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Date: 23 December 2011
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To: All Members of the Development Control Committee

Councillors:- Lisa Brett, Neil Butters, Gerry Curran, Liz Hardman, Eleanor Jackson, Les Kew, David Martin, Douglas Nicol, Bryan Organ, Martin Veal, David Veale and Brian Webber
Permanent Substitutes:- Councillors: Rob Appleyard, Sharon Ball, John Bull, Nicholas Coombes, Sally Davis, Malcolm Lees, Dine Romero and Jeremy Sparks

Chief Executive and other appropriate officers
Press and Public

Dear Member

Development Control Committee: Thursday, 5th January, 2012

You are invited to attend a meeting of the **Development Control Committee**, to be held on **Thursday, 5th January, 2012** at **2.00pm** in the **Brunswick Room - Guildhall, Bath**

The Chair's Briefing Meeting will be held at 10.00am on Tuesday 3rd January 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 - Thursday, 5th January, 2012

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

   Members who have an interest to declare are asked to state:

   (a) the Item No and site in which they have an interest; (b) the nature of the interest; and (c) whether the interest is personal or personal and prejudicial.

   Any Member who is unsure about the above should seek advice from the Monitoring Officer prior to the meeting in order to expedite matters at the meeting itself.

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. LAND AT FORMER FULLERS EARTHWORKS,FOSSEWAY, COMBE HAY, BATH (Pages 9 - 180)

To consider a joint report by the Planning and Environmental Law Manager and Development Manager

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

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 (Personal and Prejudicial)

- 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, Senior 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.

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Bath and North East Somerset Council			
MEETING: **Development Control Committee** MEETING DATE: **5th January 2012**	AGENDA ITEM NO:		

REPORT OF: **David Trigwell, Divisional Director of Planning and Transport Development**

Maggie Horrill, Planning and Environmental Law Manager (Contact Ext. No. 5174)

REPORT ORIGINATOR: **Ms Lisa Bartlett, Development Manager (Tel. Contact No. 7281)**

DATE PREPARED: **20th December 2011**

AN OPEN PUBLIC ITEM

BACKGROUND PAPERS

(i) Application for planning permission 00/02417/FUL

(ii) Supporting evidence submitted with the Certificate of Lawful Existing Use application in 2006 (06/03301)

(iii) Development Control Committee Reports of 29 October 2008, 26 February 2009 and 18 May 2011

(iv) Documentation related to the enforcement notice appeals dated 20 April 2009

(v) West of England Joint Waste Core Strategy, adopted March 2011 (JCWS)

(vi) Inspector's Report on the Joint Waste Core Strategy

(vii) High Court Judgment of Mr. Justice Lindblom dated 3 December 2010

(viii) Other historic applications and correspondence

(ix) Appeal forms including grounds of appeal against the enforcement notices dated 20 April 2009.

(x) Statement of Common Ground from call-in Inquiry 2003 in respect of application 00/0241/FUL

Annexes:

Annex A – Development Control Committee Report of 18 May 2011

Annex B – Two enforcement notices dated 25 February 2009

Annex C – Environmental Impact Assessment- Screening Opinion

Annex D – Aerial photographs 1946; 1968; 1975; 1999; 2002; 2005; 2006 and 2009 Annex E – 2003 Photographs Annex F – Plans numbered 1-2
TITLE: **Report - Land at Formers Fullers Earth Works, Fosseway, Combe Hay, Bath**
WARD : **Bathavon West**

1.0 PURPOSE OF REPORT

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

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

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

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

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

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

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

2.0 BACKGROUND

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

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

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

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

- A new driveway;
- Fences and gates;

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

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

Planning history

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

- Planning permission was granted in 1948 for the addition of a canopy to an existing works building to facilitate the loading of vehicles in adverse weather (ref:1583).

- Planning permission was granted for the erection of a warehouse for the storage or fullers earth (ref:1583/A). In the same year, permission was given for the erection of a canopy (ref:1583/B).

- In 1970, planning permission was granted for the reclamation of land at the fullers earth works by means of stripping the top soil, filling with excavated materials and replacing with 9 inches of top-soil. This related to land north-east (referred to below as 'Area E'). Plans included with subsequent submissions indicate that that this permission was implemented.

- In 1973 an enforcement notice was served with regard to the tipped unauthorised materials not in accordance with permission 1583/B.

- In 1974 no objections were raised by the council for the extension, re-roofing and raising of the roof of parts of the existing building as well as the erection of two silos. This was under the provisions of the General Development Order.

- In 1978, planning permission was granted for the reclamation of land where subsidence had occurred through clay extractions (ref:B2452/A). The plans indicated that earlier phases (including that within Area A) had been previously restored as an earlier phase of the development (at least in part approved by the earlier 1970 permission).

- In 1978 planning permission was refused (ref:B2452/A) for the erection of a concrete batching plant for the production of ready mixed concrete. The reasons for refusal related to green belt policy, landscape impact and increased traffic leading to highway hazards.

- In 1987 an outline planning application was refused for the siting of the buildings and the means of access was made for the redevelopment of the site for light industrial and office purposes. The application was refused for green belt reasons, due to inadequate access arrangements, inadequate sewerage and drainage proposals and inadequate on-site car parking. An appeal against the decision was withdrawn.

- A planning application for the partial demolition, refurbishment and extension of existing building with ancillary access and external works to form office accommodation and 19 "live/work" units was called in by the Secretary of State in 2000 (00/02417). The application was refused notwithstanding the council and planning Inspector's support for the proposal. This was on the basis, amongst other things, that the development would have been inappropriate development within the green belt due to a loss of openness as well as its urbanising effect.

- In 2005 planning permission was refused for the demolition of existing buildings and silos of 1555m^3 and the erection of a triple pitched steel framed industrial building of 2250m^3 (05/01568/FUL). An appeal against the council's decision was dismissed because even though the Inspector did not consider that particular proposal would have a harmful effect upon the character and appearance of the surrounding Area he considered that;

    (i) that the development would be inappropriate development harmful to the purposes of the green belt;
    (ii) that it would conflict with the principles of sustainable development; and
    (iii) that it would have an adverse impact upon highway safety.

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

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

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

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

- An application for the “erection and operation …. of a 45m high wind turbine for a fixed period of 5 years” (06/00209). Withdrawn.

- The “Victims Of Fullers Earth” (who do not own the site) submitted an application to “change of Use of existing 19th century building for use as Ecology, Rural Crafts and Nature Study Centre, demolition of redundant buildings and re-instatement of damaged countryside” (06/02247). The Application was withdrawn.

- A retrospective planning application to seek to regularise the construction of the revised vehicular access (07/00905) is still pending consideration.

- An application was recently approved (10/01774/FUL) for the re-profiling of land for the purposes of agricultural improvement of the field to the south west of the site. This was approved on 13th December 2010. A further application to discharge conditions was then submitted (11/01516/COND) and approved.

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

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

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

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

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

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

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

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

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

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

The Council's position.

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

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

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

The Inspectors findings.

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

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

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

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

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

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

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

3.014 At paragraph 432 the Inspector commented;

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

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

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

continuing B2 use could cause some damage to the setting of the World Heritage Site and the visual amenities of the Green Belt. The extent of this damage is dependent on the extent and type of use. The Secretary of State is not satisfied on the basis of the evidence before him that it is likely that the entire site will be used for B2 use under the fallback position" (emphasis added).

Evidence submitted with the CLEU Application.

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

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

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

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

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

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

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

3.020 The statutory declaration of Andy Ridings comments

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

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

Other Documentary Evidence

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

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

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

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

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

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

Photographs.

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

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

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

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

3.030 The 1968 aerial photograph shows some structures or surfaces in Area D adjacent to the dwellings. However by 1999, Area D had become overgrown and the curtilages of the dwellings were still distinct from it.

3.031 Area D was still largely overgrown in 2002 according to the aerial photograph. Some parking was taking place on a hard-surface to the south of the dwellings at this time. By 2005 this small parking Area had been extended further into the adjoining agricultural land and Area D had signs of being in use possibly in connection with Area A. This is apparent because the surface of the land is scarred by what looks like an informal track created by activity originating from Area A. There are also some materials on Area D at this time.

3.032 This small parking area had increased substantially by the time officers visited in 2008. By 2009 an aerial photograph shows that Area D appeared to have containers on it. A site visit in February 2010 confirmed that this area had a hard surface although no containers existed at that time.

Further Representations.

Gazelle Properties and site operators

3.033 The site is owned by Gazelle Properties Ltd. Their consistent view has been that the current uses take place across the site and are entirely lawful being within use class B2.

3.034 On 26 September 2008 the Council served a number of PCNs on the owner and different operators at the Site. PCNs were sent out to the following;

(a) Maple Scaffolding
(b) Stonecraft of Bath Ltd
(c) Maple Skip Hire
(d) Hanson Quarry Products Limited
(e) Waste Recycling @ Bath Limited

(f) Beechwood Environmental Logistic Limited

(g) Aggsales

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

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

(i) which companies operate skip hire/skip storage;

(ii) any relationship between skip hire/storage and any other use of the site; and

(iii) when the concrete surfacing of the compound was constructed;

(iv) materials stored.

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

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

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

Waste Recycling @ Bath Ltd

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

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

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

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

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

Stonecraft of Bath Ltd

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

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

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

Maple Scaffolding.

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

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

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

Protect Bath/Victims of Fullers Earth

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

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

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

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

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

3.052 Full representations can be found at http://idox.bathnes.gov.uk/WAM/showCaseFile.do?appNumber=11/05218/CONSLT

Conclusions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Area B

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

Area C

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

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

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

4.0 EXPEDIENCY OF TAKING ENFORCEMENT ACTION

HIGH COURT JUDGMENT

4.01 As has previously been reported, the Council's past decision to issue enforcement notices against the Fuller's Earth Site was successfully challenged in the High Court by Gazelle Properties Limited on the basis that the Council's decision to issue the notices was unfair and irrational. The High Court found in favour of Gazelle, quashed the notices, and determined that negotiations which had taken place between the Council and the Appellant were a material consideration the weight of which was for the Committee to decide in balancing whether or not it was expedient to take enforcement action against the site which they hadn't done.

4.02 Further, as Members will be aware, the Fuller's Earth Site has been allocated for a waste recycling facility in the Joint Waste Core Strategy. On this matter, Mr Justice Lindblom held that;

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

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

4.03 It is important to note that the Decision of the High Court in that case does not preclude the Council from taking enforcement action against the site. It is however incumbent upon the Council to identify and assess all of the relevant material considerations in determining whether it is expedient to enforce against the present use of the Fuller's Earth Site.

4.04 It is clear that breaches of planning control exist. The High Court Judgment does not fetter the Council's ability to reconsider enforcement action however there are matters that need to be taken account of that were not properly considered previously.

4.05 Enforcement action should not be taken unless it is expedient to do so having regard to the provisions of the development plan and to any other material considerations.

4.06 An unauthorised change of use has occurred on site and it is therefore open to the Council to consider enforcement action. As explained above, the Judgment of Mt Justice Lindblom commented on the following material considerations in respect of the expediency of enforcement action:

- The first issue related to negotiations between the owners of the site and another company.

- The second related to the support given by the council for the site to be included as an allocated site within the JWCS as a 'residual waste facility'. Residual waste is defined within the JWCS as that which remains after recycling and composting has or can reasonably be

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

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

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

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

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

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

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

Development Plan policies

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Other material Considerations – emerging Local Policy

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

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

Other material Considerations – National Policy

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

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

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

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

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

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

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

Other material considerations – representations received

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

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

Other concerns are:

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

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

Application of development plan and other material considerations

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

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

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

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

4.035 The main issues to consider in assessing this are:

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

Green Belt, countryside and setting of the WHS

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

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

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

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

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

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

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

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

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

Residential living conditions

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

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

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

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

Impacts upon highway safety

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

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

Nature Conservation

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

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

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

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

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

Environmental Impact Assessment.

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

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

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

4.054 The screening opinion considered the following potential environmental effects;

(i) Traffic

4.055 There is a regular flow of HGVs to and from the site on a daily basis as part of the lawful B2 use of the site. The stonemasons and scaffolding uses are likely to lead to a few traffic movements per day taking materials and equipment to and from sites where they are utilised, and in addition there is likely to be a short term increase in traffic in order to import 55,000m^3 of material pursuant to agricultural improvements. However, any increase in traffic movements needs to be judged bearing in mind the historic use which was a mineral processing use which would inevitably have entailed a significant number of traffic movements. The increased numbers of vehicles if the use of the site was permitted would not be so noticeable or substantial as to have significant impacts.

(ii) Air Quality and Noise

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

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

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

(iii) Water

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

(iv) Ecology

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

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

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

(v) Landscape / visual impact;

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

(vi) Geology

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

(vii) Cultural Heritage

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

(viii) Cumulative Impacts

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

Conclusion on Screening opinion.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Overall Balancing of issues

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

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

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

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

Expediency of taking enforcement action against operational developments

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

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

5.0 Recommendations

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

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

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

HUMAN RIGHTS ACT 1998

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

General Note
This specific delegated authority will, in addition to being the subject of subsequent report back to Members in the event of Enforcement Action either being taken, not being taken or subsequently proving unnecessary as appropriate, be subject to:
(a) all action being taken on behalf of the Council and in the Council's name;
(b) all action being subject to statutory requirements and any aspects of the Council's strategy and programme;
(c) consultation with the appropriate professional or technical officer of the Council in respect of matters not within the competence of the Head of Planning Services, and
(d) maintenance of a proper record of action taken.

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BATH AND NORTH EAST SOMERSET COUNCIL			
MEETING: **Development Control Committee** MEETING DATE **18 May 2011**	AGENDA ITEM NO:		
REPORT OF **David Trigwell, Divisional Director of Planning and Transport Development** **Maggie Horrill, Planning and Environmental Law Manager (Tel: 01225 395174)** REPORT ORIGINATOR: **Ms Lisa Bartlett, Development Manager (Tel:01225 477281)**			
AN OPEN PUBLIC ITEM			
BACKGROUND PAPERS: Application for planning permission: 00/02417/FUL Development Control Committee reports of 29 October 2008 and 26 February 2009; Two Enforcement Notices dated 25 February 2009 West of England Joint Waste Core Strategy Inspector's Report on the Joint Waste Core Strategy **Annexes:** Annex A – Order of the High Court dated 7 December 2010. Annex B - Site Location Plan Annex C - Minute of Development Control Committee Meeting of 18 February 2009 Annex D - Judgement of Mr Justice Lindblom dated 3 December 2010 Annex E - Extract Joint Waste Core Strategy – Key criteria and development management policies relating to the Fullers Earth land.			
TITLE**:** Land at former Fullers Earth Works, Fosseway, Combe Hay, Bath			
WARD :- Bathavon West			

1.0. THE PURPOSE OF THIS REPORT

1.1. The purpose of this Report is to inform the Committee of the Order of the High Court **(Annex A)** following the claim for Judicial Review against the Council's decision to issue Enforcement Notices for alleged unauthorised development at the Former Fullers Earth Works ("Fullers Earth") and to update the Committee on the West of England Joint Waste Core Strategy ("JWCS") so far as it relates to the Fullers Earth land.

2.0. LOCATION AND DESIGNATION

2.1. The Fullers Earth Land is shown edged in bold on the attached site location plan (**Annex B).** It is within the Bath and Bristol Green Belt and close to the Cotswold Area of Outstanding Natural Beauty. It is on high ground about 800 metres from the south-western edge of the city of Bath, on the south-eastern side of the Fosse Way which, as the A367 road, forms the main route into the city from that side. The city is a World Heritage Site.

2.2. In the late 19th century, and for some time after that, the land, or part of it, was used for the extraction of Fuller's Earth. Latterly it has been used for a variety of purposes, including the use of the Land for the recycling of waste.

3.0. INTRODUCTION AND BACKGROUND

3.1. Fullers Earth has a complex planning history and has been the subject of concern and complaints from the Bath Preservation Trust, Combe Hay Parish Council, South Stoke Parish Council and local residents.

3.2. At the meeting of this Committee on the 18 February 2009 the Development Control Committee delegated authority to take enforcement action when it resolved that the Divisional Director for Planning and Transport Development, in consultation with the Planning and Environmental Law Manager, be authorised to exercise 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-enactments of the Act or Order or Regulations made under the Act) in respect of the above site. A copy of the full Minute is attached to this Report as **Annex C**.

3.3 Two Enforcement Notices were served on 25 February 2009 and the owner of Fullers Earth, together with another appealed against the notices on 20 April 2010. The appeals were held in abeyance by the Planning Inspectorate pending the out come of the Judicial Review Claim.

3.4. The Hearing into the Claim for Judicial Review was heard in the High Court on 23 and 24 November 2010. The Order of the High Court is attached as Annex A to this report, but a summary of the main points set out in Mr. Justice Lindblom's Judgement of 3 December 2010 is set out in paragraph 5 below.

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4.0 ORDER OF THE HIGH COURT

4.1. A copy of the Order is annexed to this Report at **Annex A** and from which the Committee will see that the Court quashed the Council's decision to take enforcement action and to issue the two enforcement notices. It also ordered the Council to pay the Claimant's costs.

5.0. HIGH COURT JUDGEMENT

5.1 A copy of the whole Judgement is annexed to this Report at **Annex D**, but I set out below a summary of what I consider to be the salient points in the Judgement for the Committee to consider when assessing the way forward for the Fullers Earth land.

The Court held that:-

5.1.1. the Court had jurisdiction to hear a claim for judicial review of a local authority's decision that it was expedient to take enforcement action against a landowner for change of use of its land.

5.1.2. when making its decision to take enforcement action the Council had failed to take account of material considerations and had excluded relevant information.

5.2. The Owner of Fullers Earth, and another, applied for judicial review of the Council's decision to issue enforcement notices. It was successfully argued in the High Court that the Council's decision to issue the notices was unfair and irrational. This was primarily based around the case made that:-

5.2.1. Firstly, the negotiations with another Company should have been taken into account when the decision was made. There was critisim that the Council had failed to take into account the intentions of that Company who argued that they were negotiating with the co-operation of the Owner. The Council argued that the negotiations with the Company were unsubstantiated and not well advanced with Planning Services and that the harm caused by the uses and development on the Land should not be allowed to continue. I would draw you attention to paragraph 65 of the Judgement:

"Even if one were to take the view that the considerations which bear on the expediency of issuing an enforcement notice must be considerations relating to the character, use and development of land, and must go no wider than that, it would be my view that the matters the members were told to disregard at the committee meeting on 18 February 2009 were matters truly germane to that question. They clearly embraced not only factors of relevance to the planning history of the site but also factors relevant to its planning future. And they were clearly capable of affecting the view to which the members had come as to the good sense or otherwise of taking formal steps to remove the existing use or uses of the land. Whether, in land use planning terms, it would be advantageous to compel the present industrial activity on the site to cease when another

form of industrial development might possibly commend itself to the Council surely had the potential to influence the decision with which the members were faced. They were not determining such a proposal, or pre=-empting any future decision. But the prospect of such a scheme coming forward, against the background which Mr. White wanted to describe and within the timescale he envisaged, was, in my judgment, a consideration material to expediency. There is, and could be, no suggestion that what Mr. White wanted to say to the committee was motivated by bad faith, or was simply a last minute ruse to deflect the enforcement of planning control. His remarks, had they been listened to, might not have proved decisive, or even significant. But that is not for the court to judge. The court is concerned only with establishing materiality. And in my view the representations Mr. White wanted to make to the members were a material consideration" (my emphasis)

5.2.2. The Second issue was the Council's support for the allocation of the Fullers Earth land in the JWCS as a 'Residual Waste Facility'. Whilst the allocation was included *after* the Enforcement Notices were authorised and issued and notwithstanding the fact that the Council argued that the existing use is not only contrary to the current development plan but *would also be contrary* to the emerging policy in the JWCS, since it is not a Residual Waste site, the Judgement is clear in that (1) the allocation of the land in the JWCS is a material change in circumstances and the matter should have been reported back to Committee to allow the Committee to consider whether, in light of the Council's support for the allocation, it was still expedient to continue with the enforcement action and (2) the Council's self-evident acceptance in principle of this form of industrial use of the land, notwithstanding its designation. In this regard I would refer you to paragraphs 104 to 106 of the Judgement:-

"104 I see a distinction between the situation in which a local planning authority has not yet issued a statutory decision on an application for planning permission, though it may have resolved to grant such permission, and that in which it has both resolved to issue and has issued an enforcement notice to remedy a breach of planning control. The former situation can be said to be one in which the particular statutory process involved is still incomplete; in the latter the relevant process has reached its finality. But, as Mr. Elvin points out, the position is not quite as simple as that. The existence of the power in section 173A to withdraw or amend an enforcement notice after it has been issued, and even after it has taken effect implies a continuing responsibility for the authority to keep under review the expediency of the action it has decided to take.

