, could operate to prevent the re-opening of a decision made by a public body under a self-contained statutory code unless the statutory provisions themselves demonstrated an intention to exclude the principle. However, I do not think that a parallel can be drawn between *res judicata* and other forms of estoppel. As Lord Bridge pointed out at p. 289, the rationale which underlies the doctrine of *res judicata* is fundamentally different from that which underlies estoppel by representation, or, for that matter, estoppel by convention. One of the principles on which estoppel per *rem judicatam* rests is that the public interest demands that there be finality in decision-making. The other, also a principle of public policy, is that no one should be put to the trouble of dealing with the same matter twice. Together these principles as expressed in the doctrine of estoppel per *rem judicatam* provide a basis for ensuring that the decision-making process operates in an orderly and effective way. The continued applicability in the area of public law of the doctrine of *res judicata* provides no basis in my view for holding that other forms of estoppel based on different principles still have a part to play."

58. Moreover, *res judicata* is based on the principle that the issue has already been properly decided by a competent authority within the normal planning process[6] whereas other forms of estoppel (e.g. by representation or convention) would tend to undermine the planning code by allowing issues to be determined without a decision according to normal planning processes (including public consultation).

59. We have not therefore addressed other forms of estoppel. Thus, although the Council has repeatedly accepted that the entire 3.38 hectares enjoy a lawful B2 use, the Council's reiteration of its position in these respects, and any detrimental reliance by

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[6] Note for example, that a lawful development certificate under s. 191 or 192 of the 1990 Act can only be re-opened in the limited circumstances specific in s. 193(7) - effectively fraud or deliberate omissions.

Gazelle do not give rise to an estoppel. That is not to say that the inconsistency in the Council's conduct would not be relevant in other ways, not least in relation to assessing the reasonableness of its conduct for costs purposes in the enforcement appeal, but its conduct does not give rise to an estoppel or *res judicata.*

60. As Sullivan J (as he then was) held in ***R. (Wandsworth LBC) v. Secretary of State for Transport Local Government and The Regions and O2 UK Ltd*** [2004] 1 P. & C.R. 32 at paragraph 21:

> "If a matter is *res judicata* there is no need for an estoppel, if it is not there is no longer any scope for estoppels which are akin to *res judicata*".

61. We have, in preparing this opinion, seen the draft evidence of Mr Kendrick. He has examined the available evidence and concluded that the Inspector and Secretary of State were correct both on the evidence available, and in the light of further evidence now available, to find that a B2 use was established across the whole site by the beginning of 1964 and not abandoned subsequently, such that the site enjoys immunity.

62. While it is prudent and unavoidable that the Appellant has had to instruct the preparation of such evidence, given the approach of BANES criticised above, it is strictly irrelevant to the legal issue of whether the Secretary of State's determination of the question is *res judicata*. The very purpose of the doctrine of *res judicata* is to avoid a person having to prove again an issue which has already been established.

Conclusions

63. The latest attempt by BANES to re-interpret the Secretary of State's 2003 decision is in our view no different to the similar attempt in 2004 on which the Counsel received counsel's advice, and again in 2006.

64. BANES has repeatedly accepted that its latest interpretation is in substance wrong. It was right to do so. It is wrong and unreasonable for it to now revert to the earlier position. The basis for res judicata explained by Lord Bridge in ***Thrasyvoulou*** resonate loudly: BANES seeks to avoid finality to this matter and Gazelle Properties has not only been twice "vexed" in the same cause by BANES, it has been repeatedly so vexed and threatened over many years. The mischief which *res judicata* seeks to address is apparent. The principle applies in this instance so as to prohibit, as a matter of law, the visitation of the issue of the lawful use right again.

65. Consequently, the Appellant at the enforcement appeal should not be put to the necessity of re-proving this issue: the enforcement notices must be amended or

quashed so as not to traduce the lawful use right enjoyed over the whole site. Moreover, in the light of its inconsistent and unreasonable conduct, based on a misunderstanding of the law and the DL, BANES should, as a matter of public law duty and proper administration, consider the withdrawal of enforcement notices.

66. We have nothing to add as presently instructed.

David Elvin Q.C.

Alex Goodman

Landmark Chambers,
180 Fleet Street,
London EC4A 2HG

7 January 2013

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Inspector's Response to Ashfords' Letter dated 18 January 2013

This note responds to a letter dated 18 January sent to the Planning Inspectorate on behalf of the appellant. I have asked that this and the Ashfords' letter be sent to the Council, which I believe already has a copy, and the Rule 6 parties who do not.

Although the *res judicata* point has only been raised by the appellant as a late appendix to the evidence of a witness in the form of a leading and junior counsels' joint opinion, the substance of the point taken was clearly identified in the appellant's pre-Inquiry statement. Moreover, by email dated 16 January the Council confirmed that it had already given consideration to the issue and the nature of the Council's evidence to the Inquiry implies that it sees no merit in the argument. Indeed, it says as much in the email, subject only to the views of its counsel which are being sought I now understood at a conference on 21 January. The Council's considered view should be sent to the Planning Inspectorate not later than 17:00 on Wednesday 23 January so that it may be sent to and considered by me and the other parties to the Inquiry.

The remainder of this response to the direct points raised by Ashfords assumes that the Council maintains its current position. However if, on reflection, it agrees with the appellant's position this should be communicated to all parties as soon as possible.

Having now read what I consider to be all of the relevant documents that have been submitted in connection with these appeals, I agree with Ashfords that this is a matter that needs to be resolved before the evidence is heard. It seems to me that most of the Council's evidence will not need to be taken if the appellant's case on *res judicata* is correct. Of the alternatives put forward by Ashfords I propose to follow the second. I shall now explain briefly why.

Turning first to question 1, there is in my view no need for the Secretary of State to seek an opinion from the court about the meaning of a decision that he himself has taken. Moreover, I do not find any ambiguity at all in the Secretary of State's decision.

At DL 35 he very clearly contemplated the likelihood of the entire application site (in context, the only reasonable construction of the word 'site' throughout his decision) being used for B2 use under the fallback position. The use of the word 'likely' must imply some element of possibility. If he had concluded that only part of the site had a fallback use for B2 he could not have rationally considered the possibility of that use over the entire site since such use on parts would not be a fallback position.

It is in my view certainly arguable that this is not a conclusion that flows naturally from what Mr Robinson's report says. However, that does not matter. First, Mr Robinson is, by way of his report, simply providing further information to enable the Secretary of State to make a decision. That decision stands on its own and in any event did not follow Mr

Robinson's recommendation. Second, if anyone felt that the Secretary of State had misdirected himself that could have been pursued elsewhere within the appropriate time limits.

Turning to the second question, I can clearly form no view at this time since I have no information from the Council as to why it holds the view that, currently, it says it does. I would however note that it is not clear to me from the evidence what previously unknown material, apart from perhaps CD 32, has come to light to warrant a re-examination of the Secretary of State's decision. I note also that much of this is anyway subject to dispute between the expert witnesses. Moreover, even if it might have led to a different conclusion in the material part of Mr Robinson's report had it been available to him, given what I say above, it cannot be at all certain that the Secretary of State would have come to a different view.

In any event, as I have already indicated in an email dated 16 January there is an issue with Notice No 1 which could lead to it being quashed. In these circumstances it would seem to be unnecessary to trouble the court with the second question. I set out below my reasoning on this matter.

The parties might wish to read a judgement of David Elvin QC sitting as a Deputy High Court Judge in a permission hearing seeking to challenge an enforcement appeal decision of mine ***(The Queen otao East Sussex CC v SSCLG and 2 others [*2009] EWHC 3841 (Admin).** While I appreciate that this is not binding at all being only from a permission hearing, he sets out in para 2 why he went into the detail that he did. Para 20 of his judgement deals with the point that Notice No 1 gives rise to (the use of the word 'including' in a mixed use allegation) and his other comments are also pertinent since the Council's intentions here are also to, in effect, under-enforce. In those circumstances s173(11) will apply once the requirements of the notice are complied with and unconditional planning permission will be granted for all the uses not required to cease. It is clearly imperative that all of those uses are identified.

It is therefore incumbent upon the Council to state clearly all the components of the mixed use alleged otherwise the recipient of the notice cannot reasonably be expected to identify the grounds on which an appeal might be made and/or the evidence that might need to be adduced. Particularly troubling in this case is the bund that is required to be demolished even though it is not mentioned in the allegation unless, of course, it is subsumed within the term 'storage'. However, this would not seem consistent with the evidence of the Council. This suggests that this is a permanent feature probably constructed from waste material. At 2.17 Mr Herbert implies this is an operational development although there is no evidence of the appropriate exemption having been sought or obtained from the Environment Agency. Meanwhile at 6.35 Mr Harwood seems to suggest that this is in fact a waste disposal (tipping) operation which would be a material change in the use of the land not included in the allegation at all.

These issues may not be insurmountable. However, it seems to me that the allegation in Notice No 1 must be corrected to include and accurately describe all the elements of the mixed use alleged and/or the extent of the land subject of the notice altered. I would also add that requirements (i) and (ii) are clearly open to interpretation. What constitutes a B2 use and what is or is not ancillary to such a use is very much a matter of judgement and at the heart of these appeals.

It will therefore be for the parties to agree, first, what changes should be made and, second, if s176(1) can be used to do so. Obviously there must be no injustice to either party as a result if this power is to be exercised. Alternatively, if the notice cannot be corrected using s176(1), it may have to be quashed; my conclusion in East Sussex.