105 Whether or not it would be right to construct from section 173A a continuous proactive duty to review, as Mr. Elvin's submissions suggest, it is only necessary for the purposes of the present case to discern the requirement that the power conferred by this provision be exercised in accordance with public law principle. What this means at least, in my view, is that when there emerges, while an enforcement notice subsists, some new factor of which the local planning authority is or should be aware, and which is material to the expediency of the notice, the authority should consider whether to exercise its power to withdraw or amend. It seems to me that this accords with the rather broader statement in the

note at p173a.03 IN THE Encyclopaedia of Planning Law and Practice, which I would respectfully endorse:

"The ability to withdraw a notice that has come into effect allows the authority to sweep clean the planning title of a site where the enforcement notice is no longer relevant."

106 What then are the consequences of such a requirement in this case? I think they are clear. In pursuing the allocation of the site for a waste recycling facility the Council has self-evidently accepted the principle of this form of industrial use on the site, no matter whether it is properly to be categorized as a "sui generis" or as a Class B2 use. To have done this the Council must presumably have considered whether such a facility could be acceptable in principle, notwithstanding the site's presence in the Green Belt and the Area of Outstanding Natural Beauty and its proximity to the World Heritage Site…….".

6.0 WEST OF ENGLAND JOINT WASTE STRUCTURE CORE STRATEGY

6.1 The West of England Joint Waste Core Strategy ("JWCS") sets out the spatial planning policy framework for waste management for the four West of England Unitary Authorities ("UAs"), namely Bristol City, North Somerset, South Gloucestershire and Bath and North East Somerset Council. It has been prepared with the other UAs.

6.2. The JWCS was subject to Independent Examination in Public in November 2010 and the Inspector who held the Public Examination has concluded that the JWCS has met all legal requirements and is 'sound' in his binding report. A copy of the Inspector's report is a background paper to this report and is available on the Council's website.

6.3. The JWCS was adopted by the Council on 25 March 2011. It sits within the Bath and North East Somerset Development Framework and is a key element of the devlopment plan when considering development proposals for waste management superseding some of the Council's Local Plan Policies.

The JWSC sets out vision and objectives for sustainable waste management and sets the planning framework up to 2026 reflecting the waste hierarchy. The key policies are:-

6.3.1 **Policy 1 Waste Prevention:** Waste prevention is a fundamental principle that has clear links to spatial planning and policy will encourage waste generation to be reduced across the sub-region.

6.3.2. **Policy 2 - 4 Recycling & Composting (Non-residual waste treatment facilities):** Additional recycling and composting capacity requirements across the sub-region will be encouraged through positive criteria based policy. Specific sites are not allocated but opportunities are presented in policies 2, 3 and 4.

6.3.3. **Policies 5 - 7 Residual Waste Treatment:** The Spatial Strategy provides an appropriate spatial distribution for the residual waste management infrastructure required to meet the sub-regions needs. Sites and locations considered to be key to the delivery of the Spatial Strategy have been identified in policy 5. 'Key Development Criteria' (Appendix 1 of the JWCS) outlines the issues that have to be considered. Policy 6 presents operational expectations of residual waste treatment facilities. Policy 7 identifies how residual waste treatment proposals not allocated in the JWCS, which seek to deliver the spatial strategy, will be considered.

6.3.4. **Policies 8 & 9 Landfill:** The Strategic Objectives of the JWCS seek to ensure that value is recovered from waste prior to disposal and to reduce reliance on landfill. Any new landfill capacity required will be considered against criteria based policy. Proposals will be expected to demonstrate that the waste to be disposed of could not reasonably and practicably have been treated otherwise.

6.3.5 **Policy 10 Waste Water treatment**:

6.3.6 **Policies 11 & 12 Development Management Policies**: Development Management Policies 11 and 12 complement the Spatial Strategy and will ensure all new waste related development maximises opportunities and minimises adverse impacts.

6.3.7 **Policy 13 Safeguarding operational and allocated sites for waste management facilities**: Operational and allocated waste sites are safeguarded by policy 13.

6.4. The JWCS seeks to deliver, by 2020, diversion from landfill of at least 85% of municipal, commercial and industrial wastes through recycling, composting and residual waste treatment. A minimum of 50% of this total recovery target is intended to be achieved through recycling and composting, leaving **35%** to be delivered through **residual treatment capacity**. The JWCS is not technology specific, recognizing that residual waste treatment facilities incorporate:

- **mechanical and biological processes**: A generic term given to any facility incorporating mechanical (eg. material recycling/recover facilities) and biological (eg in vessel composing) processes.

- **thermal processes**: Waste management processes involving medium and high temperatures to recover energy from the waste which includes pyrolysis and gasification based processes.

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7.0 The JWCS and Fuller's Earth

7.1 The Fuller's Earth land is allocated though Policy 5 of the JWCS, along with Broadmead Lane in Keynsham, with indicative requirements for residual waste treatment of Zone C 150,000 tonnes per annum.

7.2 **Residual Waste Facility:** Residual waste is defined as that which remains after recycling and composting has or can reasonably be assumed to have occurred. (ie. the waste no longer able to be recycled, re-used or composted)

7.3 Planning permission for development involving the treatment of residual wastes where it supports the delivery of the Spatial Strategy is likely to be granted on the sites allocated, subject to the Key Development Criteria and development management policies.

7.4 The Key Development Criteria and development management policies that relate to Fullers Earth are annexed to this report at **Annex D.** Fullers Earth has been found to be unsuitable for a thermal treatment facility under the Habitats Regulation Assessment (HRA), but potentially suitable for the other waste facility types considered.

8.0 BACKGROUND TO ALLOCATION PROCESS

8.1 Fuller's Earth was one of 32 of the original sites identified but was discounted based on a discretionary negative criteria due to it being in the Green Belt and its proximity to the AONB. The land was therefore not included as a potential residual waste facility site in the JWCS Preferred Options strategy (public consultation held from 15th January to 12 March 2009). It was not proposed to be allocated as a potential residual waste facility site at the time the Council as Local Planning Authority issued the Enforcement Notices.

8.2 During the Preferred Options public consultation held from 15 January to 12 March 2009, **SITA (Southern) Ltd** submitted their representation recommending the re-appraisal and allocation of the Fullers Earth Site for a potential strategic waste management site for recovery (residual) facility.

8.3 Following the end of the public consultation, Environmental Resources Management Ltd (ERM) were appointed by the West of England Partnership as Project Manager and they reviewed the plan including assessing new sites and re-assessing sites considered previously. ERM produced a Revised Detailed Site Assessment Report (June 2009) and recommended the

inclusion of the Fullers Earth Site's allocation for development of a strategic residual waste management facility to meet 'the soundness test' through which the plan should be 'justified, effective and consistent with national policy'.

8.4 A JWCS Progress Update including the potential allocation of the site was published for public consultation from early July to August 2009. Following the Progress Update consultation, the draft submission document was prepared which included the allocation of the Fullers Earth Site. The Council at its meeting on the 19 November 2009 approved the JWCS for the purposes of publication in December 2009 in order for representations relating to issues of soundness to be made during January/February 2010; and submission in April 2010 to the Secretary of State after taking into account comments received.

8.5 Following the consultation, the JWCS was submitted to the Secretary of State in July 2010 and the independent examination was held in November 2010 in which the Inspector concluded that the JWCS provides an appropriate basis for the waste planning of the area over the next 15 years. The Partnership has sufficient evidence to support the strategy and can show that it has a reasonable chance of being delivered.

8.6 In his report the Inspector states that;

> *"the former Fuller's Earth site is subject to a number of constraints. Amongst other things, reference has been made to the ecological value of the site; its geological importance; its location relative to the Cotswolds Area of Outstanding Natural Beauty and any extension of the AONB; the presence of a major aquifer; its location within the Green Belt; and the potential effect on the setting of the nearby City of Bath World Heritage Site. Additional concerns include the alleged carrying out of unauthorised development (the subject of enforcement action[1]) and the fact that the previously envisaged growth of the area may not occur.*
>
> *The Partnership recognises that the site is constrained. Its approach has been to set down key development criteria, specific to the site, which would need to be taken into account in any scheme of development. The location is seen as important. It would serve the needs of the south east of the plan area as well as the area as a whole. ----- In terms of the impact on the environment, I see no reason in principle why an*

[1] The enforcement notices were subsequently quashed by the High Court (Order issued 3 December 2010)

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acceptable development could not come forward. I support the approach of the Partnership and the identification of key development criteria. ------On a related matter, I see no need to extend the boundaries of the allocated site. From a developer's point of view, I can see the sense of locating infrastructure such as balancing ponds on adjacent land. However, any scheme would have to be considered on its merits. Bearing in mind also the Green Belt location, it would be wrong to anticipate the acceptability of forms of development different from those assessed through preparation of the Joint Waste Core Strategy"'

8.7 In summary, the re-consideration of the Fullers Earth Site was triggered by the representation made by SITA promoting the inclusion of the site through the Preferred Options consultation held from January to March 2009 and the subsequent site assessment (June 2009) undertaken by ERM. The site was not included as a potential residual waste facility sites when the Council issued the Enforcement Notices.

8.8. The Former Fuller's Earth Works is now allocated as a Strategic Site for residual waste facility and safeguarded for that use. Any planning applications apart from this safeguarded use will be contrary to the policies and will be subject to Development Criteria and Development Management policies.

9.0 CURRENT POSITION

9.1 The two enforcement notices have been quashed by the High Court

9.2 The Inspector who resided over the Examination in Public of the JWCS has confirmed the allocation of Fullers Earth as a 'residual waste facility'

9.3 The Council adopted the JWCS on 25 March 2011 and by doing so is promoting Fullers Earth as a residual waste facility.

10.0 CONCLUSION

10.1. It is acknowledged that there is still third party local concern regarding the current uses and development on Fullers Earth. It is, however, clear from the High Court judgement, given the allocation of Fullers Earth in the JWCS as a residual waste facility that it would not be expedient to take further enforcement action regarding the current uses and development on Fullers Earth but that the Council should work with the Owner of Fullers Earth and assist in getting a proposal through the process for the land to be used as a residual waste facility as allocated in the JWCS.

11.0 RECOMMENDATION

11.1 That the Committee note the contents of this report, acknowledge the decision of the High Court and the allocation of Fullers Earth in the JWCS and in light of this endorse the Officer's proposal to work positively with the Owner to achieve delivery of a residual waste facility on Fullers Earth.

11.2. That the Owner of Fullers Earth be written to setting out the Council's support for the allocation of the land in the JWCS and inviting its assistance in achieving this aim and seeking representations from the Owner on any progress on its proposal to fulfil the allocation.

John Bosworth.

Approved.
K.L.
3 xii 10

IN THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT
Neutral Citation: [2010] EWHC 3127 (Admin) CO/4717/2009

BETWEEN:

THE QUEEN
ON THE APPLICATION OF
GAZELLE PROPERTIES LIMITED
AND
SUSTAINABLE ENVIRONMENTAL SERVICES LIMITED

Claimants

AND

BATH AND NORTH EAST SOMERSET COUNCIL

Defendant

DRAFT ORDER PROPOSED BY THE CLAIMANTS

UPON hearing leading counsel for the Claimants and counsel for the Defendant it is ordered that:

1. There shall be an order quashing the decision of the Defendant's Development Control sub-Committee on 18 February 2009 to delegate authority to its Divisional Director of Planning and Transport Development to take enforcement action in respect of land at the site known as the former Fuller's Earthworks site, at Combe Hay, Bath ("the site").

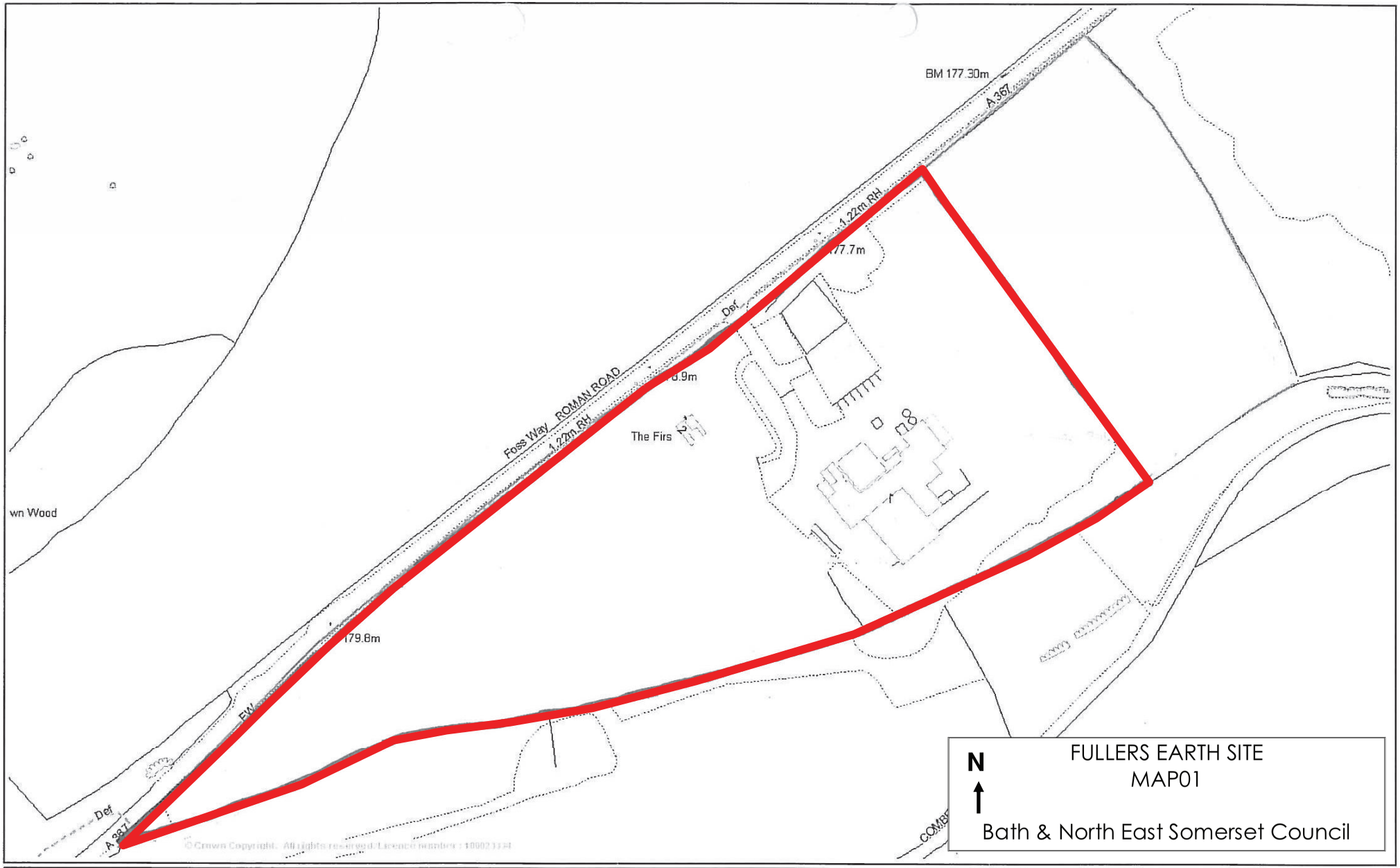
2. There shall be an order quashing the subsequent decision of the Divisional Director of Planning and Transport Development on 23 February 2009 to issue two enforcement notices in respect of the site.

3. There shall be an order quashing the two enforcement notices in respect of the site issued by the Divisional Director of Planning and Transport Development, dated 25 February 2009.

4. There shall be an order that the Defendant do pay the Claimant's costs (which for the avoidance of doubt include the Claimant's costs in claim CO/123/2009) to be assessed if not agreed.

Dated 3 December 2010

By the Court



Land Adjacent to the A367 Fosse Way, Odd Down, Bath

Bath & North East Somerset Council, Planning Services,
Trimbridge House, Trim Street, Bath BA1 2DP

Scale 1/2500

Centre = 372835 E 161211 N

Date 5/11/2007
Drawn by:

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MINUTES OF THE DEVELOPMENT CONTROL COMMITTEE

Wednesday 18th February 2009

291 ENFORCEMENT ITEM - LAND AT FORMER FULLER'S EARTHWORKS, ODD DOWN, BATH (Report 11)**.**

Referring to the Report and the Minutes of this Committee held on 29th October 2008, the Committee considered the joint report of the Divisional Director of Planning and Transport Development and the Planning and Environmental Law Manager which gave the Committee the opportunity to consider the alleged planning contraventions afresh having regard to (a) the responses received on the Planning Contravention Notices (PCN's), and (b) the accusations made by Gazelle Properties Ltd, the owners of the land, in the Judicial Review proceedings claim against the Council to the Committee's decision of 29th October regarding the above land.

The report to the October meeting set out the requirements for enforcement action, namely:

(i) residential use at Nos 1 and 2 The Firs (within Use Class C3) be allowed to continue

(ii) use of land at "The Works" and adjoining hardstandings for the purposes within Use Class B2 be allowed to continue (within Area "A" of the CLEU Plan);

(iii) cessation of all non-agricultural use outside of Area "A" (on the CLEU Plan) including:

the storage and repair of scaffolding

building/engineering/stone mason' contractors' yard

skip-hire/storage yard

storage of aggregates, hard core and green waste

the production/distribution of concrete

the siting and use of a hot food takeaway trailer; and

storage of an advert trailer, metal cages and other scrap items

(iv) demolition of the hopper and aggregate storage bays; car parking areas (CP1 and CP2); all fencing and concrete slab on the compound within Area "E"; and demolition/removal of portacabin

(v) removal of the bund currently forming the north east boundary of the site and, following this, the levelling of the land to match the adjoining land; and

(vi) restoration of the land to its former condition following compliance with the foregoing, including the covering with clean top soil and sowing of grass seed.

The report to today's Committee meeting set out the responses from occupiers of the site to the PCN's. It was considered that these responses confirmed the conclusions in the October Committee report regarding the mixed use of the land.

The report went on to discuss the expediency of enforcement action. It recommended that the B2 use be allowed to continue on part of the land (albeit a smaller part than had previously been accepted by the Council as having a B2 fallback use). Elsewhere non-agricultural activity should be ceased (apart from residential use of Nos 1 and 2 The Firs). It also considered that the encroachment of the mixed use for the various businesses close to the residential properties of Nos 1 and 2 The Firs would have a harmful impact upon the living conditions at those properties. The structures including the concrete manufacture and batching plant, storage silos, aggregate storage bays, ancillary metal buildings and the permanently sited office building were considered unacceptable.

The Development Manager read out the following statement:

"It is the view of Officers that the land outlined in bold on plan at Annex D is now in a mixed use. This view has been reached after careful consideration of the history of the site and to any fall back B2 Use (General Industrial) that may have existed at the time of the "call-in " Inquiry in 2002. You will see that the site area for the "call-in" Inquiry application at Annex G is smaller than that shown on the current site location plan and as such any B2 fall back position agreed at that time can not in any case cover the whole site within the Freeholding of the Owner. There is, however, disagreement between the Council and the Owner as to the significance of what was agreed within the Statement of Common Ground at the Inquiry.

The land does not have the benefit of planning permission; its status is therefore subject to evidence and the Council must take into account any material information that comes to its attention.

As such, a different view was taken by Officers regarding the extent of the B2 fall back position following the processing of the CLEU application in 2006. There is no consideration of planning merits when certificate applications are assessed but instead it is necessary for evidence submitted by the applicant to be assessed along with any other information that the Council has available such as the aerial photographs referred to in the main report. The aim of the application was to establish a general B2 use throughout the site. However, after detailed assessment of the evidence, your Officers did not consider that the application could demonstrate on the balance of probabilities such an established use across the area within the red line. No formal determination was made in relation to the CLEU as it was withdrawn by the Owner. Therefore, neither the SOCG or the CLEU were formal determinations.

It is acknowledged that the Council in the past accepted that the land which formed part of the application site at the 2002 "call-in" Inquiry had a B2 fall back use and it would have been inexpedient at that time to take enforcement action. However, this was based on evidence available to the Council at that time.

The site visit in September 2008 provided more evidence to Officers, which has subsequently been endorsed by the returned PCN's, that a material change of use of the land has now taken place as there are currently several uses taking place on the land and over a wider area than has historically been the case, although they do retain a link with the central use of the site.

This change of use has taken place within the last 10 years and so is unauthorised. It would not be possible now to revert back to a previous B2 use without the grant of planning permission or compliance with an enforcement notice. The Owner does not concur with this view.

In terms of the presentation, it would be helpful if Members could have open before them Annex F attached to the main report as I will show you photographs of various parts of the site and link them back to this plan.

For clarity, the Officer recommendation then is seeking your authority to take enforcement against the uses and operations listed in the main report."

The Development Manager then took the Committee through the presentation which included a series of photographs of the site.

The Planning and Environmental Law Manager reported on legal aspects of the matter and referred to the Judicial Review challenge made by the owners of the property regarding the decision made by the Committee at its meeting on 29th October 2008. The Committee then heard the statements by the public speakers. (Note: During the statement made by Mr White, the Chairman had to ask him to refrain from making references to his proposals for the site.)

It was then moved by Councillor Eleanor Jackson and seconded by Councillor Colin Darracott to delegate authority as set out below.

RESOLVED that delegated authority be granted to the Divisional Director of Planning and Transport Development, in consultation with the Planning and Environmental Law Manager, to take any necessary action on behalf of the Authority in respect of the alleged planning contraventions set out above 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-enactments of the Act or Regulations or Orders made under the Act) in respect of the above land.

General Note:

This specific delegated authority will, in addition to being the subject of subsequent report back to Members in the event of Enforcement Action 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 Divisional Director of Planning and Transport Development; and

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

(Note: The voting on this matter was 7 in favour and 2 against with 3 abstentions.)

Gazelle Properties Ltd, Sustainable Environmental Services Limited v Bath & North East Somerset Council

Case No: CO/4717/2009

High Court of Justice Queen's Bench Division Administrative Court

3 December 2010

[2010] EWHC 3127 (Admin)

2010 WL 4863705

Before: Mr Justice Lindblom

Date: 3 December 2010

Hearing dates: 23 & 24 November 2010

Representation

Mr David Elvin Q.C. & Mr Alex Goodman (instructed by Ashfords Solicitors) for the Claimants.

Mr Peter Towler & Mr Gary Grant (instructed by Council Legal Department) for the Defendant.

Judgment

Mr Justice Lindblom:

Introduction

1 In this claim for judicial review the Claimants, Gazelle Properties Limited (" Gazelle") and Sustainable Environmental Services Limited (" SES") challenge the decision of the Defendant, the Bath and North East Somerset Council (" the Council"), by its Development Control Committee, on 18 February 2009, to delegate to its Divisional Director of Planning and Transport Development the taking of enforcement action in respect of land known as the former Fuller's Earthworks site, at Combe Hay, Bath, and the decision of that officer, on 23 February 2009, to issue enforcement notices against an alleged change of use and certain operational development on that land. Gazelle owns the site. SES had an option over all or part of it, and, although that option has expired, says that it remains keen to develop a waste processing facility on the land. Both contend that in several respects the Council erred in law in deciding to take enforcement action against the existing development, asserting that the Council's consideration of the expediency of such action was flawed, that the decision was irrational and unfair, and that factors material to it were ignored.

The issues in the claim

2 Seven issues for the court arise. They are:

(1) whether the court has jurisdiction to hear the claim;

(2) whether the decision to delegate to officers the taking of enforcement action is vitiated by the Council's committee's failure to recognize the materiality of negotiations and to take account of those negotiations as a material consideration;

(3) whether the delegated decision is itself vitiated by the officers' failure to recognize the materiality of negotiations and to take account of those negotiations as a material consideration;

(4) whether the committee's decision to delegate and the delegated decision itself were unfair and irrational;

(5) whether the committee's decision was infected with procedural unfairness;

(6) whether the Council's enforcement action is vitiated by a failure to ascertain the extent of the relevant planning unit; and

(7) whether the Council's continuing decision to enforce is, in any event, vitiated by the Council's failure to reconsider the expediency of enforcement action in the light of the proposed allocation of the Fuller Earth Site in the emerging Joint Waste Core Strategy.

Procedural history

3 Originally there were two related claims in this case. The claim that is still live is the second. The first claim challenged an earlier decision of the Council's Development Control Committee (taken on 29 October 2008) to delegate to officers the taking of enforcement action on the same site. Permission for that claim to proceed was refused by Mr Mark Ockelton, sitting as a deputy judge of the High Court, on 4 September 2009.

4 By an application notice lodged on 4 November 2010 the Claimants sought to add a further ground of challenge and to rely on further evidence detailing events that have occurred since permission for the claim to proceed was granted. That application was opposed by the Council. At the start of the hearing and in view of the inherent flexibility in judicial review and in the absence of any apparent prejudice to the Council in that ground being added at this stage, I allowed the Claimants' application to do so.

Factual background

The site

5 The site to which the enforcement notices relate extends to about 3.38 hectares. It is within the Bath and Bristol Green Belt and close to the Cotswold Area of Outstanding Natural Beauty. It lies on high ground about 800 metres from the south-western edge of the city of Bath, on the south-eastern side of the Fosse Way, which, as the A 367 road, forms the main route into the city from that side. The city is a World Heritage Site. In the late 19th century, and for some time after that, the land, or a part of it, was used for the extraction of Fuller's Earth. Latterly it has been used for a variety of purposes. Today it contains two dwellings, an agricultural field and an area on which general industrial use has taken place and which is at present used for the recycling of waste and other uses within Use Class B2 of the Town and Country Planning (Use Classes) Order 1987 . It has a long planning history, which need not be recounted in detail here.

The dispute and its history

6 The substantial controversy in the case concerns the physical extent of the lawful industrial use. The Council has accepted that an area corresponding to " Area A" on a plan submitted with an application for a certificate of lawfulness, which extends to about 1.2 hectares, benefits from " historic" use in Class B2 and therefore could not or should not be subject to enforcement action. Gazelle considers that the area which should be regarded as enjoying that status is much larger, embracing the whole 3.38 hectares.

7 It is pointed out by Gazelle that on several occasions in the past a lawful Class B2 use has been accepted across the whole of the 3.38 hectares, and that these occasions include the decision of the Secretary of State on 1 August 2003 when refusing planning permission for a scheme of Class B1 development and live/work

units and subsequently in the Council's evidence for the inquiry into objections to the then emerging local plan in 2005. In the August 2003 decision the Secretary of State agreed (in paragraphs 30 and 31 of his decision letter) with his Inspector's conclusions (in paragraph 435 of his report) that " the buildings and hardstandings on the site enjoy a B2 fallback, that is, they may be used for general industry without the need for further planning permission" and (in paragraph 443) that " the use of the site for B2/B8 purposes has not been abandoned …" . Those conclusions seem consistent with the agreement between Gazelle and the Council recorded in paragraph 6.1 of the Statement of Common Ground submitted to the Inspector:

> " The applicant and the local planning authority are in agreement that the existing use of the site is industrial processing which falls within Class B2 (General Industrial) of The Town and Country Planning (Use Classes) Order 1987 …." ,

although it is to be noted that this view was evidently not shared by third party objectors. The Secretary of State differed from his Inspector on the likelihood of the fallback position being taken up on the entirety of the site (in paragraph 35 of his decision letter).

8 It is not necessary here to recount all of the events in the planning history of the site after the Secretary of State's decision in August 2003. It is to be noted, however, that the Council was advised in May 2004 by junior counsel (Mr Peter Towler) that " it would be wholly inappropriate for [it] to take enforcement action in respect of any B2 use of the site" , and in May 2006 by leading counsel (Mr Timothy Straker Q.C.) that " [e]nforcement action against a B2 use on the land is inexpedient" .

9 The Council's Development Control Committee B considered enforcement action in respect of numerous alleged breaches of planning control in November 2006. It was accepted in the officer's report that the Secretary of State's decision of 1 August 2003 had determined the established use of the site then under consideration as being Class B2 general industrial use (paragraph 1.1 of the report). It was noted that an application for a certificate of lawfulness had been submitted. The committee resolved that it should continue to receive regular reports on the site.

10 In March 2008 the Ombudsman for Local Administration, who had received a complaint from Gazelle's principal shareholder, Mr Ridings, about the Council's decision in 2004 to pursue enforcement action against the recycling of aggregates on the site, criticized the Council for threatening such action, found maladministration and recommended to the Council that it pay compensation to Mr Ridings. He also recommended (in paragraph 93 of his report) that the Council should

> " Determine the remaining planning enforcement issues at Mr [Ridings'] site without further delay and notify him of the outcome."

The Ombudsman commented on the Class B2 use on the site, stating in paragraphs 81 and 82 of his report:

> " 81. … It seems to me that, when considering enforcement action, the Council might reasonably have deduced from paragraph 30 of [the Secretary of State's decision] that the B2 fallback position applied only to the buildings and hardstanding. That said, noting the ambiguity about the extent of the fallback position in the inquiry papers, Counsel had initially advised the Council against enforcement action and, in my view, it should have heeded that advice.
>
> 82. It was not until the Statement of Common Ground was brought to its attention by [Mr Ridings'] Solicitor in 2004 that the Council, on the further advice of Counsel, revised its view and accepted that the B2 fallback position extended to the whole of [Mr Ridings'] site. In the meantime, however, contrary to legal advice and without any direction from its Planning Committee, the Council wrote to [Mr Ridings] threatening the possibility of planning enforcement action if he did not cease industrial operations on some parts of his site. The Council's approach here was ill-considered and

the threats of enforcement action were not justified. That was maladministration."

The correspondence

11 From the middle of 2007 until the second half of 2008 the Council and Gazelle's solicitors engaged in correspondence about the lawful use of the site and the possibility of finding an agreed way forward. Mr Towler referred to much of this correspondence in the course of his submissions. It seems fair to say that the tone of the correspondence is marked at times by a degree of frustration on either side. By the middle of 2008 little progress appears to have been made. In his letter to Mr Bosworth of Gazelle's solicitors dated 28 May 2008 Mr Trigwell expressed his disappointment that Gazelle considered a meeting between the parties to be unnecessary, and indicated his belief that the most appropriate thing for Gazelle to do would be to submit a planning application for the whole site. He said that in the determination of such an application " the B2 fall back position of Area A would, of course, be a material consideration" but that the Council would have to consider the application " in the light of the areas which it considers not to have a B2 fall back use, on its planning merits and including whether any very special circumstances have been put forward as to why an expansion of the B2 use, or such other use as [Gazelle] may apply for, would be acceptable on this prominent site within the Green Belt" . Mr Bosworth's reply on behalf of Gazelle, dated 30 June 2008, referred to the Council's acceptance of the Ombudsman's report, to the advice the Council had had from Mr Towler and Mr Straker as to the expediency of taking enforcement action, and to the several occasions on which the Council had accepted that the lawful use of the site was Class B2 use. Having made some comments on the principles relating to the determination of the planning unit, and having observed that he could see no reason why the the planning unit should not in this instance be taken as the historic unit of occupation, Mr Bosworth contended that there was " no case for the Council to be considering enforcement action" . His letter concludes as follows:

> " You also suggest that our client submits a planning application for the whole site. I must advise you that our client has no intention of doing this. However, I can advise you that they have entered into an agreement with a development partner, Sustainable Environmental Services Limited, with a view to that company securing a comprehensive development of the site for waste recycling purposes. I understand that Sustainable Environmental Services have already held discussions with some of your colleagues about their proposal, and I enclose a copy of a recent letter that they have provided to my client, which sets out where they currently are with a view to submitting a planning application for their proposal.
>
> …In the light of the plans that Sustainable Environmental Services have to develop the site, and the progress they are making with a comprehensive planning application, I would suggest that any meeting to discuss the points covered in your letter of 28 May is unnecessary."

12 The letter from SES to which Mr Bosworth was referring is dated 25 June 2008. It mentions the involvement of planning consultants in the preparation of an application. It also refers to SES having discussed the proposal with planning officers of the Council, and to " a very positive meeting" having been held with the Council's Estates Department. It goes on to state:

> " It is therefore anticipated that a comprehensive application will be developed in private session with the principals involved before being selectively discussed with key Councillors, Ward Members and principal objectors before being made fully public."

13 On 25 July 2008 Mr Trigwell responded to Mr Bosworth's letter of 30 June 2008, stating that the Council was " disappointed with the approach taken to its

endeavours to negotiate a way forward" and that the Council was now left " with no option other than to conclude that [Gazelle] has adopted an entrenched position against any regulation of the site" . It was now necessary, said Mr Trigwell, for the Council to conduct a site visit, relying, if it had to, on its powers of section 196A of the 1990 Act. As to Gazelle's partnership with SES and the possible submission of an application for planning permission, Mr Trigwell said that the Council, as local planning authority, had not received such an application and although SES had approached the Council with draft proposals some months ago those proposals had lacked the necessary information to enable it to make any detailed comment upon them.

The site visit and the planning contravention notices

14 After officers of the Council had attended the site on 1 September 2008 at the appointed time and been denied access, a site visit eventually did take place, on 11 September 2008.

15 On 26 September 2008 Gazelle Properties was served with planning contravention notices by the Council's Development Manager, Ms Bartlett. The notice was not signed, and Gazelle declined to respond to the questions which it contained. The notices were subsequently signed and re-served; Gazelle answered the questions in them and sent them back, but this was not done until after the Council's committee met in October 2008.

16 On 21 October 2008 Gazelle was informed by the Council that officers were proposing to put before the Development Control Committee on 29 October 2008 a report which would recommend that delegated authority be granted to officers for the taking of enforcement action. The Council stated that, if the committee authorized such action and no new information emerged when the planning contravention notices were returned, all uses on the site would be required to cease, apart from any agricultural use, the " historic" Class B2 use of the works and surrounding hard-standing areas and the continued occupation of the two dwellings. Various operational development would also have to be demolished or removed.

17 On 24 October 2008 Gazelle's solicitors wrote to Ms Bartlett, inviting her to postpone the committee's consideration of the report, contending that the members should not be asked to make any decision until officers had had the opportunity to consider the response to a valid planning contravention notice, and pointing out that the Council had not yet come back to explain what it considered the relevant planning unit to be and why.

18 Ms Bartlett's response, in her letter dated 28 October 2008, did not deal with those requests.

The meeting of the Development Control Committee on 29 October 2008

19 On 29 October 2008, when the Council's committee convened, it received from its officers a report recommending the commencement of enforcement action. In paragraph 3.2 of the report the officers advised the members that it was

> " appropriate to consider what the correct " planning unit" is and within this, whether there is a single primary use with other ancillary uses or separate primary uses which are distinct from each other or perhaps being mixed a composite use [sic]. It will also be necessary to consider whether the planning unit has changed as well as whether the uses have materially changed."

In paragraph 3.3 the officers referred to the " leading case" on the concept of the planning unit, namely Burdle v. The Secretary of State for the Environment [1972] 3 All E.R. 240 . There follows an analysis of the activities taking place in various parts of the site, and, in paragraphs 3.23 to 3.27, the officers' conclusions on " current use" , which culminate in the following passage (in paragraph 3.27):

> " The degree of physical and functional separation between some areas

> makes the consideration of the current planning unit difficult. However, on balance bearing in mind the tests set out in the Burdle case, other case law and how these uses appear to operate, it could be argued that the site within the boundary shown on MAP01 is one planning unit and within this planning unit, there is a mix of primary uses … rather than one overriding use with the others being ancillary. Again, clarification may be forthcoming on the return of the PCNs."

Under the heading " Historic use including any lawful " fall-back" position" , in paragraph 3.28 of their report, the officers noted that was necessary " to consider whether the uses taking place are materially different from any lawful use of the site, thereby constituting development requiring planning permission" . They went on to refer to the application which had previously been submitted – but withdrawn before it was determined – for a certificate of lawful existing use. Of the five areas into which the site had been broken for the purposes of considering that application, the report concentrates on areas " A" , " D" and " E" . The officers referred, in paragraph 3.33, to the Statement of Common Ground submitted to the 2002 inquiry, and said that it had been

> " … agreed that the whole of the application site at that time could lawfully be within B2 use, including part of the public highway. However, that was never a position confirmed within a formal legal determination i.e. a certificate of lawfulness. The planning inspector at the time of the call-in agreed that " the buildings and hard-standings on the site enjoy a B2 fallback" he was not definitive about which parts of the site this included. …"

> In paragraph 3.38 the officers stated: " On the balance of probabilities, the area approximating to area ' A' is that which had a " mothballed" lawful fallback situation at the time the current occupiers took ownership in 1999. …"

In their " Conclusions regarding what use/uses require planning permission" , in paragraph 3.40, the officers said this:

> " Given the conclusion above regarding the present mixed uses including B2 industrial use, sui generis storage builders/scaffold contractors yards, residential use (within the two dwellings), siting a hot-food trailer it is considered that there is a " material change" from any previous use. The responses to the PCNs may indicate that this is a new chapter in the planning history of a site."

The passage of the officers' report on " Unauthorised use" includes, in paragraph 3.55, the following comments:

> " … [The] industrial use of part of the site (the " main buildings" and surrounding hardstandings in the approximate area marked " A" on the CLEU plan) previously had a lawful fall-back position and although a new chapter in the history of the site may have occurred, this would be an important material consideration … "

The minutes of the meeting record that the Council' Planning and Environmental Law Manager told the committee that further evidence had come to light which " undermined the previously assumed extent of the lawful B2 fall back position" . The officers' recommendations, in section 5.0 of the report, included the following action:

> " 5.1 Subject to responses to the PCNs not disclosing information that would lead Officers to a materially different conclusion, the commencement of enforcement action. The requirements … should be:

…

ii. Use of land at " the works" and adjoining hardstandings for purposes within use class B2 is allowed to continue (within area ' A')

> …

> 5.3 Authorise the Divisional Director for Planning and Transport Development in consultation with the Planning and Environmental Law Manager to exercise the powers and duties of the Authority … under Parts VII and VIII of the Town and Country Planning Act 1990 … in respect of the above site."