In passing on this point I would also mention that, having read the Council's evidence, I fail to see the purpose of Notice Nos 2 and 3. Both areas are entirely within the Notice No 1 area and the use complained of is essentially storage. This is part of the mixed use alleged in Notice No 1. While I appreciate that both are in the area that the Council considers not to benefit from the B2 use, the use alleged is not (in the Council's view) B2 anyway. I mention this only because the parties may wish to consider a 'tidying-up' process when reviewing Notice No 1, possibly to include a new, all encompassing, notice No 1 and the withdrawal of the other 2.

Returning to the *res judicata* matter, my understanding is that my ruling on this will simply determine for the purpose of this Inquiry whether the fallback position applies to the entire appeal site (the appellant's position) or Area A, the buildings and hardstandings only, (the Council's). I would be grateful if advocates could confirm that in their submissions to be made on the first morning and also assist me then with the following:
1. I understand from the evidence that the fallback position derives from the view that by 31 December 1963 the whole of the land considered by the Secretary of State was immune from enforcement. Is this status the same as if its lawfulness had been established by way of an application under s191?
2. What status does the Secretary of State's decision give to the land given that the application before him was not one made under s191?
3. If the determination had arisen from a s191 application the lawfulness would have been declared as applying at the application date. What is the equivalent date in this case? Is it 31/12/1963, 1/8/2003 or some other date?
4. If it is 1/8/2003 does that mean that a ground (d) appeal in respect of any use determined as a matter of fact and degree to be other than B2 must fail (the thinking being that the Secretary of State had determined the use of the site then to be B2 so at the date of the notice 10 years could not have passed)?
5. Thinking about s57(4) and the *Fairstate Ltd* judgement what is the effect of any uses on the land that are not B2 since the date determined as the appropriate one in question 3 above?

I will therefore proceed as follows:
*By 17:00 on Wednesday 23 January the Council will provide its considered view on the *res judicata* point.
*I do **not** wish to receive a further bundle of authorities from the appellant or anyone else in advance of the Inquiry for the simple reason that other commitments between now and the start of the Inquiry will not permit me to read them.
*After opening the Inquiry I will hear submissions from the main parties and any other Rule 6 party who has a view on the points raised in Ashfords' letter. Any authorities that are **vital** to the submissions can be put in then. I will then hear what the main parties have to say about the drafting of Notice No 1.
*I will then adjourn-hopefully about lunchtime-and consider my position.
*The Inquiry will then resume and I will hand out my written determination on the *res judicata* point and the form of Notice No 1 if required. I would hope this can be first thing on Wednesday but much depends on the progress made on Tuesday and the amount of additional material that advocates choose to submit. I do not intend to then take any further submissions on this since it seems to me that the aggrieved party (assuming the Council maintains its current stance and that there will therefore be one) will have the option to seek a judicial review having considered the outcome of the appeals. If still necessary I would also then issue my 'Inspector's Inquiry note' on the issues about which I am unclear. If I have found for the appellant on the *res judicata* point we may be able to proceed straightaway as it seems to me that the issues are very straightforward (in essence, do the uses complained of fall within B2 and, if not, is the change a **material** change-not something that seems to have been given much consideration. All of this falls within ground (c), with the ground (d) case being self evident). If I find for the Council the issues are still relatively straightforward but we will have to deal with a lot more evidence to resolve the area over which the B2 use runs which may affect the assessment of the uses in Area E. It may then be necessary to adjourn for a short period while advocates prepare to present and cross examine that evidence but I will take views.
*Either way and particularly as there is now to be an application for costs by the appellant, there seems to me to be absolutely no prospect of completing this Inquiry in the 4 days now allocated so it would help greatly if advocates' clerks could come up with some dates when we can resume. However, contrary to the view expressed in Ashfords' letter I see no reason why we should not hear evidence on at least Thursday and part of Friday and see no justification for not sitting then.

Brian Cook
Inspector
20 January 2013

Bath & North East Somerset Council

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Date: 22 January 2013
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Dear Mr Agala

Re: Fullers Earth Planning Appeal

We write following our email of Friday 18 January 2013.

We have now received the Inspector's Note. We must respond as follows:

But for our request for an adjournment (please see below), we would respectfully agree with the decision that there be a hearing on the preliminary issue. We note the Inspector's provisional view as to the interpretation of the Secretary of State's 2003 decision letter which has of course had to be reached without the benefit of seeing the Council's submissions. The Council does not accept any of the arguments put forward in respect of the "res judicata" point and will strongly resist the submission. The Council does not therefore intend to withdraw the notices on that basis.

The Council does not, respectfully, agree that the substance of the point was set out in the Appellant's pre-inquiry statement. Nowhere does it state or imply that the Council is precluded as a matter of law from arguing that the whole site does not benefit from a B2 use. This was not suggested, moreover, in the 2010 High Court proceedings brought by the appellant in respect of the decision to issue previous enforcement notices, nor in their 2006 application for a CLEUD. This is striking, particularly given that the same Counsel who appeared in the High Court have provided their written Opinion, and we look forward to the opportunity to address the Inspector on this issue.

Before proceeding to respond further to the Inspector's Response, we would mention that we have now had an opportunity to discuss the proofs of evidence received with Counsel.

Although this will understandably not be a matter which could be appreciated by the Inspector on the face of the papers (and he would naturally normally leave such issues to be raised by the parties if appropriate), we are very concerned as to the considerable quantity of new evidence that has been presented in the appellants' proofs of evidence which has not been disclosed to the Council previously, will not have been seen by third parties either, and to which we have inadequate time in which to respond. The Inspector will already be aware of the unusual shortening of the timetable in respect of exchange of evidence in this appeal. This fact underlines the importance of parties not springing surprises. This is procedurally unfair and unacceptable and, as set out below, we have no option but to request an adjournment (we must also reserve our position as to costs).

Expert Photographic Evidence

In the appellants' rule 6 statement the following is stated:

"Evidence will be given in terms of commentary upon aerial photographs of the site that the local planning authority have produced."

The Council had some 10 photographs which appeared to be clear on their face; and these have been almost exclusively referred to in its reports to committee (referred to in the Council's rule 6 and in relevant correspondence in the autumn). The Appellant now produces 23 photographs in total and produces specialist technical evidence on all those photographs rather than "commentary". Because of the issues now raised for the first time in Ms Cox's evidence, particularly relating to 2002, the Council will need to take expert evidence. An adjournment is therefore plainly necessary as a matter of fairness.

If the Rule 6 statement had properly set out the case and referred to all the documents (including photographs) the Council would have been able to see those documents when deciding what experts to call and what evidence needed to be addressed.

Mr Branch's evidence

The appellant seeks to link Mr Branch's company's use of the site (around 10 years before the issue of the notices) with Area E, via that technical evidence. It has never been claimed before that the features shown on photographic evidence held by the Council is to that effect. The Council needs time to be able to make proper investigation of the claim and the supporting documentation. The 2002 inspector (paragraph 11) referred to a "small aggregate reprocessing business being carried out close to the north-eastern side of the buildings". There was no suggestion that such use was taking place on Area E i.e. beyond the then security fencing referred to by the appellants' landscape witness in his 2002 evidence (see Mr Harwood's

appendix AJH7) or that it was in any way associated with the tracks much further to the north-east as now asserted.

Uses referred to in Enforcement notices 2 and 3

The evidence provided in the proofs has not been given in responses to Planning Contravention etc Notices. The Council needs time to be able to make proper investigation of the evidence now given.
The Council does not wish to expend public money on a case if the evidence now presented is accurate; on the other hand it needs time to be able properly to assess the accuracy of the evidence and to be able to test it effectively.
In normal circumstances the Council would have been notified (1) that a fundamental res judicata/legal point was being taken much earlier than exchange of proofs and (2) would have been notified in the Rule 6 statement of the documentary evidence to which reference would be made. The 3 days set down for the inquiry would never have been considered adequate if we had been informed of (1) and (2) above. Whilst we have no objection in principle to having a preliminary issue determined first, we are concerned that we have not had a proper opportunity to assess the late and new evidence, exacerbated further by having to deal also with the detail of the res judicata point. Nor do we wish the preliminary issue to be heard if it were to be found in due course to be unnecessary.

If the res judicata point is determined in the appellant's favour

If the res judicata point is determined in the appellant's favour, the Council would, of course, have to consider its position in respect of the notices.

We confirm that we shall in any event provide our response to the res judicata point by 5 pm on Wednesday 23rd January but, as set out above, we request an adjournment of the inquiry so that the new evidence can be investigated properly and appropriate advice taken.

Turning back to the Inspector's Response, we address below the other points raised.

Enforcement notice 1

The inspector expresses concern, in effect, about the inclusion of the words "including the following activities" and expresses the view that he would wish the mixed uses to be specified. The notice can of course be amended without any prejudice to specify the uses already identified in the notice –
"general industrial use (within use class B2), storage and distribution use".
We shall endeavour to agree a form of wording with the appellant for the inspector to consider.

As to the reference to the bund in the steps required to be taken, Mr Harwood's paragraph 4.41 refers to the bund in question. The reference to paragraph 6.35 is not, however, respectfully understood . Mr Harwood is not of the view that the creation of the bund was a waste disposal operation and does not suggest otherwise in that paragraph or elsewhere. For the avoidance of doubt Mr Harwood and Mr Herbert are of the view that the bund is operational development carried out between 2004 and 2006 as part of the material change of use. It is of course open to a local planning authority when issuing a material change of use notice to require operational development carried out as part and parcel of that change of use. As the editors of the Encyclopaedia of Planning note (P173.18):

"The power to require that the land be restored to its condition prior to the making of the change of use allows the authority to require the undoing of any incidental operational development, provided it forms an integral part of the breach of planning control complained of, even though it might not have constituted any breach of planning control had it been carried out as an independent operation: see, e.g. *Burn v Secretary of State for the Environment (1971) 219 E.G. 586*; *Murfitt v Secretary of State for the Environment [1980] J.P.L. 598* (hardcore laid more than four years previously, but an integral part of the making of an unauthorised change of use for the parking of heavy goods vehicles); *Perkins v Secretary of State for the Environment [1981] J.P.L. 755* (operational development had occurred more than four years previously but as part of an unauthorised change in use); *Somak Travel Ltd v Secretary of State for the Environment [1987] J.P.L. 630* (internal spiral staircase, not in itself requiring permission, but an integral component of the unauthorised conversion of the upper floor from residential to office use)."