20 The committee resolved in accordance with the officers' recommendation.

Gazelle's solicitors' letter of 15 December 2008

21 On 15 December 2008 Gazelle's solicitors sent a Pre-Action Protocol letter to the Council's Head of Legal Services. That letter complained about several aspects of the Council's decision-making on 28 October 2008. Among the complaints raised was the contention that the report which had been provided to the committee for its meeting on that day failed to provide a full picture of the planning history of the site, including the discussions that had taken place between Gazelle and the Council. The letter referred to Gazelle's solicitors' letter to Mr Trigwell of 30 June 2008 identifying

> " the occasions on which the Council had previously confirmed the B2 use of this part of the Land, namely:

• In the Statement of Common Ground prepared for the public inquiry in 2002;

• On 21 May 2004 Mr David Davis confirmed by letter that the Council had accepted that the 2002 Public Inquiry site has a B2 use throughout its entirety; • In May 2004 Counsel advised the Council that in his opinion " it would be wholly inappropriate for the Council to take enforcement action in respect of any B2 use at the site" ;

• The Development Control Sub-Committee B on 2 June 2004 confirmed that the Council accepted that the site has a B2 use throughout;

• In July 2004 the Council approved a pre-inquiry change to the revised Deposit draft local plan which stated that the 2002 Public Inquiry had established that the entire site had the benefit of B2 use;

• The Development Control Sub-Committee B at its meeting on 25 August 2004 accepted that the site has B2 use throughout;

• At the Public Inquiry that was held in 2005, into the revised Deposit Draft Local plan, the Council gave evidence that the site had a B2 use throughout.

• In March 2006 Queen's Counsel advised the Council that in his view planning enforcement action was inexpedient over any B2 use at the Inquiry Site;

• In an email sent on 17 October 2006 to our client, Mr Rowntree confirmed again, this time in the context of the Lawful Certificate Application, that the Council's agreement for the ' 2002 appeal boundary area' was not affected.

• The Development Control Sub-Committee B at its meeting in November 2006 accepted that the Inquiry in 2002 had " determined" the established use at the Site as B2" .

The letter went on to state:

> " In the planning process the previous history of a site, including previous decisions of the authority, is a material consideration. A decision maker should realise the importance of consistency and should give reasons if they decide to depart from a previous decision … In the current case, with the exception of the reference to the statement of common ground at paragraph 3.33 of the report, the Committee were not informed either of the numerous previous decisions that the Council had made regarding the use of the Land nor as to the correct approach to adopt in respect of those previous decisions. In the circumstances, the Committee's decision to delegate authority to take enforcement action was made without regard to a material consideration and was therefore made without knowledge of the available facts. Accordingly the decision cannot have been made lawfully."

The first claim for judicial review

22 On 7 January 2009 Gazelle launched a claim for judicial review of the Council's decision of 28 October 2008, asserting, among other things, that officers had failed properly to inform the members of the discussions which had been taking place between the parties, and to explain to the committee the site's planning history and the circumstances relating to the relevant planning unit. The Council's immediate reaction to those proceedings was to undertake to bring the matter back before the committee in February 2009.

The meeting of the Development Control Committee on 18 February 2009

23 On 18 February 2009, when the committee met again, it received a report which indicated that officers were of the view that the members had been properly apprised of the relevant history. By this time the Council had received responses to the planning contravention notices. Section 6.0 of the officers' report dealt with the planning history. The corresponding part of the October 2008 report was referred to (in particular, paragraphs 2.6 and 3.28 and 3.29), and in paragraph 6.3 the officers stated:

> " Members will also have a copy of the Owner's Solicitors letter dated 15 December 2008 – Annex B. The Committee's attention is, in particular, drawn to Paragraph 6 as the accusation in the Pre-Action Protocol letter from Gazelle Properties Limited is that the Committee [were] not provided with a full picture of the planning history of the site. This accusation is repeated in the application for leave to make the Judicial Review claim. Officers are of the opinion that the Committee did have all the relevant information to make its decision on the 29 October 2008, but are bringing this to the Committee's attention for the AVOIDANCE OF DOUBT. I would also refer the Committee to Paragraph 6 of the Council's letter at Annex C. If Members require any further clarification regarding any of the matters set out in either of these letters, I would ask that they seek this from Officers before the Committee meeting. Any queries raised by Members will be reported in the Update Report to this Committee."
>
> The officers stated in paragraph 8.4 of their report:
>
> " It is your officers' view, as set out in the October Committee Report, that the land outlined in bold on the Site Location Plan, Annex D, is now in a mixed use for the purposes set out above. Full consideration has been given to any " fall back" B2 use that may have existed up to the " call in" inquiry in 2002. There is, however, disagreement between the Council and the Owner of the land as to the significance of what was agreed within the SOCG …
>
> It is acknowledged that the Council had in the past accepted that the land which formed part of the application site at the 2002 ' call in' public inquiry had a B2 fall back use and that it would have been inexpedient at that time to take enforcement action against such use. However, this was based on the information available to the Council at the time."

The officers went on to tell the members that in their opinion a material change of use had occurred:

> " The significance of these previous views is considered to be even less following the findings from the September 2008 site visit. These findings have been endorsed by the responses to the PCNs. It is considered that a material change of use of the land has now taken place as there are currently several uses taking place on the land and over a wider area than has historically been the case which, nevertheless, retain a link with the central part of the site. The material change of use to this current mixed use of the land has clearly occurred within the past 10 years and is therefore unauthorised. … The Owner of the land does not concur with your officers'

view that planning permission is required for the present mix of uses on the land."

In paragraph 9.1 of the report the officers expressed their view that the information in the responses to the planning contravention notices indicates that the conclusions in the October 2008 committee report regarding the mixed use of the site were correct. The officers also concluded (in paragraph 10.1) that, given the harm the unauthorized development was causing, the envisaged enforcement action would, represent " a proportionate and necessary interference … in the wider public interest" with the rights of the owner and occupiers of the land under the Human Rights Convention . They then turned to consider the expediency of enforcement action, concluding as follows (in paragraphs 11.1 to 11.5):

" 11.1 It is considered expedient to commence enforcement action for the reasons set out in this Report having regard to the Development Plan and national planning policy (see paragraphs 3.49 – 3.52 of the October Committee Report). However, it is also considered reasonable to take account of the historical uses of the land when considering the extent of any enforcement action. To this effect, it is recommended that a B2 use is allowed to continue within Area A on the CLEU plan (Annex E) and that the residential use of 1 and 2 The Firs should not be fettered by the proposed enforcement notices. In this way, it is considered, that the action proposed is reasonable and proportionate to the harm caused by the breach of planning control.

11.2 It is recommended that within Area ' A' on the CLEU plan, Annex E that the B2 use will be allowed to continue but that elsewhere, non agricultural activity should be ceased (apart from the residential use of 1 and 2 The Firs)….

11.4 The structures including the concrete manufacture and batching plant, storage bays, ancillary metal buildings and the permanently sited office building are considered unacceptable … 11.5 The businesses on this site have become established and may encounter difficulties in re-locating. The users that will be allowed to remain within the core-area of the site will need to change their operations. The Council should therefore allow a reasonable period of time for compliance with the requirement to cease these unacceptable uses, the reduction in the area of industrial use and the removal/demolition of operational developments. "

Thus the officers' advice was that, in view of the historic use of the site, enforcement action should not be taken against " Area A" . Their recommendation to the committee was:

" That delegated authority be granted to the Divisional Director of Planning and Transport Development, in consultation with the Planning and Environmental Law Manager, to take any necessary action on behalf of the authority in respect of the alleged planning contraventions set out above 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-enactments of the Act or Regulations or Orders made under the Act) in respect of the above land."

24 Through requests for information made on behalf of Gazelle it has emerged that at the committee meeting the members received an annex, Annex B, which was not made public. This annex contains ten documents, which relate to the planning history of the site. This material was made available to the members outside the meeting. The public had no opportunity to see it or comment on it before the members reached their decision.

25 As the minutes of the meeting record, the committee resolved, by a vote of seven in favour and two against, with three abstentions, to accept the officers' recommendation in their report, though it is to be noted that in the resolution the

phrase " any necessary action" was used rather than " any necessary enforcement action" . The resolution included a note which stated that the officers' delegated authority

> " will, in addition to being the subject of subsequent report back to Members in the event of Enforcement Action being taken, not being taken or subsequently proving unnecessary as appropriate, be subject to:
>
> …
>
> (b) all action being subject to statutory requirements and any aspects of the Council' strategy and programme;
>
> …" .

Mr White's representations

26 Mr White, the Managing Director of SES, was present at the committee meeting on 18 February 2009. SES had been set up as a special purpose vehicle to tender for the Council's waste contracts. Gazelle had entered into a formal agreement with SES, under which SES would be responsible for securing the requisite consents and commitments from the Council, whereupon SES would take a lease of the site and Gazelle would be entitled to share the profits from the waste contracts.

27 The background to Mr White's attendance at the committee meeting in February 2009 included correspondence and meetings, which may be understood from numerous documents that were produced to the court in evidence. It is not necessary to set out the whole of that story. The draft witness statement of Mr Matthew Smith, the Council's Divisional Director of Environmental Services, helpfully describes some of the salient events, and Mr White's witness statement adds detail of his own. It appears that in 2006 the Council had begun searching for suitable sites on which waste facilities could be located. Officers of the Council's Environmental Services team met Mr White on several occasions in 2006 and 2007 and discussed the concept of developing a waste recycling and treatment facility on the Fuller's Earth site. It is clear that a good deal of progress was made, to the point at which draft designs were being discussed in late 2007. In March 2008 Mr Smith indicated to Mr White that the Council would be willing to act with SES as joint applicant for planning permission for such a proposal. That position later changed. Mr Smith has explained how, and why:

> " After a discussion with Planning Services (it was considered that a joint planning application was not a recommended route, particularly given our intention to apply for permission at other, more favourable sites) and consideration of our position (i.e. we could not enter into a formal contract with them and had no further funding to support this project), I informed Mr White (via a phone call) that although the Waste Authority would support the application, we would <u>not</u> be in a position to be joint applicants. I am sure that Mr White understood this.
>
> …" .

Mr Smith says that at a meeting in April 2008 it was made plain to Mr White that the Council would not be in a position to submit a joint planning application, and that

> " Mr White was also advised that he should submit his application so that he would be in a position to tender for any work which we might offer. He was briefed on the West of England Partnership's plans to procure waste treatment facilities (to which we were a party) and the type of processing such a plant would be required to undertake. … [SES] did not tender for the West of England contract."

28 Mr Smith concludes his draft witness statement with this:

" Discussions involving myself or Waste Services officers did not progress further following a meeting of the Waste Board at which I expressed concern about any further involvement in the matter. This was because the Board agreed (in October 2008) to place a moratorium on development proposals, pending greater clarity about whether the Western Riverside scheme would progress as planned and we could not be placed in a position where we might compromise the commercial confidentiality of the Western Riverside developer to another developer (Penhalt). It was therefore agreed that the authority's Property Services would act as the contact point for any further discussion with Mr White and I informed Mr White of this change. This moratorium also placed " on hold" work on proposals to develop our preferred sites (at Pixash Lane Keynsham and Lower Bristol Road Bath)."

29 Mr White states in his witness statement of 13 May 2009 (in paragraph 9) that after September 2008, progress with the application for comprehensive development of the site slowed, but that

" no-one from within the Council has withdrawn from supporting our proposals. SES remains fully committed to taking forward plans to develop the site comprehensively" .

As I understand it, no application has yet been submitted to the Council.

30 Mr White had registered with the Council his desire to speak at the meeting of the committee on 18 February 2009. He wanted to ask the members to defer their consideration of the taking of enforcement action, because he considered that such action would unnecessarily destabilize the process of negotiation between SES and the Council. In his witness statement Mr White described what happened at the meeting:

" 12. I attended the meeting of the Development Control Committee on 18 February 2009. I had previously registered with the relevant Council officer, expressing my wish to speak at the Committee. I was therefore surprised to hear the Chairman of the Committee state, prior to the Committee's consideration of the officers report, that the contents of my letter should be ignored. The Chairman then advised me that any future development proposals that my company might have for the site were not relevant to the deliberations of the Committee and that I should direct my statement only to the enforcement report on the agenda. I attach as exhibit JW2 a copy of the speech that I had prepared to read out at the Development Control Committee Meeting. I attempted to read this out to the Committee but was prevented from doing so by the Chairman who intervened to stop me raising these issues. I had no choice but to curtail my representations.

13. I remained at the Meeting during the Committee's consideration of the Item and noted, in particular, that one of the Councillors indicated that the Council should set up a " Select Committee" style Committee to consider the future of the site. My understanding of the proposal that the councillor was suggesting to the Committee was that this should be made up of Councillors and officers that would look into the history of the site, hear and consider evidence from all interested parties and then come up with recommendations in respect of the site. However, in view of the clear advice that the Chairman had given to the Committee regarding the matters that they were entitled to consider, I was not surprised that his attempt to persuade the Committee to adopt such a stance was not accepted."

31 The statement which Mr White intended to read to the committee introduced himself as the Managing Director of SES and stated:

" I hope you have all received my package of documents and have had the chance to peruse them

From the information contained you will see that my company has been engaged in negotiation with officers of Bath and Notheast Somerset Council

in order to deliver a solution concerning the land at The Former Fullers Earth Works, Combe Hay.

I appear today to urge deferment of this proposed enforcement action to allow negotiations with your officers, which have reached an advanced stage, to continue in line with this Councils own enforcement policy.

Enforcement would, in the context of these ongoing negotiations, be potentially destructive and achieve little but the frustration of all parties involved.

Continuation of these advanced negotiations could achieve the delivery of a comprehensive solution to problems at the site whilst providing a sustainable, low carbon, integrated waste facility serving the people of BANES for decades to come.

Proposals would provide for the recycling of organic wastes " in county" with the provision for renewable energy generation.

The facility would include a much needed replacement Household Waste and Recycling Centre.

To initiate enforcement action at this time would unnecessarily destabilize a process that your officers have clearly previously committed to, and would not accord with Banes published enforcement policy.

Proposed action would deprive the City once more of a rare chance to provide the ratepayers of BANES with a much needed facility and solve the existing problems at the site.

Your vote now is crucial.

A vote for enforcement is a vote for positive change enabling (deferment could enable) the delivery of a long term environmentally sound solution and the opportunity to transform for ever an eyesore at an important gateway to The World Heritage Site of Bath.

Let us not make the mistake made with previous comprehensive proposals for this site and grasp this opportunity for progress. A negotiated solution as proposed by this company is the only way forward."

32 The Council's enforcement policy to which Mr White alluded states, in the section headed " Principles" :

" The emphasis will be firmly on negotiating compliance or regularising breaches of planning control before considering formal enforcement action. The Council will take formal enforcement action only where it considers it **expedient to do so** …"

In the section headed " General Principles for Good Enforcement Procedures" it is stated, among other things, that

" Unless immediate action is required, officers will endeavour to negotiate compliance or resolution and to provide the opportunity to discuss the circumstances of the case before formal action is taken."

The list of " planning enforcement criteria" includes

" Submission of planning application/listed building application"

and

" Not expedient to take enforcement action i.e.Permission is likely to be granted … " .

These considerations seem broadly consistent with relevant national policy in PPG18 .

33 However, as the minutes of the meeting record, the Chairman of the committee, apparently in the light of advice he had received, was not content to allow Mr White to address the committee on proposals for development which SES might wish to bring forward in due course. The minutes record these remarks as having been made by the Chairman:

> " Before we begin dealing with Agenda Item 11 regarding the former Fullers Earthworks site, I need to mention that I have received – and I believe that all other members have received – a letter and associated documents from Mr Jon White who has also registered to speak on this item. Mr White's correspondence relates principally to possible development proposals that he may bring forward for this site rather than the Enforcement Report in the Agenda papers.
>
> I understand that Mr White has been informed that any future development proposals that his company may have for the site are not relevant to today's meeting and that he should direct his statement solely to the Enforcement Report on the Agenda.
>
> Similarly, the documents received by Members from Mr White are not material to the Committee's assessment of the Enforcement Report and I am advised that Members must disregard those documents entirely in their determination of the matter before them. I will intervene if needed in order to ensure that the discussion remains focused on the issues relevant to the Report."

34 At the meeting there was no discussion of possible future development proposals or of the points raised by Mr White in correspondence.

Mr Trigwell's delegated decision

35 On 23 February 2009 a delegated decision to issue enforcement notices was made. The Council's Divisional Director of Planning and Transport Development, Mr Trigwell, to whom the decision to take " any necessary action" had been delegated, prepared a document entitled " Enforcement/Prosecution Considerations" . In that document Mr Trigwell recorded, among other things, the alleged breach of planning control as being " Change of use to mixed use site and operational development" ; the effect on the public and the environment as being an " Unauthorised use of land to the detriment of the Green Belt and other policies in Local Plan" ; the expediency of the proposed action being " As set out in Committee Report. Ongoing harm and Contrary to Policy" ; the effect of enforcement as being " To regularise and condition the site in the public interest" ; the attitude of the landowner as being " Unwilling to negotiate" ; and the " Conclusion (taking into account all of the above reasons why I am taking enforcement action[])" being " An unregulated site, failure of negotiations to conclude issues, ongoing harm to Green Belt and other policy areas. In the public interest to proceed with enforcement action" .

Gazelle's solicitors' letter of 24 February 2009 36 On 24 February 2009 Mr Bosworth wrote to the Council stating that Gazelle did not accept that the breaches of planning control alleged by the Council had occurred, but that SES had been negotiating with the Council with a view to resolving " the situation that exists at this site" . Mr Bosworth also mentioned the fact that at the meeting of the committee on 18 February 2009 he had remarked that the advice the members had been given as to the relevance of what SES was attempting to say to the members was wrong. For this reason, said Mr Bosworth, he had advised Gazelle that the committee was misdirected in law, that the committee's decision to delegate the power to take enforcement action was " fundamentally flawed" , and that he was minded to advise Gazelle to commence further proceedings for judicial review.

The enforcement notices

37 Two enforcement notices were issued by the Council on 25 February 2009.The first notice, which relates to the use of the site, alleges a change of use of the whole site from residential use, agricultural use and general industrial use to a mixed use comprising nine different activities. It requires the permanent cessation of the use of the site, save for " Area A" , for several uses, including waste processing within Class B2, thus under-enforcing so as not to affect the area on which the Council considers general industrial use not to be unacceptable. The second notice, which relates to operational development, requires the demolition of the concrete batching plant on the site and the removal of the office building from it. The reasons given in notices for the taking of enforcement action referred to the planning harm and conflicts with policy upon which the Council relied.

Gazelle's section 174 appeals

38 On 20 April 2009 Gazelle appealed, under section 174 of the 1990 Act, against both notices, the appeal against the first notice being made on grounds (a), (b), (c), (d), (f) and (g), and the appeal against the second notice on grounds (a), (c) and (g).