Thus the bund, as incidental operational development, can properly be required to be removed by the change of use notice. There has been no complaint by the Appellant.

If the Inspector would prefer that the bund is also specified in the matters alleged to constitute the breach of planning control then that operational development can also be included in section 3. We shall endeavour to agree a form of wording with the appellant for the inspector to consider.

The express exemption of ancillary uses in paragraph 5 (ii) accords with the requirement (*Mansi*) not to affect such rights. Parliament defines what a B2 use is but whether a particular activity (to use a neutral term) is B2 inevitably has to be considered on the facts.

Enforcement Notices 2 and 3

The Council notes the Inspector's suggested tidying up (i.e. simply having one enforcement notice) but in the Council's view there are 3 planning units which should be addressed by separate notices. In respect of notice 1 the Council alleges a mixed use (B2 and B8) but in respect of Area A is seeking to respect the extent of the historic use. The Council therefore from the outset considered it clearer to have 3 notices, without any injustice to the appellant. Again there has been no complaint by the Appellant.

Other issues relating to Res judicata

These will be addressed in the legal submissions and/or orally.

Conclusion

We would respectfully suggest the following procedure:

(1) we would request that our application for an adjournment be considered if at all possible this week;

(2) if that is granted, then the inquiry be adjourned to a date to be fixed;

(3) If it be not granted, then the inquiry should proceed to hear the res judicata point.

Yours sincerely

Maggie Horrill
Planning and Environmental Law Manager

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Ashfords
Solicitors

Incorporating ROCHMAN LANDAU

BY EMAIL AND POST

21 January 2013

Head of Legal Services
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Upper Borough Walls
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FAO Mrs M Horrill

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Our Ref: JWB.173755-2

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Dear Sirs

Pre-Action Protocol Letter regarding proposed Judicial Review of the failure to review the decision to take planning enforcement action in respect of the Former Fullers Earth Site at Odd Down, Bath

1. We are instructed by Gazelle Properties Limited ('Gazelle') to pursue a claim for judicial review of the failure of Bath and North East Somerset Council ("the Council") to review the decision of the Council dated 9 May 2012 to delegate to officers authority to take enforcement action in respect of the use of the Former Fullers Earth site and adjoining land and the issue of the actual notices, each dated 30 May 2012. This letter comprises our letter in accordance with the protocol of the Administrative Court.

Our Client

2. Gazelle Properties Limited, is the owner of the Former Fullers Earth site and adjoining land ('the Land').

Our Complaint and Proposed Grounds of Challenge
The Facts

3. The Land comprises a site that has a historic general industrial use, and which is presently used for waste processing and other uses falling within the general industrial use class (B2) of the Town and Country Planning Use Classes Order.

The Issues

Failing to take into account a material consideration

4. By virtue of Section 172(1)(b) of the Town and Country Planning Act 1990, the local planning authority may issue an enforcement notice where it appears to them that it is

expedient to issue the notice, having regard to the provisions of the development plan and to any other material considerations.

5. Section 173A of the Town and Country Planning Act empowers a local planning authority to withdraw or amend an enforcement notice after it has been issued, and even after it has taken effect.

6. By virtue of the case of *Gazelle v Bath and North East Somerset Council* [2010] EWHC 3127 the Court accepted that the existence of a power to withdraw an enforcement notice serves to underline the necessity of a continuing discretion being exercised in enforcement proceedings and the implication in the statute of a duty to reconsider enforcement proceedings in the light of any changes of circumstance. In effect this implies a continuing responsibility for the authority to keep under review the expediency of the action it has decided to take.

The Facts

7. On 9 May 2012 the Development Control Committee of the Council ('the Committee') delegated authority to its officers to take enforcement action in respect of the Land. Enforcement notices were duly issued by the Council on 30 May 2012. These notices have now been appealed and a public inquiry is due to open on 29 January 2013 to consider them.

8. Paragraph 7.3 of the report to the Committee referred the members of the Committee to an earlier report to the Committee of January 2012 ('the January Report') for the officer's reasoning as to why there was not a lawful industrial use throughout the Land. The January Report indeed formed Annex A to the May Report.

9. Paragraphs 3.010 to 3.015 of the January Report dealt with the Officer's interpretation of the report of the inspector and the decision of the Secretary of State following the 2002 call-in inquiry. At paragraph 3.015 the Committee were advised that:

> *'even if the Inspector has (sic) considered that the B2 use should extend to the whole of the application site, decision of the Secretary of State that was given as a result of that call in inquiry came to a different view'*

10. The previous decision of the Secretary of State on the extent of the B2 use was clearly a matter of considerable importance to the Committee. Despite strong representations from this firm that the Council's interpretation of the Secretary of State's was incorrect the Committee were not advised that the view set out in the report was in any way incorrect. That is not surprising since the same line of reasoning is now set out in the proof of evidence of Mt Harwood on behalf of the Council.

11. On 21 January 2013 the Inspector appointed to determine the appeals circulated a note to the parties. In that note the Inspector states:

'I do not find any ambiguity at all in the Secretary of State's decision. At DL 35 he very clearly contemplated the likelihood of the entire application site (in context, the only reasonable construction of the word 'site' throughout his decision) being used for B2 use under the fallback position. The use of the word 'likely' must imply some element of possibility. If he had concluded that only part of the site had a fallback use for B2 he could not have rationally considered the possibility of that use over the entire site since such use on parts would not be a fallback position.'

This interpretation accords with the view of the Secretary of State's decision letter that we have always maintained was the case, and which in truth is the only possible interpretation open as a matter of law. We have pointed this out to the Council many times. Indeed the Council also accepted this to be the case for many years and in many contexts (we do not rehearse this well known history). The correct interpretation of the Secretary of State's decision is however, fundamentally different from what the Committee were advised when deciding to take enforcement action.

12. It is now apparent that the Committee's decision to delegate authority to bring enforcement proceedings was based upon a fundamental factual error as to the contents of the Secretary of State's decision in 2003. We therefore invite the Council to reconsider the expediency of the service of the enforcement action in line with the interpretation that the Inspector has confirmed is the correct one. This invitation is extended notwithstanding the Council's indication that it does not agree that the extent of the B2 use is a matter which is res judicata: irrespective of this point it remains evident that the Committee's authorisation of enforcement action requires to be revisited.

Orders to be Sought

13. We shall be seeking an order declaring unlawful the failure of the Council to reconsider enforcement action.

What you are asked to do

14. We ask you to respond to this letter by close of business on 25 January 2013. We appreciate that this deadline is short, but this is necessary in view of the impending public inquiry into the appeals.

15. We ask that the Council reconsiders its enforcement action in the light of the correct interpretation of the Secretary of State's decision letter

16. We will in all events be seeking our client's costs thrown away in consequence of the Council's misconception of the Secretary of State's decision. This claim is anticipated without prejudice to any aspect of the Appellant's appeal against the enforcement notices.

Prospective Claimant's Legal Advisers and Address for Reply and Service of Court Documents

17. Ashfords Solicitors, Ashford House, Grenadier Road, Exeter EX1 3LH

Interested Parties

18. Waste Recycling @ Bath Limited; Stonecraft Ltd; Maple Scaffolding Limited

Period for Reply

19. Please respond within 3 days, failing which we reserve lodge judicial review proceedings without further notice.

Yours faithfully

Ashfords

Inspector's Response to Correspondence Received on 22 January

This note deals with a number of points and questions raised in letters from the Council, Bath Preservation Trust and Harrison Grant, all of which have been copied to the other main and Rule 6 parties, and in a very short email from Ashfords, which has not.

My approach both before and during Inquiries and Hearings is to let all participating know my evolving view on the basis of the information so far available. Advocates generally appear to find this helpful as it enables them to correct through submissions and/or evidence any misunderstandings that I may have developed. My previous response and this one should be read in that light.

Res judicata

The matter of *res judicata* needs to be ruled upon by me before the evidence is heard as it will fundamentally affect the nature of the evidence that is eventually called. I will therefore hear submissions as per my earlier outline programme. That makes it absolutely clear that any Rule 6 party that has a view on this matter will be heard at this point. Harrison Grant has already made it clear that its client will wish to make submissions and if Bath Preservation Trust similarly wishes to they can and should.

My understanding is that there are two parts to this matter. First, is whether this principle applies in this case. On the correspondence available to date, only the appellant thinks so. The Council will tell us why it does not on 23 January and the Rule 6 parties that have so far declared can make submissions on the morning. This is a matter of law and the parties' interpretation of it. As I made absolutely clear in my earlier Response I have no view on this at present; I cannot have since I have heard detailed argument from only one party.