The proposed allocation of the Fuller's Earth Site in the Joint Waste Core Strategy

39 Since the enforcement notices were issued the Council has continued to participate, with the three other unitary authorities which belong to the West of England Partnership, in the production of a spatial planning framework for waste for its sub-region. This framework is called the Joint Waste Core Strategy. Ms Kaoru Jacques, a planning officer employed by the Council in its Planning Policy Team, has described the process in her witness statement of 16 November 2010. Among other things, the core strategy will identify indicative capacities for " Residual Waste" to be treated in the sub-region and will allocate " Residual Waste Facility sites" . The process is now well advanced. Several stages of consultation have been gone through. The draft core strategy was submitted to the Secretary of State in July 2010. Between 16 and 23 November 2010 an Inspector conducted an Examination in Public at which objections to the proposals in the document were heard. The Inspector will in due course issue his report, probably about eight weeks from now, setting out his conclusions and his recommendations, which will be binding. The core strategy is expected to be adopted in April 2011. Having been one of the 32 sites originally identified as possible locations for a strategic waste facility, the Fuller's Earth Site, which substantially overlaps the site which is the subject of the Council's enforcement action, did not progress to the Stage 3 assessment, which took place in early 2009, because it is in the Green Belt and close to the Area of Outstanding Natural Beauty. Thus the site was not included in the draft core strategy as a potential allocation for a residual waste facility at the time when the Council issued the enforcement notices. In July and August 2009 the Progress Update stage public consultation was carried out. The draft submission document was then prepared. It included the Fuller's Earth Site as a potential allocation for a residual waste facility. Thereafter the draft core strategy has proceeded with this allocation in place. Ms Jacques has explained in her evidence how proposals for development on the Fuller's Earth Site would be dealt with if it is retained as an allocation in the adopted core strategy, as the Council intends. In summary, she states (in paragraphs 53 and 54 of her witness statement):

> " 53. The Fullers Earth site is proposed to be allocated as a residual waste facility with the safeguards and strict criteria that would require [sic] given the site's sensitive location.
>
> 54. The phasing of the Spatial Strategy suggests that Zone C is implemented to meet the medium term requirements ie 2016 – 2021. The Fullers Earth Site, even if allocated, might not therefore come forward for another 5 to 10 years which would leave the harmful impact caused by the unauthorised uses and development currently on a site in the Green Belt and in proximity to the AONB for some years to come."

40 In the material which it submitted in response to issues raised by the Inspector for consideration at the Examination in Public the Council, in answer to the questions " Is allocation of the Fuller's Earth Works site appropriate? Are any additional safeguards necessary?" , stated:

> " The detailed site assessment report concluded that the Former Fullers Earth Works site is an appropriate site allocation for the development of a residual waste treatment facility because the site is well located to serve the needs of the south west of the Plan area.
>
> The site has a long and complex planning history, and is currently owned and managed by a waste recycling company, it is currently operational but B&NES has issued two enforcement notices for alleged breaches of planning control. The notices have been appealed, but the appeal has been held in abeyance due to a claim for Judicial Review in the High Court. The site is situated in Green Belt so … any proposals to develop the site would therefore need to demonstrate … very special circumstances. The site assessment process has identified very few opportunities for development of strategic waste facility in this area, which is a relevant consideration for development in Green Belt. …" .

That summary seems consistent with what was said in the responses to representations received to the Pre-Submission Document earlier in 2010, and in particular with the response to the representation submitted on behalf of the Coombe Hay Parish Council, which had drawn attention to the " current (and very long running) planning, planning enforcement and environmental issues relating to Site BA12 and its surrounding area [which] MUST be resolved before Site BA12 is considered as a site for a potential Residual Waste Treatment Facility" . The response stated:

> " The allocation of Site BA12 is for its future use as a residual waste treatment facility. Allocation of the site will give a better operational and planning outcome."
>
> No change to the draft core strategy was proposed.

41 In her second witness statement, dated 16 November 2010, the Council's Development Manager, Ms Lisa Bartlett, observes that there are representations for and against the allocation of the Fuller's Earth Site and that the allocation is not a foregone conclusion. She states (in paragraph 19 of her witness statement):

> " There are a number of interested third parties such as the local residents, including those that come under the banner of ' The Victims of Fullers Earth' , the Combe Hay Parish Council and the Bath Preservation Trust. Were the Council to take no action they would be entitled to hold the Council accountable for allowing the continuing harm caused by the development to continue unchecked in the hope that the site is:—
>
> (1) allocated as a residual waste facility;
>
> (2) a successful planning application is submitted for a residual waste facility; and
>
> (3) the approved planning application is implemented and the site is developed as a residual waste facility some time in the future."
>
> Ms Bartlett goes on (in paragraph 23) to say:
>
> " I can further advise that the Divisional Director for Planning and Transport, David Trigwell, using his delegated authority, has confirmed that he does not consider it appropriate to refer the matter back to the Development Control Committee at the moment, notwithstanding the potential allocation in the JWCS, due to the continuing harm caused by the unauthorised uses and operational development taking place on the Site. Clearly the outcome of these proceedings and, in due course, the Inspector's report, will be reported to the Committee who will then have an opportunity to consider what future

action the Council should take in these circumstances."

Delay

42 The Council has maintained its resistance to the claim on the grounds of the delay in the bringing of proceedings, contending that this is a matter to which the court should have regard in exercising its discretion as to the granting of relief. It is true, and unfortunate, that the claim has not come to a hearing until more than 14 months after permission for it to proceed was given by Mr Ockelton, some 18 months after the application for permission was lodged, and some 21 months after the Council's resolution to delegate to its officers the taking of any necessary steps for the enforcement of planning control on the site. I have not been able to discern where the responsibility for this delay rests. The Council complains, probably correctly, that had the enforcement appeals taken their course rather than having been held in abeyance while the present proceedings run their course, the substantive issues in the appeals would by now have been resolved. But it appears that neither side has at any stage sought to have the hearing of the claim expedited. This is the context in which the issue of delay has to be considered. Has any identifiable delay caused any real prejudice to the Council? Mr Elvin stated, rightly in my judgment, that no such prejudice has been identified. The Council has not pointed to any particular period within the span of approximately three months from the date of the Council's decision to the launching of proceedings which is said to have caused some specific detriment to good administration, or any hardship or prejudice. A detailed and uncontested account of what was done in the preparation of the claim has been provided by Mr Bosworth in his second witness statement (dated 2 September 2009). I see no reason to doubt the accuracy of that account, and I accept it. In my view, there was no undue delay in the bringing of the claim such as to warrant the withholding of relief under section 31(6) of the Senior Courts Act . Nor do I consider that, in the circumstances of this claim and its history, it would be right to give any material weight to delay as a factor in the exercise of my discretion to withhold such relief as might otherwise be appropriate.

The relevant statutory framework

43 Control over the development of land is effected by section 57(1) of the Town and Country Planning Act 1990 (" the 1990 Act") which provides:

> " Subject to the following provisions of this section, planning permission is required for the carrying out of any development of land" .

44 " Development" is defined by section 55(1) of the 1990 Act as meaning " the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land."

45 Section 171A of the 1990 Act provides:

> " (1) For the purposes of this Act –
>
> (a) carrying out development without the required planning permission; or
>
> (b) failing to comply with any condition or limitation subject to which planning permission has been granted,
>
> constitutes a breach of planning control.
>
> (2) For the proposes of this Act –
>
> (a) the issue of an enforcement notice (defined in section 172); or

(b) the service of a breach of condition notice (defined in section 187A), constitutes taking enforcement action."

46 The power to issue an enforcement notice is contained within section 172 of the 1990 Act, which provides:

" (1) The local planning authority may issue a notice (in this Act referred to as an " enforcement notice") where it appears to them -

(a) that there has been a breach of planning control; and

(b) that it is expedient to issue the notice, having regard to the provisions of the development plan and to any other material considerations."

47 An enforcement notice, once issued, may be varied or withdrawn under section 173A of the 1990 Act, which so far as is material provides:

" (1) The local planning authority may-

(a) withdraw an enforcement notice issued by them; or

(b) waive or relax any requirement of such a notice and, in particular, may extend any period specified in accordance with section 173(9).

(2) the powers conferred by subsection (1) may be exercised whether or not the notice has taken effect.

…" .

48 Section 174 of the 1990 Act provides for appeals to be brought against enforcement notices, on specified grounds:

" (1) A person having an interest in the land to which an enforcement notice relates or a relevant occupier may appeal to the Secretary of State against the notice, whether or not a coy of it has been served on him.

(2) An appeal may be brought on any of the following grounds -

(a) that, in respect of any breach of planning control which may be construed by the matters stated in the notice, planning permission ought to be granted or, as the case may be, the condition or limitation concerned ought to be discharged;

(b) that those matters have not occurred;

(c) that those matters (if they occurred) do not constitute a breach of planning control;

(d) that, at the date when the notice was issued, no enforcement action could be taken in respect of any breach of planning control which may be constituted by those matters;

(e) that copies of the enforcement notice were not served as

required by section 172;

(f) that the steps required by the notice to be taken, or the activities required by the notice to cease, exceed what is necessary to remedy any breach of planning control which may be constituted by those matters or, as the case may be, to remedy any injury to amenity which has been caused by any such breach;

(g) that any period specified in the notice in accordance with section 173(9) falls short of what should reasonably be allowed."

49 Section 285 of the 1990 Act provides that

" the validity of an enforcement notice shall not, except by way of an appeal under Part VII, be questioned in any proceedings whatsoever on any of the grounds on which such an appeal may be brought." "

Issue (i): **Jurisdiction**

The law

50 In Davy v Spelthorne Borough Council [1984] AC262, the House of Lords considered the provision in the Town and Country Planning Act 1971 which was the predecessor to section 285 , and in similar terms. Lord Fraser of Tullybelton stated (at p.272 D-G):

" But, in my opinion, the respondent's claim for damages is not barred by section 243(1)(a). That paragraph provides that the validity of an enforcement notice shall not be questioned in any proceedings whatsoever " on any of the grounds on which such an appeal may be brought." The words " such an appeal" are a reference back to an appeal under Part V of the Act of 1971 [analogous to Part VII of the 1990 Act], and they mean in effect the grounds specified in section 88(2) [of the 1971 Act, analogous to s.174(2) of the 1990 Act]. But section 243(1)(a) [of the 1971 Act, i.e. s.285(a)(a) of the 1990 Act] does not prohibit questioning the validity of the notice on other grounds. If, for example, the respondent had alleged that the enforcement notice had been vitiated by fraud, because one of the appellants' officers had been bribed to issue it, or had been served without the appellants' authority, he would indeed have been questioning its validity, but not on any of the grounds on which an appeal may be brought under Part V. So here, the respondent's complaint that he acquiesced in the enforcement notice because of negligent advice from the appellants is not one of the grounds specified in section 88(2), and it would not have entitled him to appeal to the Secretary of State under Part V of the Act of 1971 [i.e. Part VII of the 1990 Act]. Accordingly, even on the assumption that the validity of the enforcement notice is being questioned in the present proceedings (an assumption which in my opinion is open to serious doubt), it is certainly not being questioned on any of the grounds referred to in section 243(1)(a) [of the 1971 Act, i.e. s.285(1)(a) of the 1990 Act] and the proceedings are not barred by that subsection. …" .

Amplifying that principle in R v Wicks [1998] A.C. 92 Lord Hoffmann stated (at p.120):

" … there remain residual grounds of challenge lying outside the grounds of appeal in section 174(2) of the Act of 1990, such as mala fides, bias or other procedural impropriety in the decision to issue the notice. I shall call these " the residual grounds" . … If section 285(1) says that the notice cannot be questioned on certain grounds, it follows that it *can* be questioned on any other grounds. One has to ask why they were not included in the appeal procedure. The reason, as it seems to me, is obvious. Questions of whether the planning authority was motivated by mala fides or bias or whether the

> decision to issue the notice was based upon irrelevant or improper grounds are quite unsuitable for decision by a planning inspector …" ,
>
> and (at p.122):
>
> " I do not think that in practice hardship will be caused by requiring the residual grounds to be raised in judicial review proceedings. The statutory grounds of appeal are so wide that they include every aspect of the merits of the decision to serve an enforcement notice. The residual grounds will in practice be needed only for the rare case in which enforcement is objectively justifiable but the decision that service of the notice is " expedient" (section 172(1)(b) is vitiated by some impropriety" . "

51 In R v Caradon DC, ex parte Knott , a challenge was made to a local planning authority's decision to take enforcement action. The first ground of the challenge was that the authority acted outside the powers granted to it under section 172(1) of the 1990 Act because the taking of enforcement action was not expedient, as that section requires or, in the alternative, that the decision that it was expedient was, in the circumstances, unreasonable. Revocation and discontinuance orders in respect of the enforced against development were already in place and beyond challenge, and, as it appeared to the authority at the time when it issued the enforcement notice, the notice would achieve no more than those two orders would achieve. Sullivan J., as he then was, said this (at p. 171):

> " Under section 172(1), it must appear " expedient" to issue an enforcement notice, not for any purpose, but for a proper planning purpose. It would not be lawful for a local planning authority to serve an enforcement notice upon a landowner, for the sole purpose of reducing the compensation payable to that landowner if his land was going to be acquired by the local planning authority, for example, under a compulsory purchase order. Issuing an enforcement notice must have some planning purpose. The reduction of a potential liability to pay compensation is not, on its own, such a purpose."

52 In the recent decision of the Court of Appeal in The Health & Safety Executive v. Wolverhampton City Council[2010] EWCA Civ 892 the court considered the meaning of the concept of expediency in the taking of decisions under section 97 and other provisions of the 1990 Act. Section 97 provides the power for the local planning authority, if it appears to it to be " expedient" to do so, to revoke or modify a planning permission. Sullivan L.J., with whose judgment Longmore L.J. agreed, stated (in paragraph 38):

> " I readily accept that it was for Wolverhampton as the local planning authority to decide what was the best way forward, but a decision to rule out taking action under section 97 as one of the options had to be a rational one applying conventional *Wednesbury* principles. Thus, Wolverhampton had first to correctly direct itself as to the ambit of its powers under section 97, and then reach a decision not to exercise those powers having regard to relevant, and not irrelevant, considerations. …" .

Sullivan L.J. went on to consider the decisions of Richards J. (as he then was) in Alnwick District Council v. Secretary of State for the Environment, Transport and the Regions (2000) 79 P. & C.R . and of Ouseley J. in R. (Usk Valley Conservation Group) v. Brecon Beacons National Park Authority [2010] EWHC 71 (Admin) , preferring the latter in its conclusions on the relevance of the liability to pay compensation to an authority's decision under section 97 (see paragraphs 39 to 62). Sullivan L.J. referred (in paragraph 42) to the conclusions expressed by Ouseley J. in *Usk* (in paragraphs 198 to 202 of his judgment) on the implications of the need for the authority to consider expediency in the making of such a decision:

> " 198. An *expedient* decision would, to my mind, necessarily require attention to be paid to the advantages and disadvantages of taking one or other or none of the available steps under s102. These advantages and disadvantages should not be confined to those which the subject of the

notice would face; they should be measured against the advantages and disadvantages to the public interest at large, including the costs and effectiveness of the various possibilities. The question of whether the cost to the public is worth the gain to the public is, I would have thought, the obvious way of testing expediency. At least it is difficult to see that expediency could be tested without consideration of that factor.

…

201. … S102, like s97 and s172, deals with expediency decisions: what if anything should be done about a state of affairs that has arisen. They are processes which an authority can initiate to deal with that state of affairs, if it is *expedient* to do so. There is no obligation to take enforcement action in respect of every breach of planning control, nor to take revocation or discontinuance proceedings in respect of unlawful uses or permissions which the authority wishes had not been granted. The notion of " *expediency* " in the context of a decision as to what to do, if anything, about a state of affairs which has arisen, brings with it the issue of whether the gain is worth the cost, which I regard as an obvious part of any decision on expediency. The cost and time of taking enforcement proceedings balanced against the prospects of success and the gain from success would be obviously relevant to the decision on enforcement proceedings.

202. Although Richards J. in Alnwick may be right to say that what is expedient must be judged in a planning context, that context is provided by the statutory provision itself. The inclusion of the notion of " *expediency* " contrasts s102, s97 and s172 enforcement, with s70, the grant of permission whether prospective or retrospective. This shows quite clearly that these provisions, two of which are expropriatory, must be approached quite differently from the grant of a s70 permission. … " *Expediency* " is not part of the s70 decision-making process which, by contrast, is initiated by the applicant and not the authority, and requires the authority to reach a decision one way or the other having regard to the development plan and other material considerations. A proper and substantial meaning has to be given to that contrast and to the notion of " *expediency* " . No interpretation of s102 which fails to draw a very clear distinction between decisions under s70 and decisions under s102, or s97 and s172 for that matter, can be correct."

Sullivan L.J. observed (in paragraph 47) that

" the mere fact that the word " expedient" is to be found in sections 97(1) and 102(1) but not in section 70(2), is not, of itself, a sufficient reason for concluding that a local planning authority may lawfully have regard to its liability to pay compensation when deciding whether to make an order under section 97 or 102. The question is one of substance, not semantics, and the need for decisions under sections 97(1), 102(1) and 172(b) to appear to the local planning authority to be " expedient" is, in part at least, a reflection of the different character of the decisions that have to be taken under those enactments."

He went on (in paragraph 59) to endorse the submission of counsel that if a local planning authority was entitled to have regard to its liability to pay compensation under sections 107 and 115 when deciding whether it was expedient to make an order under section 97 or 102 , the weight to be given to that factor would (subject to *Wednesbury* irrationality) be a matter for the local planning authority. Longmore L.J, agreeing with Sullivan L.J., noted (in paragraph 65 of his judgment) the absence of the word " expedient" from the statutory language relating to the grant or refusal of planning permission. Pill L.J., disagreeing with Sullvan L.J. and Longmore L.J. as to the breadth of the concept of expediency, stressed (in paragraph 91) the statutory context, and the question for the decision-maker, therefore, will be whether the decision contemplated is

> " expedient having regard to the development plan and to any other material considerations? The word permits latitude in an evaluation but the evaluation must be based on matters lawfully taken into account, in my view considerations relating to the character, use or development of the land" .

Submissions

53 For Gazelle and SES, Mr David Elvin QC submitted that, in the light of the principle acknowledged in the House of Lords decisions in Davy v. Spelthorne and Wicks , and following the approach adopted by the court in ex parte Knott , it is plain that the court does have jurisdiction, on a claim for judicial review, to entertain and determine issues, such as those which arise in the present case, which go to a local planning authority's consideration of the expediency of taking enforcement action. Though the Council relies on the provision in section 285 of the 1990 Act that the validity of an enforcement notice shall not, except by way of an appeal under Part VII , be questioned in any proceedings whatsoever " on any of the grounds on which such an appeal may be brought" , it is those words themselves which demonstrate the difficulty with the argument it seeks to advance. The present claim for judicial review, submitted Mr Elvin, clearly raises matters which could not be the subject of an appeal under section 174 of the 1990 Act.

54 For the Council Mr Towler submitted that the exclusive provisions cannot be avoided by bringing proceedings for a declaration in anticipation of a notice being issued and served, if the substance of the proceedings, once the notice has been served, is a challenge to its validity falling within section 174(2) . He referred to Square Meals Frozen Foods v Dunstable [1974] 1 WLR 59, in which the Court of Appeal held that the proceedings were barred by the predecessor provision to section 285(1) of the 1990 Act and should in any event be stayed because the statutory appeals procedure was a comprehensive and also more convenient procedure for dealing with all the matters raised in the case. In R. (on the application of Sivasubramaniam) v. Wandsworth County Court [2003] 1 WLR 475 Lord Phillips M.R. (giving the judgment of the court) stated (in paragraph 47) that there was:

> " an abundance of authority for the proposition that judicial review is customarily refused as an exercise of judicial discretion where an alternative remedy is available. Where Parliament has provided a statutory appeal procedure it will rarely be appropriate to grant permission for judicial review. The exceptional case may arise because the statutory procedure is less satisfactory than the procedure of judicial review."

In that case the Court of Appeal referred to a number of authorities to that effect (including R v Birmingham City Council, ex parte Ferrero [1993] 1 All ER 530 per Taylor L.J. at p. 537c) and also recognized that special considerations applied in the case of immigration appeals (see paragraphs 51 and 52). Mr Towler submitted, in effect, that the authorities cited by Mr Elvin to found the proposition that the court has jurisdiction to hear the present claim in truth provide no support for it. The cases of R v Camden L.B.C., ex parte Comyn Ching and R. v. Wiltshire County Council, ex parte Nettlecombe are, said Mr Towler, clearly distinguishable on their facts. In the Camden case the CPO had not taken effect and therefore the privative provisions did not apply. In the Wiltshire case, which concerned the regime in section 66 of, and Schedule 15 to, the Wildlife and Countryside Act 1981 , the respondent authority's counsel conceded that there was no factual basis to support the Council's resolution to designate a route as a Byway Open to All Traffic. Davy v Spelthorne DC concerned a claim for negligence relating to advice by a planning officer in connection with an issued enforcement notice, which clearly fell outside the statutory grounds of appeal. The case of Wicks involved a criminal prosecution in the Magistrates' Court for a failure to comply with an enforcement notice in which the defendant sought to rely on matters which might have been challenged under the statutory grounds of appeal as part of his defence to that criminal charge. In ex parte Knott revocation and discontinuance orders were already in existence and the court concluded that there was, in those circumstances, no need to issue

enforcement notices as well.

Discussion

55 I accept Mr Elvin's submissions on jurisdiction. Section 285 leaves for the court, on a claim for judicial review, grounds of challenge to the decision of a local planning authority to take enforcement action which are not within the compass of a statutory appeal as provided in section 174 . Such grounds were described by Lord Hoffmann in Wicks as " residual" . Nowhere in the relevant authorities are they precisely or comprehensively defined. But, as Lord Hoffmann emphasized, the deliberate inclusion by Parliament of the words " on any of the grounds on which such an appeal may be brought" in the preclusive provision in section 285(1) is recognition of the fact that there is a category of challenge to an enforcement notice which is not within the ambit of section 174 . The specific grounds in section 174 are for decision-makers on appeals, not for the courts. This much is effectively acknowledged in the statutory code itself. Where the line is to be drawn between the statutory grounds and the residual category is for the court to determine. And the court has been cautious in drawing that line no further than the traditional boundaries of judicial review, as is shown by the Court of Appeal's decision in the Wolverhampton case.

56 As Mr Elvin submitted, two conclusions which are pertinent here emerge from that case and Ouseley J.'s decision in *Usk* : first, that the concept of " expediency" in contexts which include the exercise of enforcement powers by a local planning authority goes wider than the concept of material planning considerations such as are engaged in the determination of an application for planning permission, extending, in the enforcement context, to the balance of advantage and disadvantage to the public interest and, in particular, the question of whether the potential gain in going ahead with enforcement action against an identified breach of planning control is worth the cost and time likely to be spent in doing so; and, secondly, that an authority's exercise of its discretion when making an " expediency" decision is susceptible to review by the court on conventional public law grounds.

57 The " residual" category of grounds is not so narrowly confined as being limited only to cases of bad faith or bias. It may safely be said to include the exceptional case where, as Lord Hoffmann put it in Wicks , " the decision to issue the notice was based upon irrelevant or improper grounds" . One illustration of the kind of case that falls on this side of the line is to be seen in ex parte Knott . Another, in my judgment, would be the case where a local planning authority's consideration of the question of expediency – an exercise embracing the factors mentioned by Ouseley J. in *Usk* – was vitiated by irrationality or unfairness. Moreover, if matters relevant to the question of expediency and beyond the reach of the statutory grounds of appeal are ignored, or, as a corollary, if matters not relevant to that question are taken into account, the court's jurisdiction is not excluded by section 285 . In my view therefore Mr Towler was right to acknowledge, without conceding their merit, that there are some matters raised in the present claim which are susceptible to judicial review. Those matters are clearly to be distinguished from the appraisal of planning merit required by an appeal on ground (a) in section 174(2) (which is equivalent to the task facing an authority dealing with an application under section 70), from the fact finding exercise entailed in considering an appeal on ground (b), (c), (d) or (e), and from the judgments called for by an appeal on ground (f) or (g). So to conclude is, I believe, wholly consistent with the principles to which I have referred in Wicks and Davy v. Spelthorne , and it is not at odds with the jurisprudence which informed the cases on which Mr Towler relied.

58 Further support for that conclusion, albeit on a somewhat different rationale, can be seen in the decision of Dyson J., as he then was, in the Wiltshire case (at p.713):

> " In my judgment, the court does have jurisdiction to entertain the application in the instant case. No good reason has been advanced against the existence of the jurisdiction. The existence of the statutory regime alone, in circumstances where it is accepted that the ouster clause does not bite, is not enough. It might be said that the fact that the ouster clause deals with

certain situations gives rise to the inference that Parliament did not intend to exclude the availability of judicial review in other situations. I prefer, however, to rest my decision on wider considerations. There has to be a good reason to deny jurisdiction. Prima facie, a party is entitled to have recourse to the court. It seems to me that the existence of the statutory remedy of public inquiry by an Inspector and statutory appeal thereafter is relevant to the question of whether I should refuse relief in the exercise of my discretion. I do not consider that it goes to jurisdiction. I find it difficult to detect any material distinction between the present case and *ex parte Comyn Ching* . [Counsel] did not identify any such distinction. His argument involves the proposition that, where a Council is threatening to commit a plain error of law … an aggrieved party cannot seek the intervention of the Court. Instead, he or she is obliged to embark on the often time consuming and costly procedure of a public inquiry, in which objectors can make representations, possibly involving detailed factual investigations, with the risk that the Inspector may repeat the Council's error of law. [Counsel] did not seek to justify this, save by reference to the existence of the statutory regime."

(cf. the judgment of Lord Denning M.R. in *Square Meals Frozen Foods Ltd.* , at p.65 F-H).

Conclusion

59 For the reasons I have given, I am satisfied that, in principle, an attack on the Council's decision on the expediency of taking enforcement action may legitimately be pursued by means of a claim for judicial review. It will, however, be necessary, for each of the issues with which I now go on to deal, to consider whether the challenge on that particular issue truly belongs to the " residual" grounds outside the scope of section 174(2) of the 1990 Act.

Issue (2): **whether the decision of the Council's committee was vitiated by a failure to have regard to negotiations**

Submissions

60 Mr Elvin submitted that a decision to take enforcement action is discretionary, and, as a statutory pre-requisite to the exercise of that discretion in favour of enforcement, it must appear to the local planning authority that it is " expedient" to take that course (section 172(1)). In the present case it was incumbent on the Council's committee to ask itself whether the objectives of enforcement might nevertheless be achieved without resort to enforcement action. The Council's own policy for the enforcement of planning control, reflecting national policy in PPG18 , indicates that the Council will endeavour to negotiate compliance or a resolution of the dispute rather then taking enforcement action. The committee did not consider, for example, whether, in view of the progress that had been made in negotiations, it would be expedient to delegate the taking of enforcement action to officers or whether it might better defer such action to enable the SES initiative which Mr White had wanted to explain to members to be further explored. The officers' advice to the members appears to have been, in effect, that negotiations were immaterial and that they were not entitled to give any weight to the negotiations at all, because they were not material. At least one member on the committee, Councillor Wilcox, had asked whether a " select committee" approach to considering the future of the site could be adopted. The Council's position was that by the time the committee met in February 2009 there had been sufficient time for Gazelle or SES to submit an application for planning permission. But this was not what the Council had decided, and it was not what the committee's Chairman had said.

61 Mr Towler countered those submissions with the contention that, as a matter of fact, Gazelle had refused to negotiate and that SES was not in " advanced negotiations" with the Council. Preliminary discussions had taken place, but there had been no meetings of any substance since October 2008. Nor had an application

for planning permission been submitted. And, in any case, the use of the site envisaged by Gazelle and SES was, in principle, contrary to policy. Mr Towler submitted that the committee's refusal to allow Mr White to read the statement he wished to read at the meeting was correct. The Council had been endeavouring for some time to negotiate with Gazelle. In June 2007, because Gazelle had at that stage indicated that it wished to negotiate, officers of the Council had agreed not to take a report to committee recommending that authority be given for the taking of enforcement action. After that there had been no meaningful negotiations. Invitations to meet the Council's officers were rejected. SES, for its part, had never submitted an application for planning permission. This was the context in which the decision was taken to prevent Mr White from reading his statement. That statement was not accurate, in two respects. In the first place, it wrongly asserted that negotiations were at an advanced stage. And, secondly, it was incorrect to state that officers were committed to SES's proposal. Mr Towler added that if local planning authorities had to refrain from considering enforcement action whenever speculative proposals were put forward, the effective enforcement of planning control would be undermined. But in the present case the possibility of an application being made by SES was not material to the committee's consideration of the unauthorized development that had taken place on the site, nor would it have relieved the need for the Council to consider the harm resulting from breaches of planning control on this prominent site in the Green Belt. The notion of a " select committee" approach to enforcement was not recognized in the Council's Constitution. Deferring their decision was an option open to the members, as they well knew, but they did not want to do that.

Discussion

62 I accept the submissions made by Mr Elvin on this issue.

63 One must begin, I believe, with an understanding of the statutory context for the decision the Council's committee went about making at its meeting in February 2009. The context is provided by section 172(1) of the 1990 Act, which required the committee to ask itself, first, whether there had been a breach of planning control (section 172(1)(a)) and, secondly, if the answer to that first question was " yes" , whether it would or would not be expedient, having regard to the provisions of the development plan and to any other material considerations, to issue an enforcement notice (section 172(1)(b)). It is important to keep in mind that those two questions are separate. They imply the distinction between discerning a breach and deciding pragmatically what, if anything, ought to be done about it. This distinction was, as I see it, at the heart of the observations made by Ouseley J. in paragraphs 198 to 202 of his judgment in *Usk* , with which I would respectfully agree. Both questions required the committee to consider the relevant circumstances as they were at the time when they met. But the second question, if it arose, also required them to ask themselves whether the public interest demanded that enforcement action be proceeded with at that stage, and this made it necessary for them to take a reasonable and realistic view of the likely consequences of their going ahead with such action. This was an essential element of the expediency decision.

64 Did the members approach that decision lawfully when they excluded from it information and comment available to them about the discussions which had taken place between the Council and Gazelle and SES, including the negotiations which SES had had with the Council's Environmental Services department, and about the intentions of Gazelle and SES for the development of a waste recycling facility on the site? I do not believe that they did. 65 Even if one were to take the view that the considerations which bear on the expediency of issuing an enforcement notice must be considerations relating to the character, use and development of land, and must go no wider than that, it would be my view that the matters the members were told to disregard at the committee meeting on 18 February 2009 were matters truly germane to that question. They clearly embraced not only factors of relevance to the planning history of the site but also factors relevant to its planning future. And they were clearly capable of affecting the view to which the members had to come as to

the good sense or otherwise of taking formal steps to remove the existing use or uses of the land. Whether, in land use planning terms, it would be advantageous to compel the present industrial activity on the site to cease when another form of industrial development might possibly commend itself to the Council surely had the potential to influence the decision with which the members were faced. They were not determining such a proposal, or pre-empting any future decision. But the prospect of such a scheme coming forward, against the background which Mr White wanted to describe and within the timescale he envisaged, was, in my judgment, a consideration material to expediency. There is, and could be, no suggestion that what Mr White wanted to say to the committee was motivated by bad faith, or was simply a last minute ruse to deflect the enforcement of planning control. His remarks, had they been listened to, might not have proved decisive, or even significant. But that is not for the court to judge. The court is concerned only with establishing materiality. And in my view the representations Mr White wanted to make to the members were a material consideration.

66 It may be, as Mr Elvin submitted, that the Council had confused or had failed to distinguish between, on the one hand, negotiations directed at securing compliance with planning control and, on the other, negotiations aimed at regularizing the use and development of the site, including the possibility of one form of industry being replaced with another as a result of the submission and approval of a proposal. These two purposes are not the same. In correspondence the Council's officers do seem to have concentrated on discussions about compliance rather than on any meaningful dialogue about the future of the site. But, in any event, the assertions made on behalf of the Council in the pre-application correspondence – and indeed the submissions made by Mr Towler – about the stage negotiations had reached late in 2008, and the unlikelihood of further progress being made, simply go to reinforce the point that those negotiations were relevant to the members' consideration of expediency. It might be the case that the parties were never going to reach agreement. It might be right that Mr White's optimism was misplaced, as the Council contends. There is clearly some contest about that. Mr Elvin suggested that a fair reading of Mr Smith's draft witness statement is that the withdrawal of the Council's Environmental Services' department from the submission of a joint application with SES was just a hiatus, and not an end to progress. This too might be so. But these were matters for the members to consider and give such weight as they saw fit.

67 The officers' advice to the committee was not that the negotiations about the future of the site had turned out to be abortive, nor that they had no more than a faint chance of coming to anything. The fact is that there seems to have been no advice at all on this topic, one way or the other.

68 The difficulty for Mr Towler's submissions on this issue lies in the crucial difference between materiality and weight. It is one thing to say that a consideration is not material, and quite another to say that it is material but should command little or no weight (see Tesco Stores Ltd. v. Secretary of State for the Environment [1995] 1 W.L.R. 759 , per Lord Hoffmann at p. 780). Mr Towler could not argue that the negotiations over the future of the site and the intentions of SES were material but given no weight, because there is no doubt that, at the committee meeting, both the officers and the members appear to have convinced themselves that these matters were immaterial. Mr Towler was not able to refute the clear evidence in the minutes that the members simply prevented themselves from judging what weight the negotiations and the intentions of SES should have. The members ought to have been allowed to make up their own minds on the weight, if any, to be given to the negotiations and, in particular, to Mr White's representations so that they could put that factor in the balance with the others which militated for or against the taking of enforcement action. Without that factor they could not properly strike the balance they had to strike. That they failed to do this was, in my judgment, a basic and fatal error. And I am no doubt that it is the kind of error which attracts relief in a claim for judicial review, rather than one which ought to be left, or could be, to an inspector hearing a statutory enforcement appeal.

Conclusion 69 For the reasons I have given this ground of the challenge succeeds.

Issue (3): **whether the delegated decision was vitiated by a failure to have regard to negotiations**

Submissions

70 Mr Elvin submitted that the scope of the officers' delegated authority was defined by the delegation. To paraphrase the resolution: the Divisional Director of Planning and Transport Development, Mr Trigwell, in consultation with the Planning and Environmental Law Manager, was given authority, by virtue of that delegation, to take any necessary action on behalf of the Council to deal as he saw fit with the contraventions of planning control the members had identified. On the face of the document which Mr Trigwell completed, his decision and the members' were incompatible. The members had purposely given no attention to whether negotiations had failed, or to the intentions of Gazelle and SES, whereas Mr Trigwell patently did have regard to negotiations, though it was not clear from his document quite what it was that he did consider. Matters that were irrelevant at the time of the committee meeting could scarcely have become relevant a few days later, and vice versa. It was not open to the officer under delegated authority unilaterally to issue enforcement notices, partly at least on the basis of factors which the committee had ruled out of account. This ran counter to the principle apparent in the decision of the Court of Appeal in *Kides.* And it was no answer to point out, as had the Council in its detailed grounds, that the alleged failure of negotiations was but one of several factors in the officer's decision. Even if everything else in Mr Trigwell's document was as it ought to be, this one factor was enough to make the officer's decision bad.

71 Mr Towler submitted that there could be no dispute about the committee's power to delegate the decision on the taking of any necessary enforcement action to its officers. The submissions made for Gazelle and SES betray a misunderstanding of what it was that the committee actually resolved. The resolution was to grant " delegated authority" to Mr Trigwell to " take any necessary action" on behalf of the Council " in respect of the alleged planning contraventions set out above by exercising the powers and duties (as applicable) under Parts VII and VIII of the 1990 Act …" . Parts VII and VIII of the 1990 Act contain a range of enforcement powers. In authorizing the officer to take " any necessary action" the resolution left to him the decision as to what the appropriate action would be at the time of his decision. He had a discretion as to what he should do. The only limit on that discretion was that it must be exercised in respect of the planning contraventions identified in the minutes, which in turn refer to the reports given in writing and orally by officers to the committee. Neither the resolution itself nor legal principle required the officer when subsequently making his decision to restrict his consideration to the matters which were before the committee. The position here was not analogous to that in *Kides* . The fact that there had been no meaningful negotiations was material to the officer's decision. That decision, said Mr Towler, was consistent with the relevant advice in paragraph 5(5) of PPG18 , and was informed by all relevant matters, including the history of the site.

Discussion

72 On this issue too I accept Mr Elvin's argument.

73 There is, in my judgment, an obvious tension between Mr Towler's submissions here and those he made in resisting the contention that the committee was entitled to ignore what Mr White had wanted to say about the negotiations and the intentions of SES. What Mr Towler had to say on this issue was, in effect, that Mr Trigwell, when acting on the authority delegated to him, was not only entitled to have regard to the progress – or lack of it – in negotiations between the Council and Gazelle but bound to take that factor into account because it was – as it was put in paragraph 49 of Mr Towler's skeleton argument – " material" .

74 In my judgment, the Council cannot have it both ways on the relevance of the negotiations to its decision to take enforcement action. If the negotiations were material to the delegated decision of Mr Trigwell, they were material to the

members' decision from which the delegation sprang. Because they went to expediency, as I have held they did, they were in my view clearly relevant at the committee stage, when that issue was addressed, and did not become so only after the members had made their decision. Moreover, if they were material, they were, in my judgment, relevant in both of their aspects – compliance and regularization – and not just the former. In other words, it was necessary to consider not merely the question of whether, if enforcement action were not taken, the alleged breach of planning control was going to be removed or controlled to the satisfaction of the Council within a period of its choosing, but also whether there was a prospect of a satisfactory solution being found for the site through the initiative of a development proposal.

75 Mr Trigwell has not produced any evidence to explain precisely what he meant in the succinct remarks about negotiations which he made in completing his document entitled " Enforcement/Prosecution Considerations" . If those remarks are taken at face value they seem to give rise to three conclusions. In the first place, the fact of " negotiations" itself and the perceived " failure of negotiations to conclude issues" were regarded, at least by Mr Trigwell when acting on his delegated authority, as material to the decision whether or not to issue enforcement notices. Secondly, the proposition that the " attitude" of the " landowner/offender" was one of unwillingness to negotiate seems to leave out of account the thinking and behaviour of SES, which, on a fair view, could be seen as the opposite of unwilling. And thirdly, following my conclusion on the previous issue, although the attitude and aspirations of SES were material considerations, they were apparently not regarded as such by the officer. It follows that Mr Trigwell's decision to issue the enforcement notices was, at least to this extent, infected by the same error as I have found in the members' approach.

76 I do not think that the officer's failure to have regard to the intentions of SES is overridden by the Government's advice in paragraph 5(5) of PPG 18 that where a local planning authority fails in an initial attempt to persuade the owner or occupier of the site to remedy the harmful effects of unauthorized development, " negotiations should not be allowed to hamper or delay whatever formal enforcement action may be required to make the development acceptable on planning grounds, or to compel it to stop" . That advice does not say that negotiations are generally immaterial to the question of whether enforcement action is required or not, and in my view it should not be read in that way. It needs to be set in the broader context of the advice in PPG 18 , the tenor of which is to support a case-specific consideration of whether the taking of enforcement action is essential.