If, and only if, I decide that the principle does apply to this case, the only matter that appears to then be in contention is the extent of the fallback area so the second question is has the Secretary of State (as the decision maker) determined that it is the entire application site before him or only a part of it? I shall rule on the extent of the B2 fallback area if I need to since this too fundamentally affects the nature of the evidence to be called. At this stage this is not a matter for evidence but one for submissions as to how the Secretary of State's decision should be interpreted. This is not, in my view, a matter of law but a matter of reading and interpreting the language used in the Secretary of State's decision in the context of the evidence before him. The Inspector's report to him is clearly a very significant part of that evidence and for anyone not directly involved in that matter is the only source. As it may help all parties my current reading of the decision is this.

As I understand that appeal proposal the bulk of the built development was to be in the area of the existing buildings and hardstandings; unsurprising on a Green Belt site. I therefore believe that Mr Robinson

was focussing on the fallback use of the area that would be developed. In para 427 and 428 he talks in general principles and in 429 introduces the concept of 'the works'. This concept continues through to 433 where he appears to conclude that the works have a lawful B2 use. However, in 434 some doubt is introduced (in my reading) because in placing the works adjacent to a mine, he may also place those mine workings beyond the site which must, in context, mean the application site. This depends how the phrase '…to the north-east of the site…' is read. If it means the north-east part of the site then it would be within the site. If it means north-east of the site it would be beyond its boundary; either is possible in my view. Nevertheless, the opening to 435 seems beyond question and the final sentence of 436 refers to the prospect of the B2 use continuing **on** the site (my emphasis). I am well aware that the Secretary of State accepted these paragraphs without reservation (DL 30). However, where the Secretary of State offers his view about the entire site being used for B2 under the fallback he refers not to these paragraphs but to 455 and 456. In 455 Mr Robinson refers to the prospect of B2 use **of** the site. A subtle difference perhaps and maybe not even intentional but that is the paragraph drawn upon.

Advocates are asked to deal with both questions (principle of *res judicata* applying and area covered by B2 fallback) in their submissions on this matter. I would also like advocates to address at least the first 3 points on which I requested their assistance in my earlier Response. One of the reasons for asking is that, unless I have missed it, the Secretary of State does not use the word 'lawful' at all in his decision, only fallback; there may be no practical difference but I would welcome views.

The Notices

This is an Inquiry into appeals against 3 enforcement notices issued by the Council. It is my duty, irrespective of whether a point has been raised by the parties, to ensure that the notices are right and meet the *Miller-Mead* tests. The power of correction and variation conferred by s176(1) is wide-ranging and subject only to there being no injustice to either party in the event of it being used. That was the reason for raising the concerns about Notice No 1 and I will hear any submissions on this as per my previous outline programme. There is no point in proceeding with an Inquiry into a notice that is defective and incapable of correction. While I am encouraged by the Council's view that the necessary changes can be achieved, the appellant has still to comment and I can therefore form no view at this point.

The Council has raised some points arising from my earlier Response which I am happy to deal with as best I can. Turning first to the bund, I readily agree that I may have misunderstood Mr Harwood's 6.35. Nevertheless, Mr Herbert is clear that it has been constructed from inert waste (2.17) and Mr Harwood says that it was substantially complete by 2006 (4.41). The Council would therefore appear unable to allege unauthorised operational development since, on its own evidence, the bund had been there well over 4 years when the notice was issued. However, where waste is concerned, 'storage' to one person is 'tipping' to

another. This would be a material change in the use of the land and subject to the 10 year rule. If that is the case, it should be included in the mixed use alleged. I am well aware of the cases cited but the key word is 'integral' to the alleged unauthorised change of use. In saying all this I am of course also aware of the appellant's position that the alleged bund is not a bund at all (Mr Kendrick 8.93).

Turning to requirement 5 (ii), I am also aware of the *Mansi* principle with *Duguid* and *Cord* also being relevant. This really flows from the inadequately described breach of planning control. If this stated clearly all the uses (both lawful and the alleged unauthorised uses) within Area A as set out in Circular 10/97, 2.10 and 2.11, the requirement could similarly be drafted to require the unauthorised uses, and only those, to cease. The lawful uses and any uses ancillary to those would therefore be preserved.

These appeals are proceeding only on the legal grounds and the onus is on the appellant to prove the case made. Parties are reminded of paragraph 8.15 of Circular 10/97 which, unlike PPG18, was not replaced by the National Planning Policy Framework. If I have understood the Council's letter correctly it has indicated that it may wish to reconsider its position with regard to Notices Nos 2 and 3 in the light of the evidence now available from the appellant. Perhaps this could be confirmed on Tuesday?

Revised Inquiry programme

I am grateful for the confirmation that all matters remain in dispute and that most parties wish to make submissions. That will clearly extend the amount of time taken on Tuesday and I therefore propose to proceed as follows. As will be seen, the adjournment requested by the Council will, in practice, occur.

1. Shortened formal opening of the Inquiry taking appearances but not witnesses as this may alter.
2. Hear submissions on both aspects of the *res judicata* point taking the 'application' point first from all before moving on to the 'extent' point.
3. Hear submissions on the form of Notice No 1 and any corrections and/or variations that may be agreed or proposed as appropriate. Since s176(1) limits the issue of injustice to the appellant and the local planning authority I do not expect to hear submissions from the Rule 6 parties on this.
4. Adjourn to consider the submissions and write my rulings on those matters that I need to. I would expect to adjourn on Tuesday.
5. Resume 10:00 Friday 1 February. I will need to reflect carefully on the submissions made and explain my reasoning clearly. Therefore I intend to allow two days. I will hand out my ruling at 10:00 or earlier if <u>everyone</u> is represented and allow a period for parties to consider it. As stated in my earlier Response I see no merit in any further submissions since it is unlikely that my ruling will be acceptable to all parties. The purpose of resuming with all parties

present is so that we can then agree how to take the Inquiry forward. During the period for consideration after receiving the ruling parties are asked to resolve as appropriate: whether any appeal or notice is to be withdrawn; which witnesses may either not now need to be called or may be able to give much abbreviated evidence; which additional witnesses may need to be called; whether applications for costs are likely to be made and by whom against whom. We can then agree the number of Inquiry days required when we resume. We can also agree a date for the final submission of any new evidence if any additional witness is to be called. Parties are therefore requested to come with a clear view of their availability over the next few months.

Brian Cook
Inspector
23 January 2013

RE: FORMER FULLERS EARTH WORKS

JOINT REBUTTAL OPINION

Summary

1. The Council takes the view that

(i) The Secretary of State did not determine in 2003 that the existing lawful use of the whole of the application site then before him was B2;

(ii) The Secretary of State had no jurisdiction formally and finally to determine that issue on a section 77 application: this can only be done via an application for a Certificate of Lawful Use (s.191) or on an enforcement notice appeal (s.177(1)(c));

(iii) Nor does an issue estoppel arise. (1) the appellants do not contend that a cause of action estoppel arises (see paragraph 40 of their

Opinion). They do not, however, draw attention to the view of the majority of the Court of Appeal in Porter (1996) (pp 7,10) that an issue estoppel can only arise where the original decision was capable of amounting to a cause of action estoppel. (2) even if the present Inspector were ultimately to take the view that the position in respect of (i) is not clear, then no issue estoppel can arise where there is uncertainty, as the authorities to which the appellant refers expressly confirm.[1]

Introduction

2. By decision letter dated 1st August 2003 the Secretary of State refused to grant planning permission, pursuant to section 77 of the Town and Country Planning Act 1990 (as amended) ("the 1990 Act"), for the partial demolition, refurbishment and extension of existing buildings with ancillary access and external works to form 3,186 sq m of B1 floorspace and 19 "live/work" units. The decision was in the Council's favour. Only the unsuccessful appellant could have appealed.

3. The focus of the inquiry, axiomatically, was whether planning permission should be granted for that development.

The Secretary of State's decision

4. The issue as to whether planning permission should be granted for the proposed development entailed consideration of planning policies and other material planning considerations. Because the site is in the Green Belt one of a number of

1 - e.g. Watts v Secretary of State for the Environment and South Oxfordshire District Council (1991) 62 P.& C.R. 366, 386; R (Exmouth Marina Ltd) v First Secretary of State [2004] EWHC 3166 (Admin) (paragraph 8)

sub-issues arose: whether there were any very special circumstances that outweighed the harm caused by the reason of inappropriateness .

5. One of the issues which arose in connection with the "very special circumstances" argument was whether a 'fallback' position existed.

6. The Inspector first made a general statement that when considering the lawful use "regard should be had to what constitutes the planning unit": **IR 427**.

7. In considering the lawful use, the planning inspector therefore addressed his mind to the planning unit at **IR 432** and commented that after the new adit at Under Sow Hill opened and its mineral was processed at the Works, which according to the evidence before him was in 1969,[2] *"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 at some distance from the works. This physical separation is important.*

8. At **IR 433** the inspector referred to and did not dispute the *'recognition given by the planning officer of the then local planning authority in 1985 that the works had formed a separate planning unit for some time.*' The 1985 letter that the Inspector was referring to is reproduced at Mr Harwood's Appendix AJH11 and discussed in Mr Harwood's proof of evidence at paragraph 3.15. That correspondence resulted from pre-application discussions in which the Pioneer Group (well-known of course and experienced mineral operators) had sought to "find out [from the Council] exactly what the planning situation is …" , specifically as to whether a planning application was required for a proposed

[2] CD39, p.3

concrete batching plant. The red line of the plan for the proposals extended beyond the buildings and hardstandings into what has since been labelled as Area E by the Council. The Council's response to Pioneer's query was that

> *"the site which you have outlined in red on your plan appears to extend outside the planning unit of the Fullers Earth Works.*"

No application appears thereafter to have been submitted.

The Inspector's reference to a "separate planning unit" clearly therefore did not include Area E.