77 As with the previous ground, so too with this: the error is an error of law, and there is no reason why the court should not intervene to grant appropriate relief.

Conclusion

78 I conclude that the claim must succeed on this ground.

Issue (4): **whether the committee's decision to delegate and the delegated decision were unfair and irrational**

Submissions

79 Mr Elvin's submissions on this issue mirrored what he had said on the previous two. He submitted that to both the members' decision to delegate and the officers' decision upon that delegation the basic principles of fairness applied. As Woolf J. (as he then was) held in R. v. Monmouth District Council, ex parte Jones [1985] 53 P. & C.R. 108 (at p.115) a local planning authority is " under an obligation to consider [an] application for planning permission fairly" . When it is considering the expediency of taking enforcement action, or when it is delegating the decision to do so, the obligation is the same. It is underpinned by Article 6 of the Human Rights Convention . In the present case, both the members' decision, deliberately taken in reliance on advice that the preceding negotiations and the intentions of SES for a

waste plant on the site were immaterial, and the officer's delegated decision, consciously taken on the basis that Gazelle was " unwilling to negotiate" and that negotiations had in fact " failed" , were, in the first place, irrational. The first decision was irrational because no reasonable local planning authority could have regarded the negotiations and the intentions of SES as other than relevant and important in the Council's consideration of expediency. The second decision was irrational both because it was inconsistent in its approach with the first and because it was patently wrong as a matter of fact, or, at best, partial in the sense that it ignored the intentions of SES. And, secondly, both of these decisions were also unfair because both of them were taken after Mr White had been prevented from sharing with the members his comments on the proposals SES wanted to pursue, and the support they had received in discussions with the officers of the Council as waste authority. Had the officer acknowledged the willingness of SES to take forward its proposal for the site in co-operation with Gazelle as the owner of the land, he could not reasonably have characterized the attitude of the " landowner" as being hostile to negotiation. The perversity of this process of decision-making was only compounded by the Council's subsequent decision to allocate effectively the same piece of land for the kind of use that SES was urging in February 2009.

80 Mr Towler submitted that there was no unfairness or irrationality in the committee's decision to delegate the taking of enforcement action, nor in the delegated decision itself. This decision must be seen in the right context. That context included, as the background to the committee's consideration of alleged breaches of planning control on the site, the long history of such breaches, the lack of any tangible outcome to negotiations, and the absence of an application for planning permission for a real proposal which might have undone the harm that was being caused to the Green Belt. Viewed in that context the officer's decision should be seen as being a rational determination which he was entitled to make.

Discussion

81 Again, I accept Mr Elvin's submissions.

82 This issue is closely connected with the previous two, and my conclusions on it are similar.

83 In my view, it cannot sensibly be denied that in preventing Mr White from speaking at its meeting on 18 February 2009 the Council's committee acted unfairly. Mr White had something relevant to say about the matters in hand. He was entitled to have that taken into account by the members. There was no reasonable basis for the committee refusing to do that. Fairness in the making of a planning decision extends in both directions: to applicant and to objector (see R.v. Monmouth District Council, ex parte Jones [1985] 53 P.& C.R. 108 , per Woolf J. (as he the was) at p.115). The unfairness in Mr White not being heard affected not only SES, but also Gazelle, as landowner, facing the possibility of enforcement action being launched against the current use of its site. The interests of both were prejudiced. It is enough that there was something which might have affected the outcome. As was held in Hibernian Property Co. Ltd. v. Secretary of State for the Environment and another (1974) 27 P.& C.R. 197 , a case in which objectors to a compulsory purchase order had not had the opportunity of commenting on information taken by the inspector from other objectors in the course of her site inspection, the court is concerned here with the loss of a chance to influence the outcome. In that case Browne J. stated (at p. 211):

> " … the question is not whether the information obtained by the inspector did in fact prejudice the applicants by contributing to the decision of the Secretary of State to confirm the compulsory purchase order but whether there is a risk that it may have done so."

That is not a high test. Applying it in this case, I find it impossible to say that there is no risk that what Mr White wanted to say to the members might have made a difference to their decision.

84 The other point in Mr Elvin's submissions is also made out. For the committee

consciously to rule out any consideration of what Mr White had to say was, I consider, neither reasonable nor rational. I would have reached this view even in the absence of the Council's enforcement policy – underpinned as it was by national policy in PPG 18 – which sees relevance of the prospect of a negotiating a satisfactory outcome or means of regularizing the use or development of a site. The existence of that policy does, however, strengthen the conclusion that for the members to deny themselves any discussion of those matters and how much, if any weight, to give them, was irrational.

85 As on the previous two issues, I do not doubt that this part of the claim falls well within the province of judicial review.

Conclusion

86 This ground of the challenge therefore succeeds. Issue (5): **whether the committee's decision was procedurally unfair**

Submissions

87 Mr Elvin's submissions on this issue were based on the complaint, which was made in the first claim, that the decision to delegate enforcement action made by the Council's committee in October 2008 was flawed by the committee's failure to have proper regard to the planning history of the site. The attack is now directed at the manner in which the planning history came to be dealt with in the course of the committee's meeting in February 2009. In particular, Mr Elvin submitted that the provision to the members outside the meeting of the ten documents comprised in Annex B to the committee report was procedurally unfair. The documents were not attached to the officers' report when it was made available to the public, nor were the public given the chance to comment on them. Despite the obvious importance of the history of the site, no advice was given to the committee during its meeting about the position the Council had previously taken on the presence and extent of a lawful Class B2 use on the site. No privilege could be claimed for the documents. Indeed, they were all familiar to Gazelle. There was, therefore, no good reason for the members to receive or consider the documents in private. Gazelle would have wanted to address the committee on the historic use of the site had it known this was going to feature in the members' deliberations. This was particularly unsatisfactory because Gazelle had been assured by Mr Trigwell that the rationale for any enforcement action, in the light of the planning history and the Council's understanding of the planning unit, would be explained to it. It was not fair to Gazelle that the members received advice on those matters " in secret" . Mr Elvin referred to the well-known observations of Lord Russell of Killowen in Fairmount Investments Ltd. v. The Secretary of State for the Environment [1976] 1 W.L.R 1255 (at pp. 1265A to 1266A) on the need for parties to be given " a fair crack of the whip" , and to the speech of Lord Mustill in R. v. The Secretary of State for the Home Department, ex parte Doody [1994] 1 A.C. 531 (at p. 560):

> " … Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; …. Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."

The reason for withholding from the public the information which the Council had about the site's planning history had not been explained, said Mr Elvin, and the unfairness of its having done so taints both the committee's and the officer's decision.

88 Mr Towler submitted that this part of the claim is misconceived. The members' decision to adjourn was properly taken. There was no closed session of their meeting. They simply adjourned to enable themselves to retire and consider the papers comprising Annex B to the officers' report. Those papers had been compiled

by the officers to assist the members in their understanding the planning history of the site. This reflected the complaint, made on behalf of Gazelle in its solicitors' letter dated 15 December 2008 preceding the first claim for judicial review, that at the October 2008 meeting the members had been given an incomplete history. This amounted to no more than doing what the Council had been asked to do by Gazelle's solicitors. What had happened in this instance was no different from the quite normal giving of informal advice to members before or during a committee meeting. To accept the principle that such briefings should never occur in private would, as Mr Towler put it in his skeleton argument, " cause chaos to local government administration" .

Discussion

89 I consider that Mr Towler's submissions on this issue are correct.

90 In the circumstances I see nothing sinister or untoward in the documents that were provided to the members being given to them outside the meeting. No real prejudice or unfairness to anybody resulted from this. Gazelle had seen, or had had access to, all of these documents. Their solicitors had been able to comment on them in representations to the Council, and the members had those representations before them. 91 Reference to Annex B was made in the list of annexes on the first page of the report for the February 2009 meeting. The document referred to there was a front sheet identifying the documents mentioned in paragraph 6 of Gazelle's solicitors' letter of 15 December 2008. All of the documents identified were in Gazelle's possession and their solicitors had already commented on the matters they raised not only in that letter, which was itself provided to the members, but also, at length, in Mr Bosworth's letter of 30 June 2008 to Mr Trigwell. Indeed, it was for this very reason that the documents were made available to the committee. I do not doubt the evidence which has been given about what happened during the adjournment of the committee meeting, by Ms Horrill in her witness statement of 21 August 2009 (in paragraph 10) and by Ms Bartlett in hers of 20 October 2009 (in paragraph 78), the gist of which is that during the adjournment copies of the documents referred to in Annex B to the officers' report were made available to the members, but that neither any other material nor any additional advice was given to them by the officers.

92 This was not a case of members of a committee receiving, outside the meeting of that committee, entirely new material relating to an item on their agenda or material which had not previously been seen by the parties involved. What happened in this instance was that the committee was given the very material the absence of which at its meeting in October 2008 had moved Gazelle's solicitors to complain in their letter of 15 December 2008. The complaint had been that the officers' report to the October meeting had failed to provide the committee with a full picture of the planning history of the site. Behind this lay Mr Bosworth's letter of 30 June 2008 identifying the occasions on which the Council had previously confirmed the Class B2 use of the site.

93 I accept that the officers who were briefing the members at the committee meeting in February 2009, and presumably the members themselves, wanted to ensure that the Council could not again be criticized for failing to have regard to the planning history as it was displayed in materials which Gazelle, or their solicitors, thought significant. Had the documents not been provided to the committee, it seems likely that the complaint made in the first claim would have been repeated in the present proceedings. The point now taken is a very different one. It is not about the adequacy of the information the members received but about the circumstances in which they were given it. If the documents had been produced and discussed in the meeting itself Gazelle could not, and presumably would not, have complained. This does not mean, however, that the submissions made by Mr Elvin are cogent. In my judgment, for the reasons I have given, they are not.

Conclusion

94 This ground of the application therefore fails.

Issue (6): **the planning unit**

Submissions

95 Mr Elvin's submissions on this issue took as their starting point the complaint made in Gazelle's first claim for judicial review that, in their report for the committee meeting in October 2008, the Council's officers had failed to apprise the committee of the considerations necessary to ascertain the relevant planning unit. The essence of the complaint was that although the officers' had recognized the relevance of the concept of the planning unit in a case where dispute had arisen as to a material change of use, had set out for the members the considerations bearing on the proper identification of the planning unit, and had suggested the location and extent of the planning unit within which the composite use was said to have been begun, they had not properly assessed the planning unit to which the lawful Class B2 use related. Mr Elvin submitted that this shortcoming had not been put right in the report for the committee meeting in February 2009. Once again the officers had acknowledged that it was necessary to identify the planning unit to which the enforcement action might relate. But again they had failed to come to come to grips with the question of what the planning unit actually was. Had they done so the members might never have concluded that the taking of enforcement action was expedient.

96 Mr Towler submitted that the question of the true extent of the planning unit was not a matter for the court, but for an inspector hearing a section 174 appeal. In other words, this issue lies beyond the scope of the court's jurisdiction on a claim for judicial review. In any event, the question of the planning unit was addressed, and properly addressed, in both the October 2008 and the February 2009 committee meetings. The members were shown a power-point presentation and various drawings, as Ms Bartlett had described in her evidence. The Council's contention was that a new chapter has opened in the planning history of the site, changes having taken place in the extent of planning unit and in the uses going on within that unit. But, be that as it may, the committee did not fall into any justiciable error when grappling with this aspect of the whole matter.

Discussion

97 I accept Mr Towler's submissions on this issue.

98 Here, in my judgment, although Mr Elvin maintained that this part of the challenge went no further than to impugn the process by which the planning unit had been considered, or not considered, by the Council, the claim does trespass into the territory defined by the statutory grounds of appeal in section 172 of the 1990 Act. The court's jurisdiction is therefore excluded by section 285 of the 1990 Act. There is good reason for this. Matters of fact and degree are quintessentially the responsibility of inspectors dealing with enforcement and other planning appeals. Inspectors find the facts. They scrutinize the relevant planning history. If there is dispute, which often there is, as to the implications of events that have occurred in what may be a lengthy and complex history, for example a material change in the use of land within or including the site on appeal, or the abandonment of a particular use or the intensification or expansion of a particular activity, it is for the inspector to resolve. He hears the evidence and submissions. He inspects the site and its surroundings. Ascertaining the extent of the planning unit, if that is controversial, will be a basic exercise for him to undertake, applying tests which are well established. None of this is the business of the court on a claim for judicial review.

99 It is true that Mr Elvin's submissions acknowledge all of that. He was careful to stress that his aim was at the procedural, not the substantive dimension of the Council's decision. But the divide is not distinct. When one looks at the statutory grounds which have been submitted to the Planning Inspectorate on behalf of Gazelle in its appeal against the first enforcement notice, one sees in the appeal on

ground (b) that the issue of the true extent of the planning unit is squarely raised:

> " The enforcement notice alleges that a single composite planning unit has been created throughout the area referred to in the notice. This is not the case. Although the freehold of the land identified in the notice is in one ownership the uses described in the notice are neither functionally nor physically related to one another and the change of use that is alleged has not occurred."

Should those contentions be resisted by the Council this would be an issue for the inspector hearing Gazelle's section 174 appeal. The strength of either side's case on that issue is not for the court to decide. Within the statutory process Gazelle would be able to put forward its case, through evidence and submissions, on the extent of the planning unit which it believes has the benefit of a lawful use in Class B2. The Council, whether or not it has so far considered the question as closely as Gazelle suggests it ought to have done, would have to confront that case. The inspector would have to decide which case was right. If the Council has not yet addressed its mind to the question, though it seems firm in its belief that it has, it would be well advised to do so before producing its evidence for the appeal. If its case did not stand up to scrutiny and it were shown to have behaved unreasonably in this respect it would be exposed to the possibility of costs being awarded against it. Those matters, however, would be for the inspector; they are not for the court.

Conclusion

100 This ground of the claim therefore fails.

Issue (7): **whether the Council's continuing decision to enforce is vitiated by failure to reconsider the expediency of enforcement action in the light of the proposed allocation of the Fuller's Earth Site in the emerging Joint Waste Core Strategy** *Submissions*

101 Mr Elvin submitted that, irrespective of the position in February 2009, the mandate to enforce conferred on the officers then could not survive the subsequent proposed allocation of the site for a waste recycling facility in the development plan. This was a material change of circumstances calling for the matter to be put back before the members, or, at least, for the officers to exercise their own discretion again. Neither had happened. It was, Mr Elvin submitted, well established that a decision coming after a claim for judicial review had been made might itself be reviewed if it were germane to the one already impugned. For this proposition he cited three immigration cases, namely R. v. The Secretary of State for the Home Department, ex parte Alabi [1997] I.N.L.R. 124 , R. v. The Secretary of State for the Home Department, ex parte Turgut [2001] 1 All E.R. 719 and E v.The Secretary of State for the Home Department [2004] Q.B. 1074 , and two planning cases, namely *Kides* (to which I have already referred) and R.(on the application of Dry) v. West Oxfordshire District Council [2010] EWCA 1143 . Mr Elvin submitted that in a case such as the present, in which more than 20 months have elapsed since the decisions under challenge were made, it was not merely possible but necessary for the court to have regard to the situation as it is now. For the Council to persist now in its decision that enforcement action is expedient in this case, without formally reconsidering that decision, was irrational. The exercise of the statutory discretion to take enforcement action is predicated, in the first place, on it appearing to the local planning authority that a breach of planning control had emerged, but also, secondly, on the authority considering it expedient to enforce having regard to the development plan and other material considerations. It is pertinent that, once an enforcement notice has been issued, the authority has power, under section 173 A of the 1990 Act, to withdraw it, or to waive or relax its requirements, at any time. The existence of this power implies the need for a continuing discretion to be exercised in the enforcement of planning control in the light of circumstances as they evolve. Analogous to this requirement, Mr Elvin argued, is the duty of a local planning authority, under section 70(2) , to take into account, before issuing its formal decision on an application for planning permission, any new material consideration –

indeed, anything that might rationally be regarded as a material consideration – arising after the resolution to grant or to refuse has been made. This duty had been underlined by the Court of Appeal's decisions in *Kides* and Dry . The principle was the same in an enforcement case. Enforcement action engages the public interest. If it ceases to be in the public interest to pursue it the local planning authority should not do so. In the present case it was obvious that the Council ought to have asked itself whether it ought to withdraw the enforcement notices once it had decided to promote the allocation of the site for waste recycling development in the joint waste core strategy. Having maintained that proposal in the face of opposition to it at the public examination of the draft core strategy, the Council now has no sensible choice but to desist from enforcing against industrial use on the site.

102 Mr Towler did not accept the concept that a local planning authority which has initiated enforcement action is under a continuing duty to review the appropriateness of proceeding with such action. None of the authorities cited by Mr Elvin sustains the proposition he sought to gain from them. Both of the planning cases relied upon could be materially distinguished on their facts. The immigration cases Mr Elvin relied on are also distinguishable. As Ms Jacques had explained in her witness statement of 16 November 2010, the present uses on the site which have been enforced against are contrary to Green Belt policy. The use now proposed to be allocated by the Council in the Joint Waste Core Strategy would also be contrary to that policy. That use is a " sui generis" use and is therefore not the same as the use for which planning permission is being sought through the ground (a) appeal against the first enforcement notice. Moreover, as Ms Jacques had said, even if the site is eventually allocated, the Council does not envisage a waste facility being built on it for some five years hence. The timescale for the site's development in accordance with the allocation remains to be resolved. Thus, on the facts of the present case, taking the question of the expediency of enforcement action back to the committee could not be justified. Only when the result of the Inspector's deliberations on the proposed allocation and the outcome of the present proceedings are known would it be right for the committee to consider the matter afresh. Gazelle has a remedy. If the Inspector who hears Gazelle's appeals against the enforcement notices concludes that the notices ought to have been withdrawn before the inquiry and, therefore, that the Council had behaved unreasonably, he would be able to award costs in favour of Gazelle.

Discussion 103 In *Kides* the authority's committee had resolved in 1995 that it was minded to permit residential development subject to the completion of a section 106 agreement. That was done five years later, whereupon planning permission was issued by an officer without referring the matter back to the members for them to consider whether any new considerations which might cause them to change the authority's decision had arisen in the meantime. The Court of Appeal held that there was no requirement to take the proposal back to a committee in the particular circumstances of that case. Parker L.J. stated (in paragraphs 125 and 126 of his judgment):

> " 125. … where the delegated officer who is about to sign the decision notice becomes aware (or ought reasonably to have become aware) of a new material consideration, section 70(2) requires that the authority have regard to that consideration before finally determining the application. In such a situation, therefore, the authority of the delegated officer must be such as to require him to refer the matter back to committee for reconsideration in the light of the new consideration. If he fails to do so, the authority will be in breach of its statutory duty.
>
> 126. In practical terms, therefore, where since the passing of the resolution some new factor has arisen of which the delegated officer is aware, and which might rationally be regarded as a " material consideration" for the purposes of section 70(2), it must be a counsel of prudence for the delegated officer to err on the side of caution and refer the application back to the authority for specific reconsideration in the light of that new factor. In such circumstances the delegated officer can only safely proceed to issue the

> decision notice if he is satisfied (a) that the authority is aware of the new factor, (b) that it has considered it with the application in mind, and (c) that on a reconsideration the authority *would* reach (not might *reach*) the same decision."