9. Moreover, at **IR 434** The Inspector stated that *"the various adits and working of the adjacent mine … were the subject of a series of planning permissions in the 1970s for various reclamation schemes. These schemes have been implemented."* The 1970s permissions included land within Area E but not Area A. The use of land for the deposit of waste materials pursuant to that permission was a material change in the use of the land. (The appellant's point, if correct, that the 1970s permission was not implemented lawfully would not change this fact – i.e. that a material change of use occurred.) The Inspector makes no observation that there was any B2 use of the "adjacent land" thereafter which land he distinguishes from "the works". His focus thereafter in **IR 435** was expressly on the buildings and hardstandings alone.

10. On any view the Inspector was acknowledging that the adjacent land was;

    (i) separate to "the works"

    (ii) had permission for reclamation works which had been implemented; and

(iii) was viewed by the Council to be part of a separate planing unit to "the works" on the basis of the 1985 correspondence.

10. The Inspector concluded at **IR 435** "*that the buildings and hardstandings on the site enjoy a B2 fallback.*" (this is referred variously as the first fallback scenario or position). If the Inspector had meant to say the whole site enjoyed a B2 fallback, he would surely have said so, or for example to have said, that the buildings, hardstandings, and adjacent land enjoyed a B2 fallback. He did not, and nor did he consider anything other than the buildings and hardstandings in the other two specific fallback scenarios that he identified:

(1) Under the GPDO 235 sq m of B2 building could be changed without planning permission to B8 or and unlimited amount of B2 to B1' (the second fallback position); or

(2) Planning permission could be granted for the re-use of approximately Re-use of 2,000 sq m of buildings for B1 with controlled use of areas of hardstanding in accordance with paragraphs 3.7 to 3.9 of PPG2 (the third fallback position).

11. At **IR 455** headed "preclusion of the fallback position" the Inspector refers to the fact that he has "already concluded" in respect of the B2 use. This is a clear reference to his conclusion on fallback 1 at **IR 435.** The reference to outside plant and other structures is plainly in this context i.e. on the areas of hardstanding which were at that time some 3,457 square metres **[IR 410].**

Secretary of State's decision letter (DL)

12. At **DL 30** the Secretary of State expressed his agreement *"with the Inspector's conclusions in **IR 436** on whether a fallback position exists, for the reasons given in **IR 427-436"***. At **DL 35** the Secretary of State made express reference to the three fallback positions identified at **IR 435** and agreed that "*these are theoretically available."* (underlining added) The Secretary of State did not go beyond the Inspector's conclusions and identify any new fallback positions or expand on the conclusions reached by the Inspector.

13. At **DL 35** in respect of the first fallback, i.e. "*that the buildings and hardstandings on the site enjoy a B2 fallback.*" the Secretary of State took the view that he had insufficient evidence to assess the likely extent or type of B2 use. He was not there addressing the site as a whole but the buildings and hardstandings; if he were going beyond the Inspector's findings then he would have said so. That was the clear context for his reference that he was "*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."* The first fallback was expressly limited to the buildings and hardstanding. He refers back to **IR 455** which, as set out above, refers to the fallback scenarios considered. The Secretary of State gave "some weight" to the prevention of the first fallback position as a material consideration.

15. The Secretary of State went no further in his "overall conclusion" at **DL 5**9 than to say he had considered the "preclusion of the fallback position – continuing B2" and that he had also considered" "the other fallback positions" (underlining added).

16. Further, he repeated the conclusion in **DL 35 that** "he does not identify the same degree of harms from such use as the Inspector." Again, the reference to the

Inspector's findings clearly demonstrate that the "fallback" the Secretary of State is considering in his conclusion is that identified at **IR 435** and no more. Thus the Secretary of State did not consider that the whole of the then appeal site had a lawful B2 use; only the buildings and hardstandings identified by the Inspector.

Conclusion on the Decision letter

17. If the Council is right in its interpretation of the Secretary of State's decision, that is an end to the matter; there can be no question of an estoppel as to the use of the 2003 site arising. Further, even if the Inspector does not agree with the Council, but were to conclude that the extent of the B2 fallback under consideration was unclear on the face of the DL, that lack of clarity cannot found an estoppel. The cases of Watts (p.386 of report), and R. (Exmouth Marina) (paragraph 8 of report) referred to by the appellant (paragraphs 50 and 54 respectively of Opinion), make precisely this point: see for example criterion (3) "the tribunal must make an unequivocal decision on that matter." (emphasis added) The appellant also concedes that ambiguity prevents an estoppel arising (at paragraph 53 of the Opinion).

Estoppel

19. If however the Inspector accepts the appellant's construction of the Inspector's Report and the 2003 Decision Letter, close attention must be given to the Thrasyvoulou case which is relied on extensively but, with respect, inaccurately by the appellant. In that case both appeals concerned enforcement action where the landowners had successfully appealed enforcement notices only to be served with further notices some time later, despite no change of use having occurred.

Both appellants were therefore 'vexed twice in the same issue'. The House of Lord held that where statute creates a specific jurisdiction for the determination of any issue which establishes the existence of a legal right then the principle of res judicata applies to give finality to the determination [p.289 per Lord Bridge]. Further, it was held that the resolution in that context of a factual issue is capable of creating an issue estoppel where the finding is not merely incidental or ancillary, but an essential foundation of a decision.

20. The principles established in Thrasyvoulou were specifically in the context of enforcement notices and the specific statutory provisions. They were not intended to be generally applicable to all determinations in a planning context. Moreover, even in respect of enforcement action, the House of Lords made it clear that a decision on a ground (a) appeal under what is now section 174(2) of the 1990 Act, namely as to whether planning permission ought to be granted in respect of the breach of planning control alleged, did not determine a legal right and could not give rise to an estoppel:

> *"In determining whether to allow an appeal on that ground the Secretary of State will decide as a matter of policy and in the exercise of discretion whether planning permission should be granted and in relation to ground (a) no question of legal right arises."* (Lord Bridge, p.287G)

21. This, the House of Lords held, was by contrast with the position in relation to grounds (b) to (e), where determinations as to legal rights are made. Part of Lord Bridge's reasoning appears at p.290F;

Mr. Laws submitted that no distinction could be drawn between a decision on ground (a) of section 88(2) to grant or withhold planning permission for the development the subject of an enforcement notice, and a decision of any issue arising under grounds (b) to (e). If an estoppel arises in one case, he submits, it must equally arise in the other. I cannot accept this submission. A decision to grant planning permission creates, of course, the rights which such a grant confers. But a decision to withhold planning permission resolves no issue of legal right whatever. It is no more than a decision that in existing circumstances and in the light of existing planning policies the development in question is not one which it would be appropriate to permit. Consequently, in my view, such a decision cannot give rise to an estoppel per rem judicatam"

(emphasis added)

22. The same reasoning must apply to the Secretary of State's decision in 2003 because an appeal under section 77 (that planning permission should be granted) raises identical issues to those in an appeal against an enforcement notice under ground (a). As such the Secretary of State lacked the 'specific jurisdiction' [per Lord Bridge, p.289D] to establish, formally and conclusively, the existence of a legal right so as to create an "issue estoppel" and for res judicata to operate.

23. The House of Lords held that it is only

"where the statute has created a specific jurisdiction for the determination of any issue which establishes the existence of a legal right, the principle of res judicata applies to give finality to that determination ..." (p.289D)

24. One of the cases cited by Lord Bridge was Wakefield where there was specific jurisdiction to determine an express ground of objection that a highway was repairable by the inhabitants at large rather than by the frontagers. It was there held that the justices had been given the jurisdiction buy Parliament to determine this as a substantive issue rather than as "a medium concludendi" of the liability or non-liability of the objectors.

25. There is no specific jurisdiction conferred on the Secretary of State when determining a section 77 application by the 1990 Act. Such a specific jurisdiction does arise under section 191 of the 1990 Act (certificates of lawfulness of use or development) and under section 177 of the 1990 Act which relates to enforcement appeals.

26. Section 191 provides:

> (1) If any person wishes to ascertain whether—
>
> (a) any existing use of buildings or other land is lawful;
>
> …..
> he may make an application for the purpose to the local planning authority specifying the land and describing the use, operations or other matter
> …..
>
> (6) The lawfulness of any use, operations or other matter for which a certificate is in force under this section shall be conclusively presumed."

Section 177 provides:

"(1) On the determination of an appeal under section 174, the Secretary of State may—

…

(c) determine whether, on the date on which the appeal was made, any existing use of the land was lawful, any operations which had been carried out in, on, over or under the land were lawful or any matter constituting a failure to comply with any condition or limitation subject to which planning permission was granted was lawful and, if so, issue a certificate under section 191."

25. The case of Porter (addressed at para.56 of the Joint Opinion) clarifies matters further. That case concerned compensation payable following a compulsory purchase order and the subsequent issuance of a certificate of "appropriate alternative development" on appeal under section 18 of the Land Compensation Act 1961.

26. The passages from Thrasyvoulou outlined above were cited with approval by Stuart-Smith LJ in the Court of Appeal in Porter - a case which cannot properly be characterised as an 'exception' to the Thrasyvoulou case because it applies and follows Lord Bridge's speech.

27. It was common ground in Porter that four matters have to be established if there is to be an issue estoppel;

1. The issue in question must have been decided by a court or tribunal of competent jurisdiction…

2. That the issue must be one which arises between parties who are parties to the decision.
3. That the issue must have been decided finally and must be of a type to which an issue estoppel can apply.
4. The issue in respect of which the estoppel is said to operate must be the same as that previously decided. These propositions derive from Carl Zeiss Stiftung v. Rayner & Keeler Ltd. [1967] 1 AC 853

28. The Appellant in Porter argued that:

> "*even if the decision itself that planning permissions would have been granted up to the green route does not create an estoppel per rem judicatam for the reasons given by Lord Bridge, findings of fact made by the Inspector and adopted by the Secretary of State which were a necessary part of the reasoning which led to the grant of the certificate nevertheless can give rise to an issue estoppel."* (p.6)

29. Stuart-Smith LJ with whom Thorpe LJ agreed (Peter Gibson LJ dissenting on the point) found against the appellant in an important part of the judgment to which the Opinion makes no reference:

> *"If Lord Bridge had thought that even though a decision whether or not to grant planning permission was not one to which estoppel per rem judicatam could apply, it was possible for an issue estoppel to arise in relation to some finding of fact made by the Secretary of State and necessary to his decision, I*

find it very surprising that he did not say so. It seems to be implicit in his judgment that he thought no such thing. In fact as Diplock L.J. made clear in the passage I have cited from Thoday v. Thoday , estoppel per rem judicatam embraces both cause of action estoppel and issue estoppel. Since Lord Bridge cited this passage, it seems to me clear that in holding that a decision on ground (a) of s.88(2) cannot give rise to estoppel per rem judicatam, he must be taken to have included in this issue estoppel." (emphasis added)

30. Thorpe LJ agreed that:

"Although the speech of Lord Bridge does not expressly state that issue estoppel cannot underlie a decision to which estoppel per rem judicatam cannot apply, I share the view of my lord, Lord Justice Stuart-Smith, that that is the effect of his judgment by implication. Thus I accept Mr Barnes submissions on both issues and agree that this appeal should be allowed." (p.10)

31. Accordingly, because the decision on a section 77 appeal is not one to which estoppel per rem judicatam can apply, there can be no issue estoppel either.

32. Both Thrasyvoulou, and Porter addressed the distinction between issues raised as part of a decision concerning the grant of planning permission as opposed to appeals under those grounds capable of establishing legal rights. In particular at pp 7-8 of the Porter decision Stuart-Smith LJ observed the following;

> *There is I think an additional reason why a decision of the Secretary of State whether to grant planning permission, whether on an appeal from an enforcement notice or original refusal by the Local Authority, cannot give rise to estoppel per rem judicatam, either in the form of cause of action or issue estoppel, and that is because it lacks the necessary element of finality. It is well established that a judgment pending trial, such as whether or not to grant an interlocutory injunction, cannot give rise to an estoppel of either sort, because it lacks this element of finality. As Lord Bridge pointed out in Thrasyvoulou a refusal of planning permission does not finally determine the matter; a fresh application can be made. Moreover, although a grant of planning permission can create rights and if acted upon cannot be revoked, if it is allowed to lapse determines nothing."*
>
> (emphasis added)

33. Undoubtedly then, the fact that Thrasyvoulou concerned an enforcement context where the specific jurisdiction had existed and was exercised on a previous occasion is not just a relevant distinction in this case as the appellant asserts at para.45 of the Opinion, it is a distinction that is fatal to the appellant's arguments on this issue.

34. Porter is clear that a refusal of planning permission does not finally determine the matter, and the appellant has never before been put to the trouble of proving its lawful rights over the site.

35. The appellant also relies on Williamson v. Mid Suffolk District Council [2006] EWLands LCA 73 2001 in support of its contention for a wider application of the res judicata principle. In that matter, the Secretary of State confirmed a discontinuance order under s.102 at the 1990 Act. The effect was to amend the conditions of a 1989 planning permission relating to the use of Mr Williamson's airfield to include more stringent conditions reflecting those attached to later planning permissions following the expansion of the airfield on to additional land.

36. Mr Williamson sought compensation and an argument arose as to whether he would still have had the benefit of the 1989 permission (but for the order) if the 1991 permission ceased or was abandoned . He submitted that the necessary implication of the confirmation of the Order was the the 1989 permission was unfettered as a stand alone permission - why else would the conditions be required? He argued that the compensating authority were estopped from contending otherwise.

37. The Lands Tribunal agreed, obiter, with this argument. The modification to condition 4 of the 1989 permission could only have been "expedient" (the specific statutory requirement/jurisdiction under s.102) if the Minister had considered that otherwise it was unfettered by the 1991 permission (paragraph 46). The facts and statutory provisions are, of course, very different and the decision is plainly distinguishable. Unlike the instant case, the decision of whether to confirm a discontinuance order necessarily resolves issues of legal rights because specific jurisdiction is granted by s.102 of the 1990 Act to interfere with them. If there are no legal rights over the land then the issue of an Order does not arise in the first

place and so the analogy drawn by the appellant at paragraph 48 of the Joint Opinion is flawed. In addition, the tribunal's attention was not drawn to the Porter case.

38. We turn now to the other cases raised in the Joint Opinion.

39. In R. (on the application of Reprotech (Pebsham Ltd) v. East Sussex CC [2003] 1 WLR 348 the County Council resolved to grant conditional permission pursuant to section 73 for development without complying with a condition previously imposed, No permission was ever issued. In subsequent years it was argued that the resolution amounted to a determination pursuant to the then s.64 of the 1971 Act (now s.192) that the use of the existing waste treatment plant for the generation of electricity would not amount to a material change of use.

40. It was held that a determination pursuant to s.64 was

> *27. ... a juridical act, giving rise to legal consequences by virtue of the provisions of the statute. The nature of the required act must therefore be ascertained from the terms of the statute, including any requirements prescribed by subordinate legislation such as the General Development Order. Whatever might be the meaning of the resolution, if it was not a determination within the meaning of the Act, it did not have the statutory consequences.*
>
> *28. A reading of the legislation discloses the following features of a determination. First, it is made in response to an application which provides the planning authority with details of the proposed use and existing use of the land. Secondly, it is entered*

in the planning register to give the public the opportunity to make representations to the planning authority or the Secretary of State. Thirdly, it requires the district authority to be given the opportunity to make representations. Fourthly, it requires that the Secretary of State have the opportunity to call in the application for his own determination. Fifthly, the determination must be communicated to the applicant in writing and notified to the district authority."

41. The importance of seeking a formal determination in accordance with the statutory provisions laid down by Parliament is thus underlined by Reprotech. The importance of the statutory provisions/context cannot be over-emphasised. Reprotech does not cast doubt on Thrasyvoulou, indeed it is consistent with it. Res judicata requires a formal determination pursuant to a specific jurisdiction. Reprotech made it clear that no other forms of estoppel (by convention, by representation etc) have any place in planning/public law. As Moore-Bick J made clear in Stancliffe Stone Co Ltd v. Peak District national Park Authority [2005] Env.L.R. 4 at [34] (referred to by the appellant at para.57);

I do not think that a parallel can be drawn between res judicata and other forms of estoppel. As Lord Bridge pointed out at p.289, the rationale which underlies the doctrine of res judicata is fundamentally different from that which underlies estoppel by representation, or, for that matter, estoppel by convention.

42. Applying the decision in Reprotech to the present facts; the 1990 Act does not give powers to the Secretary of State on a section 77 application/call-in (or on a s.78 appeal) to make the sort of determination the Appellant seeks to imply from the Secretary of State's Decision Letter. Secondly a section 191 application gives members of the public a right to make representations on the application/the past use. It may be particularly noted in this regard that the Inspector's report draws attention to the fact that third parties were not aware that a fallback might even exist and/or was relevant to the section 77 inquiry.

43. It was further held that even the High Court itself had no jurisdiction to make a declaration that the generation of electricity would amount to a material change of use.

44. The Editors of the Encyclopaedia of Planning observe:

> *"Whereas, previously, issues relating to the validity and scope of an existing planning permission were outside the range of the former s.64, they are squarely within the scope of its successor, s.192. Now there is a comprehensive statutory code that is capable of addressing all the issues that prior to 1991 could be addressed only through an enforcement notice or by proceedings for a declaration.*

45. So, if the appellants wish to have the issue formally determined they must either seek a certificate of lawfulness (ironically, they made an application in 2006 but, it appears, withdrew the application upon seeing an unfavourable draft officer's

report); alternatively, the present Inspector in this enforcement notice appeal has the jurisdiction pursuant to section 177.

46. The case of R. (Wandsworth LBC) v. Secretary of State for Transport Local Government and The Regions and 02 UK Ltd [2004] 1 P. & C.R. 32 cited by the appellant, and again, inappropriately referred to as an exception to Thrasyvoulou followed Reprotech and dealt with estoppel by representation, that the appellant accepts is irrelevant to their res judicata point (para.59).

47. As to Keevil, the key passage is paragraph 24 in the judgment of Dobbs J. In that case, Mr and Mrs Keevil appealed the decision of a planning inspector in dismissing their appeal against an enforcement notice relating to the stationing of two residential caravans on their land. Prior to the notice, the Council had issued a certificate of lawful use for the stationing of those caravans, but failed to identify the precise smaller parcel land where that might lawfully be done, and thereafter a Caravan Site Licence was granted in respect of all of Mr and Mrs Keevil's land. A site licence could only have been granted if there was a permission or CLU in respect of the land and so the Keevils argued that an issue estoppel rose in relation to the area of land to be included in the CLU.

48. The Inspector rejected the argument distinguishing the facts from those in Thrasyvolou and the High Court agreed;

> *24 In my judgment...The situations were not comparable. The decision which formally determined the legal position was the certificate of lawful use, which was in fact limited to the land edged*

in red on the most likely plan 001A. The decision to grant the licence was made based on an erroneous understanding of the legal position and was granted without robust investigation by the Council officer concerned. It is quite clear that the inspector found that proper checks and balances should have operated when they did not (paragraph 64). It is to be noted, however, that the plan that was sent by the claimants in application for the licence showed where it was intended to site the caravans, but in referring to the certificate, the claimants, having not obtained the plan which should have been attached to the certificate, did not submit it with the application. It can be seen, therefore, how there was room for error. As was conceded by Mr Wadsley today, a reasonable inference to be drawn by anyone reading the documentation and not checking the plan was that the certificate covered the area that the claimants proposed to site their caravans.

49. As the appellant has correctly accepted, where the determination was made on an erroneous basis then it cannot found an estoppel. That would be the case for example, (<u>if</u> it were relevant) if the Secretary of State had taken the Inspector at **IR 435** to be referring to the whole of the application site when he was clearly limiting his findings to the buildings and hardstandings only.

Previous advice from Counsel

50. Although not strictly relevant to the present matter, since the Appellant seeks to rely on previous advice received by the Council to make its point these are considered briefly below. These are therefore considered briefly below.

Peter Towler Counsel Opinion 23rd December 2003

51. He had represented the Council at the 2002 inquiry (which closed on 11th October 2002). 13 months later he was asked to advise (paragraph 1) whether certain activities which had taken place since the Secretary of State's decision of 1st August 2003 were lawful or whether enforcement action could be taken. His view was that:

(1) the Council had accepted that the existing buildings and hardstanding had an existing B2 use.

(2) he noted that the Secretary of State had agreed with "the Inspector's conclusions on the fallback position" (he refers, in error, to paragraph 436 of the report; his quotation is from 435.)

(3) He refers to references to the site where the context suggests the whole site (paragraph 5) though without the analysis above, but he nevertheless expressed his view that "the Council has a reasonable case for asserting that the lawful use is confined to the existing buildings and then extant hardstanding."

(4) He went on to advise against enforcement action because of the uncertainty and because of permitted development rights.

52. What is particularly striking is that he understood the case he had spent 11 days advancing was that the buildings and hardstanding had an existing B2 use.

Peter Towler Further Opinion 5th May 2003

53. He refers, in a very brief Opinion (6 paras) to "further passages in the Statement of Common Ground which were not before me when I advised previously." (paragraph 4) The SOCG refers to agreement that the"existing use of the site is industrial processing which falls within B2."

54. It is striking that this was not uppermost in his mind. This is consistent with the fact that the case of the Council at the inquiry was in fact that the buildings and hardstanding had B2 rights which was entirely consistent with fallback position (1) .

55. Mr Towler did not suggest that the issue was res judicata.

Timothy Straker QC Opinion 12th May 2006

56. Mr Straker did not, for the purpose of his Opinion, analyse the inspector's report or the Secretary of State's decision letter in close detail. For example he does not refer to fallback scenario (1) or paragraph 435 of the inspector's report nor to the planning unit and the documents to which the Inspector makes express reference ssuch as the 1985 correspondence, or the reclamation permissions. This is not a criticism (and no criticism of any Counsel is made). It is understood that he did not have these documents before him.

57. Even though he advised against enforcement action as "inexpedient" Mr Straker QC did not state that the issue was res judicata.

Gary Grant of counsel Opinion 15th December 2006 (AJH13)

58. This Opinion was written in relation to the 2006 CLEUD application (the application was subsequently withdrawn).

59. He expressed the view (para 8) that the view set out in the draft report of the planning officer that B2 use across the application site had not been established *"was clearly a reasonable conclusion on the material provided"*. He also expressed the view that "t*he better view is that the inspector ... was carefully limiting the findings he could make in respect of the fall back position."* (para 12) (see para 17(5) too).

60. He did not take the view that the matter was res judicata (para 14).

Gary Grant Opinion dated 11th August 2008

61. Counsel weighed the pros and cons of enforcement action and advised that in the absence of a negotiated solution it was probably expedient to take enforcement action against the area not now considered to be subject to a lawful fall back.

Other points raised in the Opinion of David Elvin QC and Alex Goodman of counsel

62. For completeness:

Paras 4 and 5 –contrary to the factual assertions, the Council has considered res judicata before as Mr Lewis' email to the case officer at PINS dated 16th January 2013 confirms. No explanation was provided by the appellant as to why this

point was not raised in the Statement of Case of September 2012 nor why the point was not raised before 7th January 2013. It appears that the Opinion had been prepared some time in advance of 7th January (and only signed on that day) – Mr Kendrick's evidence refers to both the opinion and the legal issue.

Para 9 – the recent change alleged – this can be traced back, for example, to the report to committee dated 5th January 2012. The minutes disclose that Counsel's advice had been taken into account. It can be traced further back to 2006, as evidenced by Counsel's then Opinion (Mr Grant) and the draft report to committee re the CLEUD. See, further, e.g. the 2009 report to committee which preceded the first enforcement action.

Para 12 – the Opinion makes no reference to the specified terms of the fallback scenarios or positions. The "face of the letter" clearly includes "the fallback positions" referred to in paragraph 35.

Para 15/19 – outside storage – the use of the extensive hardstanding areas (on which the appellant placed considerable emphasis in 2002 (IR 74 – some 3457 (sq metres) has been addressed above.[3]

As to the extent of the B2 use both the Inspector and the Secretary of State considered that to be the buildings and their hardstandings. This is consistent with the fallback positions considered, it is also entirely consistent with views expressed by the Inspector as to the planning unit.

Para 16 the incorrect assumption in the Council's view is that of the appellant that the Secretary of State in paragraph 59 was referring to the site as a whole as opposed to the fallback positions as defined and previously referred to by both

the Inspector and Secretary of State. It is axiomatic that the decision letter is to be read as a whole. The Inspector and Secretary of State took the view that the use of the entirety of the buildings and hardstanding for B2 use (fallback position 1) would not be likely to occur.

Para 17 – the dichotomy is incorrect. There was a B2 use of the buildings and hardstanding but in the Secretary of State's view the entire extent of those buildings and hardstandings would not be used.

Para 20 – the SOCG is not entirely clear: the existing use of the site may be said to be B2 even though the existing use of only part of the site is B2 and Part E for example has a nil use.

Para 21 The Inspector identified his fallback positions and the planning unit having heard the evidence and the Secretary of State considered the recommendations in that light.

Para 25 the Appellant omits reference to the withdrawn CLEU officer report. The appellant refers to an "unexplained change of position" and yet recognises that the report of 5th January 2012 provides the rationale.

Para 26 – the purpose of this paragraph appears to be purely prejudicial. The Appellant well knows (see paragraph 28) that the Council had the benefit of Counsel's input when preparing the January 2012 committee report.

Conclusion

63. It is noteworthy that although the appellant now asserts the 2003 decision "unequivocally determined" an established B2 use across the whole of the

application site, the 'res judicata' argument was not raised until around 7th January this year. If the matter were so clear it could have been raised as part of 2006 Cleud application, the High Court challenge, in the present grounds of appeal, or at the very least, in the Rule 6 statement submitted in September 2012.; particularly as the same Counsel who appeared in the High Court have provided their written Opinion on the matter.

64. In conclusion the Council contend that, properly interpreted, the Inspector's Report and the Secretary of State's Decision Letter did not determine that the whole of the then application site had a B2 use. The B2 fallback position specified applied only to the buildings and hardstandings.

65. Even if that is not the case, the Secretary of State had no jurisdiction (which can only be exercised pursuant to statute), formally and finally to determine the issue on the section 77 appeal, and so the principle of res judicata cannot apply. Consequently, there can be no issue estoppel either as this must arise from a decision to which a cause of action estoppel can apply. Moreover, an issue estoppel cannot arise, in any event, if it is considered that there is ambiguity.

23rd January 2013 **RICHARD HUMPHREYS QC**

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Dear Mr Agala

Re: Inspector's further note received this morning
APP/FO114/C/12/217926

The Council are grateful for the Inspector's further note and note its contents. It is, however, felt that we ought to make one point of clarification on the Council's position at this stage in case it affects the views of the Inspector.

On the third page, paragraph 3 of his note the Inspector states "If I have understood the Council's letter correctly it has indicated that it may wish to reconsider its position with regard to Notices Nos 2 and 3 in the light of the evidence now available from the appellant. Perhaps this could be confirmed on Tuesday?"

We wish to make it clear that the Council, dependent upon the outcome of its investigations into the evidence now available from the appellant, may wish to reconsider its position with regard to all three notices; and it was for that reason, as previously stated, that the Council sought an adjournment of the inquiry i.e. before even the Inspector's consideration of the 'Res Judicata' point. When we referred to "the notices" in our sentence following the heading "If the res judicata point is determined in the appellant's favour" we were referring to all the notices.

I trust that the above clarifies the Council's position.

Yours sincerely

Maggie Horrill
Solicitor
Planning and Environmental Law Manager

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Bath & North East Somerset Council

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BY EMAIL AND FIRST CLASS POST

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ASHFORDS
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Date: 25 January 2013
Our ref: MH/PEV8597
Your ref: JWB/GJC/173755-2
Phone: 01225 395174
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Dear Sir

Re: Pre-Action Protocol Letter regarding proposed Judicial Review of the failure to review the decision to take planning enforcement action in respect of the Former Fullers Earth Site at Odd Down, Bath

I write in response to your letter dated 21 January 2013 (received in hard copy on 24 January 2013).

The details of the matter being challenged

The putative Claimant seeks judicial review of the alleged failure of Bath and North East Somerset Council ("the Council") to review the decision of the Council dated 9 May 2012 to delegate to officers authority to take enforcement action in respect of the use of the Former Fullers Earth site and adjoining land and the issue of the actual notices, each dated 30 May 2012. As paragraph 7 of the letter admits, these notices have now been appealed and a public inquiry is due to open on 29 January 2013 to consider them.

Response to the proposed claim

The putative Claimant does not identify a date on which it is alleged that has been a failure to review the decision.

The Council has taken legal advice both before issuing the enforcement notices and during the preparation for the appeal.

The Council in its response (dated 22nd January) to a note issued to all parties by the Inspector on 21st January stated:

"The Council does not accept any of the arguments put forward in respect of the "res judicata" point and will strongly resist the submission. The Council does not therefore intend to withdraw the notices on that basis."

The Council takes the view, as further set out in its Response to the putative claimant's legal opinion dated 7th January 2013 that:

(1) the Secretary of State did not determine that the whole of the 2003 application site (or the enforcement notice site) had B2 use rights;

(2) further, the Secretary of State did not have jurisdiction to do so;

(3) no issue estoppel could arise or has arisen;

(4) further, and in any event, could not arise if there is ambiguity in what was decided.

It is not accepted that this position is incorrect in law so it is not accepted that the enforcement notices were issued unlawfully; and if the matter is not 'res judicata' the Council is entitled to proceed with its notices.

The putative claimant is seeking to have the res judicata point determined as a preliminary issue by the Inspector appointed to determine the inquiry. Ashfords raised this (ie. a preliminary issue) process as a possibility in their letter to the Inspector dated 18th January to which the Inspector responded on 21st January. The Inspector has already indicated, therefore, that he intends to determine this matter as a preliminary issue, as requested by the putative claimant, so an alternative remedy exists for the determination of this issue.

The Council acknowledges that it has applied for an adjournment of the inquiry (for reasons set out in its letter dated 22nd January) which in practice (please see the most recent note from the Inspector dated 23 January below) will now occur.

The Inspector has confirmed the Council's understanding of the Inspector's position in his note dated 23 January 2013 that he has not formed a view on the issue of res judicata at this present time and cannot have "since I have heard detailed argument from only one party." The Inspector did not formally determine the preliminary issue in his response of 21st January. The Inspector, moreover, has of course invited representations from the Council. Indeed it is axiomatic, a basic principle of natural justice, that the Inspector will "hear the other side", indeed sides (and some third parties are moreover legally represented and have indicated that they will be making submissions next Tuesday) before determining that preliminary issue. At the date of the Note dated 21st January the Inspector, understandably, had only seen the Legal Opinion prepared by Counsel for the Appellant. The Council notes also

that the Inspector was not provided by the putative Claimant with copies of the authorities referred to in that Opinion. It is noted that the pre-action letter was despatched to the Council (by email, after 'close of play', at 6.35 pm on Monday 21st January) in the knowledge that representations on the Joint Opinion were to be sent by the Council to the Inspector by 5 pm Wednesday 23rd January, as indeed occurred. The timing of the pre-action protocol letter in circumstances both where the appellant has raised this very issue for determination by the Inspector and was to receive the Council's legal submissions by 23 January is, with respect, both misconceived and/or unexplained.

Summary

We are responding by 25th January as requested.

We do not propose at this stage to reconsider the enforcement action in the light of the Inspector's letter in terms of the position vis-à-vis res judicata or otherwise in relation to the interpretation of the decision letter.

Yours faithfully

Ms. M. Horrill
Solicitor
Planning & Environmental Law Manager

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Without prejudice to the Notices as issued, but following the Inspector's request to consider the wording of the Notices – solely in respect of the points seeking greater precision as to the uses and reference to the deposit of waste rather than a bund, the following wording is provisionally put forward by the Council for consideration by the Inspector and discussion with the appellant.

Enf Notice 01:

Replacement Section 3:

THE MATTERS WHICH APPEAR TO CONSTITUTE THE BREACH OF PLANNING CONTROL:

Without planning permission:

the change of use of the Land from agriculture and general industrial use (B2) to a mixed use for general industrial use (B2), storage and distribution use (B8) and the deposit of waste material;

Replacement Section 5:

WHAT YOU ARE REQUIRED TO DO:

i) Permanently cease using the Land for B8 uses;

ii) Permanently cease using the Land, save for that area referred to as 'Area A' and coloured yellow on '2012 Enforcement Notice 01 Detail Plan' for B2 uses;

iii) Permanently remove from 'area D' and 'area E' as labelled and coloured green and brown respectively, on the '2012 Enforcement Notice 01 Detail Plan': all stored and processed sands, aggregates, stone, top-soils, sub-soils, green-waste and waste awaiting processing such as hard-core, rubble, road-scalpings, timber, pallets, plastic, skips, tyres, vehicles, window and door frames;

iv) Demolish the waste material deposited along the north-east boundary of the Land in the approximate position indicated by the black dashed line shown on the '2012 Enforcement Notice 01 Detail Plan' so that the ground level is that of the adjoining land;

v) Dismantle all concrete, hardstandings, underlying sub-bases, fences and storage-bays on the Land (other than within 'area A' coloured yellow shown on the attached plan '2012 Enforcement Notice 01 Detail Plan') and remove the resultant materials from the site;

vi) Permanently cease parking of vehicles on the area coloured blue (labelled 'car park') '2012 Enforcement Notice 01 Detail Plan' apart from as part of the residential use of 1 and 2 The Firs

The above would relate to the same plan as already attached to notice No 1.

One Notice

Again, entirely without prejudice to its existing Notices, but so as to show the Inspector how the notices might be amalgamated into one notice should he so decide having heard the evidence, the following wording might be used:

Replacement Section 3:

THE MATTERS WHICH APPEAR TO CONSTITUTE THE BREACH OF PLANNING CONTROL:

Without planning permission:

the change of use of the Land from agriculture and general industrial use (B2) to a mixed use for general industrial use (B2); storage and distribution use (B8); the deposit of waste material; storage, distribution and repair of scaffolding (sui generis use); and contractors yard for the preparation, cutting, forming and storage of stone and equipment (sui generis).

Replacement Section 5:

WHAT YOU ARE REQUIRED TO DO:

i) Permanently cease using the Land for B8 use;

ii) Permanently cease using the Land, save for that area referred to as 'Area A' and coloured yellow on '2012 Enforcement Notice 01 Detail Plan' for B2 uses;

iii) Permanently cease using the Land for the deposit of waste material;

iv) Permanently cease using the Land for B8, storage, distribution and repair of scaffolding (sui generis use);

v) Permanently cease using the Land as a contractors yard for the preparation, cutting, forming and storage of stone and equipment (sui generis);

vi) Permanently remove from 'area D' and 'area E' as labelled and coloured green and brown respectively, on the '2012 Enforcement Notice 01 Detail Plan': all stored and processed sands, aggregates, stone, top-soils, sub-soils, green-waste and waste awaiting processing such as hard-core, rubble, road-scalpings, timber, pallets, plastic, skips, tyres, vehicles, window and door frames;

vii) Remove the waste material deposited along the north-east boundary of the Land in the approximate position indicated by the black dashed line shown on the '2012 Enforcement Notice 01 Detail Plan' so that the ground level is that of the adjoining land;

viii) Dismantle all concrete, hardstandings, underlying sub-bases, fences and storage-bays on the Land (other than within 'area A' coloured yellow shown on the attached plan '2012 Enforcement Notice 01 Detail Plan') and remove the resultant materials from the site;

ix) *Permanently cease the parking of vehicles on the area coloured blue (labelled 'car park') '2012 Enforcement Notice 01 Detail Plan' apart from as part of the residential use of 1 and 2 The Firs.*

A revised plan removing the "white areas" on Enforcement Notice 01 Detail plan would also be issued.

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Inspector's Note No 3: Matters arising at the adjournment

I have prepared this short note to confirm and in one minor way extend the timetable that was agreed at the end of the session yesterday (Wednesday) prior to the adjournment.

*By Friday 8 February my rulings will be circulated to all parties.
*By midday 1 March, in consideration of both my rulings and what it now understands to be the appellant's evidence, the Council will respond to the Planning Inspectorate case officer to explain its position with regard to the notices (are any/all to be withdrawn?) and any additional evidence that it considers will need to be called (nature, documents to be produced and number of witnesses as required by the Rules and when this would be available). Hopefully, this response can then be circulated that afternoon.
*By midday 8 March ALL parties (except the Council) should respond to the case officer in consideration of the rulings and the Council's position with similar details of any new evidence they consider will be required and full details of documents etc again in line with the Rules. Again, I would hope these responses could be circulated to all that afternoon.
*By midday 15 March ALL parties should then provide realistic estimates of the time to present their cases and cross examine the other side. In doing so, it should be assumed that all openings and closings will be in writing (but will still need to be read albeit at pace) and evidence will be taken as read. As applications for costs have also been indicated these and the responses to them should be in writing but time must be allowed for any additional points to be made. It would also assist if advocates' known availability could be provided.
*As appropriate, the Planning Inspectorate will then arrange for the resumption of the Inquiry on the basis of the time estimates given and, with regard to the spirit and letter of the Rules, a timetable for the submission of any new material will be set out. This will include the submission of a Statement of Common Ground which should include the views of the Rule 6 parties and which will be timed to be available in advance of the preparation of any further evidence.

I believe the above reflects the discussion prior to the adjournment. The only additional stage is the further iteration between 8 and 15 March but this seems to me necessary.

For the avoidance of doubt **all** new material should be submitted in accordance with the timetable which, for the evidence, will ensure 4 weeks are available before the resumption. I will therefore require very exceptional reasons to justify the submission thereafter of any further documents prior to or during the Inquiry.

Brian Cook
Inspector
31 January 2013

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