In Dry , Carnwath L.J. referred to what Parker L.J. had said in *Kides* (in paragraph 126) and stated (in paragraph 16):

> " Without seeking to detract from the authority of the guidance in *Kides* , I would emphasise that it is only guidance as to what is advisable, " erring on the side of caution" . Furthermore, in that case there had been a gap of five years between the resolution and the issue of permission. The guidance must be applied with common sense, and with regard to the facts of a particular case."

104 I see a distinction between the situation in which a local planning authority has not yet issued a statutory decision on an application for planning permission, though it may have resolved to grant such permission, and that in which it has both resolved to issue and has issued an enforcement notice to remedy a breach of planning control. The former situation can be said to be one in which the particular statutory process involved is still incomplete; in the latter the relevant process has reached its finality. But, as Mr Elvin points out, the position is not quite as simple as that. The existence of the power in section 173A to withdraw or amend an enforcement notice after it has been issued, and even after it has taken effect, implies a continuing responsibility for the authority to keep under review the expediency of the action it has decided to take.

105 Whether or not it would be right to construct from section 173A a continuous, proactive duty to review, as Mr Elvin's submissions suggest, it is only necessary for the purposes of the present case to discern the requirement that the power conferred by this provision be exercised in accordance with public law principle. What this means at least, in my view, is that when there emerges, while an enforcement notice subsists, some new factor of which the local planning authority is or should be aware, and which is material to the expediency of the notice, the authority should consider whether to exercise its power to withdraw or amend. It seems to me that this accords with the rather broader statement in the note at P173A.03 in the Encyclopedia of Planning Law and Practice, which I would respectfully endorse:

> " The ability to withdraw a notice that has come into effect allows the authority to sweep clean the planning title of a site where the enforcement notice is no longer relevant."

106 What then are the consequences of such a requirement in this case? I think they are clear. In pursuing the allocation of the site for a waste recycling facility the Council has self-evidently accepted the principle of this form of industrial use on the site, no matter whether it is properly to be categorized as a " sui generis" or as a Class B2 use. To have done this the Council must presumably have considered whether such a facility could be acceptable in principle, notwithstanding the site's presence in the Green Belt and its proximity to the Area of Outstanding Natural Beauty and the World Heritage Site. As Mr Elvin observed, the fact that the site had originally been kept out of the emerging core strategy, and was only put in after enforcement action had been taken, is itself a material change in circumstances. I do not think that the fact that any redevelopment of the site for such a waste recycling facility would necessarily require planning permission, or the fact that the Council apparently does not see the site being required for this purpose immediately, goes against that acceptance in principle. In my judgment, the fact of the site's having been promoted for waste recycling development is, on any sensible view, a consideration relevant not merely to the merits of Gazelle's ground (a) appeals against the enforcement notices but also to the expediency of the very decision to enforce.

107 Although the Allocation of the Fuller's Earth Site in the waste core strategy is not yet certain, the fact of its promotion by the Council is. It seems plain from paragraph 23 of Ms Bartlett's witness statement of 16 November 2010 that neither by a decision of its Development Control Committee nor by Mr Trigwell exercising his delegated authority – if, having issued the enforcement notices, he retains such authority – has the Council considered whether the progress of the proposed allocation and its own support for that allocation are factors which would justify the exercise of the power available to it under section 173A . I accept the submission of Mr Elvin that this ought to have been done. At this stage the proposed allocation is, without doubt, a material consideration which goes to the expediency of the enforcement action which the Council has seen fit to take. And for this reason, in my judgment, it is a matter for the members, not Mr Trigwell, to weigh.

Conclusion

108 For the reasons I have given this ground is sustained.

109 To the extent that I have indicated this application therefore succeeds. I shall hear counsel as to the appropriate form of relief.

Crown copyright

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Figure 10 BA12 Former Fuller's Earth Works, Fosseway, Bath

Identified for Policy Policy 5

Site Area 3.36 ha

Key Development Criteria

- Traffic: Any proposal should assess traffic movements and the relationship with adjacent development.
- Strategic Flood Risk Assessment: Any proposal should refer to the flood mitigation measures listed in the Joint Waste Core Strategy Strategic Flood Risk Assessment Report (June 2009).
- Habitats Regulation Assessment: The Joint Waste Core Strategy Habitats Regulations Assessment (August 2009) found BA12 to be unsuitable for a thermal treatment facility based on all parameters assessed, but potentially suitable for the other waste facility types considered. Any proposal for thermal treatment at BA12 would require further assessment which would have to demonstrate that it could meet the requirements of the Habitats Regulations and that it would not have an adverse effect on the integrity of European designated sites.
- Bats: A greater horseshoe bat roost is known to have been present on this site in 2000, however the exact location was not recorded. Bat radio racking surveys between 2000 and 2009 suggest that horseshoe bats are using habitats in the local area for foraging and commuting. It is not known whether the identified bat roost was linked directly with the Bath and Bradford-on- Avon Bat Sites SAC. Bats and their roosts and the SAC are protected under the Habitats Regulations and any development at this site will need to demonstrate that it will not have an adverse effect on the integrity of the SAC (alone or in combination), or the favourable conservation status of any bat species present. Mitigation measures should be considered as part of further assessment as necessary to demonstrate that a development proposal will have no adverse effect on the integrity of the SAC or the bat species. Mitigation measures will need to be tailored to the precise use of the site by bats which will require further bat surveys, however could include the following measures:
    - Ensuring foraging areas and commuting routes are maintained and enhanced as necessary;
    - Provision of replacement artificial roosts and habitat as informed by further survey work; and
    - Any necessary monitoring surveys.
- Site Design: A high standard of design is expected for both built development and site layout, including landscaping, the relationship with nature conservation and geological interest on site.

- Site Design: A high standard of design is expected for both built development and site layout, including landscaping, the relationship with nature conservation and geological interest on site.
- Visual Impact: A landscape and visual impact assessment would be expected to address the Area of Outstanding Natural Beauty, World Heritage Site and its Setting.
- Green Belt: Any development should be designed to minimise any impact on the openness of the Green Belt.
- Land contamination: Any proposal should consider potential land contamination on site and appropriate remediation.

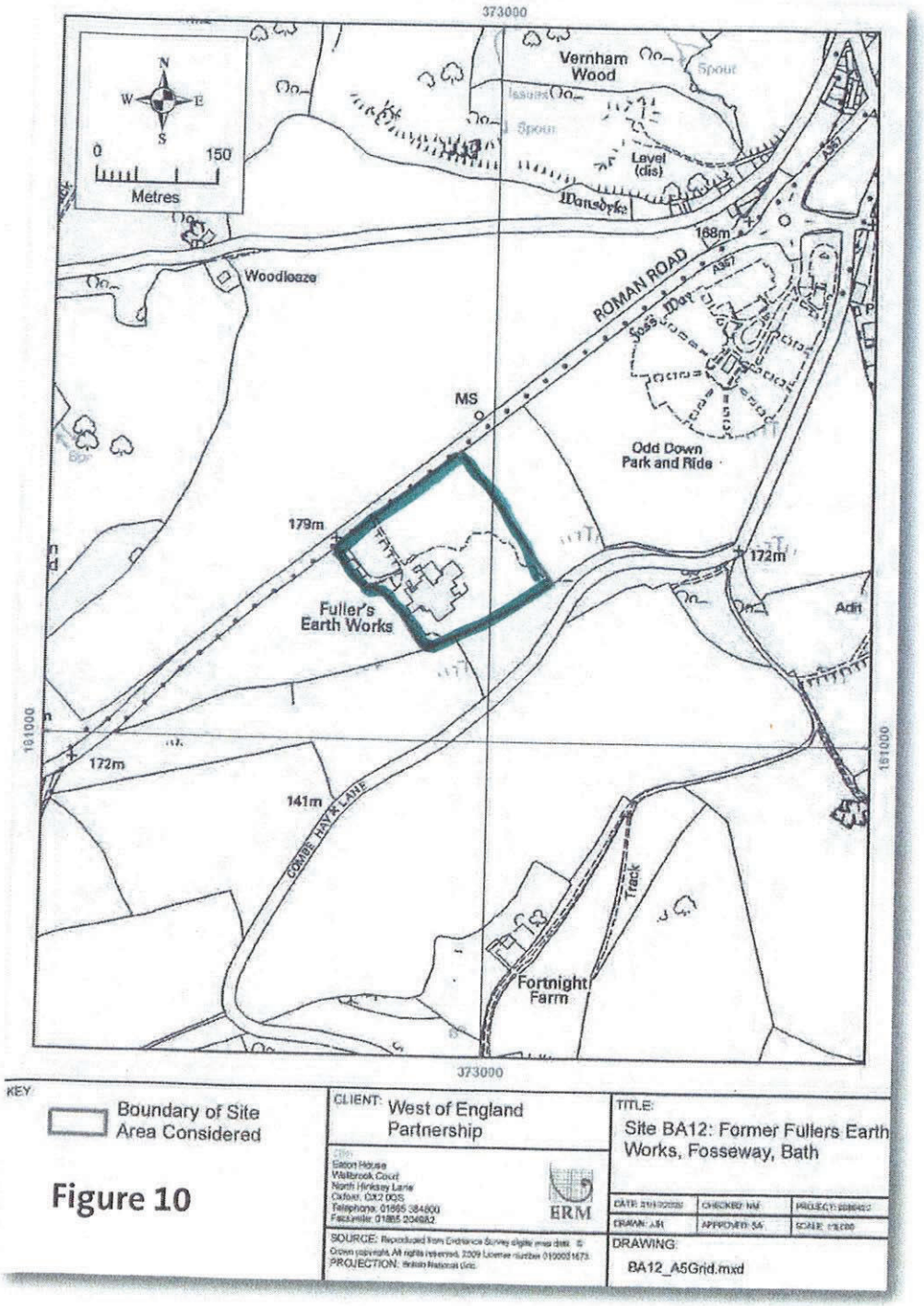


Figure 10

SCANNED

IMPORTANT - THIS COMMUNICATION AFFECTS YOUR PROPERTY

TOWN AND COUNTRY PLANNING ACT 1990
(as amended by the Planning and Compensation Act 1991)

ENFORCEMENT NOTICE

ISSUED BY BATH AND NORTH EAST SOMERSET COUNCIL

1. **THIS NOTICE** is issued by the Council because it appears to them that there has been a breach of planning control, within paragraph (a) of Section 171A(1) of the above Act, at the land described below. They consider that it is expedient to issue this Notice, having regard to the provisions of the development plan and to other material planning considerations. The Explanatory Note at the end of the notice and the enclosures to which it refers contain important additional information.

2. **THE LAND TO WHICH THE NOTICE RELATES:**

Land at the Former Fullers Earth Works, Fosseway, Combe Hay, Bath, BA2 8PD shown edged red on attached 'ENF plan01'.

3. **THE MATTERS WHICH APPEAR TO CONSTITUTE THE BREACH OF PLANNING CONTROL:**

Without planning permission:

- the installation of a permanently sited office building in the approximate position outlined in blue and marked with a 'B1' on the attached 'ENF plan 03'
- the construction of concrete manufacture and batching plant, storage silos, aggregate storage bays and ancillary metal buildings in the approximate position outlined in blue and marked with an 'B2' on the attached 'ENF plan03'

4. **REASONS FOR ISSUING THIS NOTICE**

a) It appears to the Council that the breach of planning control has occurred within the last four years.

b) The concrete manufacture and batching plant, storage silos, aggregate storage bays, ancillary metal buildings and the permanently sited office building have an adverse impact upon the character and appearance of the rural green belt area which is important for the setting of Bath, a World Heritage Site. The development is therefore contrary to policies NE.1, NE.4, GB.2 and BH.1 of the Bath and North East Somerset Local Plan (including minerals and waste policies) adopted October 2007, to Planning Policy Statement 7 "Sustainable Development in Rural Areas" (PPS7).

c) The concrete manufacture and batching plant, aggregate storage bays and the permanently sited office building are inappropriate development within the green belt which reduce the openness of the area and no very special circumstances have been brought to the Council's attention that clearly outweigh this harm. The development is therefore contrary to

policy GB.1 of the Bath and North East Somerset Local Plan (including minerals and waste policies) adopted October 2007 as well as Planning Policy Guidance note 2 "Green Belts" (PPG2).

5. WHAT YOU ARE REQUIRED TO DO:

a) Demolish the concrete manufacture and batching plant, storage silos, aggregate storage bays and ancillary metal buildings,

b) Remove the two sets of wooden steps constructed on the south-west and south-east sides of the office building, disconnect the building from services, permanently remove the office building from the land and demolish the concrete pillars supporting the structure

c) Remove from the land all materials resulting from steps a) and b), restore the land to its condition before the breach took place by leveling with top-soil or compacted hard-core.

6. TIME FOR COMPLIANCE

Within 6 months from the date this Notice takes effect.

7. WHEN THIS NOTICE TAKES EFFECT

This notice takes effect on **22nd April 2009** unless an appeal is made against it beforehand.

Dated 25/02/09... Signed .....

David Trigwell
Divisional Director of Planning and Transport

On behalf of Bath and North East Somerset Council
Trimbridge House
Trim Street
Bath
BA1 2DP

Served on:-

Company Secretary
Gazelle Properties Limited
Lilliput House
Fosseway
Midsomer Norton
Radstock
BA3 4BB

SVENSKA HANDELSBANKEN
Trinity Tower
9 Thomas More Street
London
E1W 1WY

Company Secretary
Waste Recycling @ Bath Limited
Lilliput House
Fosseway
Midsomer Norton
Radstock
BA3 4BB

Company Secretary
Bath Recycling Skips Limited
The Shop
16 Old Street
Clevedon
North Somerset
BS21 6ND

Company Secretary
Beechwood Environmental Logistics Limited
16 Old Street
Clevedon
North Somerset
BS21 6ND

Maple Skip Hire
29 Banwell Road
Bath
BA2 2UJ

Company Secretary
Stonecraft of Bath Ltd
34A Wellsway
Bath
BA2 2AA

Company Secretary
Hanson Quarry Products Europe Limited
Hanson House
14 Castle Hill
Maidenhead
SL6 4JJ

Company Secretary
Maple Scaffolding Limited
46 Hillside View
Peasedown St John
Bath
BA2 8ET

Mr Paul Derek
1 The Firs
Fosseway
Englishcombe
Bath
BA2 8PD

Simon Bishop
2 The Firs
Fosseway
Englishcombe
Bath
BA2 8PD

Susan Ridings
Winsbury House
Bath Road
Marksbury
Bath
BA2 9HF

Mr A Ridings
c/o Former Fullers Earth Works
Fosseway
Combe Hay
Bath
BA2 8PD

Mr Barry Williams
c/o Former Fullers Earth Works
Fosseway
Combe Hay
Bath
BA2 8PD

AND

"The Occupier – To Who It May Concern"
Former Fullers Earth Works
Fosseway
Combe Hay
Bath
BA2 8PD

EXPLANATORY NOTE

YOUR RIGHT OF APPEAL

There is a right of appeal to the Secretary of State (at the Planning Inspectorate) against this Enforcement Notice.

If you appeal against this Notice, any appeal must be received or posted in time to be received by the Secretary of State BEFORE the date this Notice take effect as specified in Paragraph 7 of the Notice.

Unless an appeal is made, as described below, the Enforcement Notice will take effect on 22 April 2009 and you must then ensure that the required steps, for which you may be held responsible, are taken within the period(s) specified in the Notice.

Lodging your appeal

Any appeal to the Secretary of State must be made in writing. I also enclose information sheet from the Planning Inspectorate which provides further information on how to obtain appeal forms and lodge an appeal.

As mentioned above, the appeal must be submitted in good time so that it is received by the Secretary of State BEFORE the date on which the Enforcement Notice takes effect.

Grounds of appeal

Under section 174 of the Town and Country Planning Act 1990 (as amended) you may appeal on one or more of the following grounds:-

(a) That planning permission should be granted for what is alleged in the notice.
(b) That the breach of control alleged in the enforcement notice has not occurred as a matter of fact.
(c) That there has not been a breach of planning control
(d) That, at the time the enforcement notice was issued, it was too late to take enforcement action against the matters stated in the notice.
(e) The notice was not properly served on everyone with an interest in the land.
(f) The steps required to comply with the requirements of the notice are excessive, and lesser steps would overcome the objections.
(g) The time given to comply with the notice is too short.

Not all of these grounds may be relevant to you.

When you submit your appeal, you should state in writing the ground(s) on which you are appealing against the Enforcement Notice and you should also state briefly the facts upon which you intend to rely in support of each of those grounds of appeal. If you do not do this when you make your appeal, the Secretary of State will send you a notice requiring you to do so within 14 days.

Deemed planning application fee

If you appeal under Ground (a) above, this is the equivalent of applying for planning permission for the development detailed in the Enforcement Notice and you will have to pay a fee of £670. You should pay half of the fee to Bath and North East Somerset Council (payable to Bath and North East Somerset Council) and the other half of the fee to the Planning Inspectorate (made payable to the Department for Communities and Local Government). Joint appellants need only pay one set of fees.

Additional Information

For your information, Sections 171A, 171B, and 172 – 177 of the Town and Country Planning Act 1990 (as amended) are set out in the Annex overleaf.

ANNEX

171A Expressions used in connection with enforcement

(1) For the purposes of this Act—

(a) carrying out development without the required planning permission; or

(b) failing to comply with any condition or limitation subject to which planning permission has been granted,

constitutes a breach of planning control.

(2) For the purposes of this Act—

(a) the issue of an enforcement notice (defined in section 172); or

(b) the service of a breach of condition notice (defined in section 187A),

constitutes taking enforcement action.

(3) In this Part "planning permission" includes permission under Part III of the 1947 Act, of the 1962 Act or of the 1971 Act.

171B Time limits

(1) Where there has been a breach of planning control consisting in the carrying out without planning permission of building, engineering, mining or other operations in, on, over or under land, no enforcement action may be taken after the end of the period of four years beginning with the date on which the operations were substantially completed.

(2) Where there has been a breach of planning control consisting in the change of use of any building to use as a single dwellinghouse, no enforcement action may be taken after the end of the period of four years beginning with the date of the breach.

(3) In the case of any other breach of planning control, no enforcement action may be taken after the end of the period of ten years beginning with the date of the breach.

(4) The preceding subsections do not prevent—

(a) the service of a breach of condition notice in respect of any breach of planning control if an enforcement notice in respect of the breach is in effect; or

(b) taking further enforcement action in respect of any breach of planning control if, during the period of four years ending with that action being taken, the local planning authority have taken or purported to take enforcement action in respect of that breach.

172 Issue of enforcement notice

(1) The local planning authority may issue a notice (in this Act referred to as an "enforcement notice") where it appears to them—

(a) that there has been a breach of planning control; and

(b) that it is expedient to issue the notice, having regard to the provisions of the development plan and to any other material considerations.

(2) A copy of an enforcement notice shall be served—

(a) on the owner and on the occupier of the land to which it relates; and

(b) on any other person having an interest in the land, being an interest which, in the opinion of the authority, is materially affected by the notice.

(3) The service of the notice shall take place—

(a) not more than twenty-eight days after its date of issue; and

(b) not less than twenty-eight days before the date specified in it as the date on which it is to take effect.

173 Contents and effect of notice

(1) An enforcement notice shall state—

(a) the matters which appear to the local planning authority to constitute the breach of planning control; and

(b) the paragraph of section 171A(1) within which, in the opinion of the authority, the breach falls.

(2) A notice complies with subsection (1)(a) if it enables any person on whom a copy of it is served to know what those matters are.

(3) An enforcement notice shall specify the steps which the authority require to be taken, or the activities which the authority require to cease, in order to achieve, wholly or partly, any of the following purposes.

(4) Those purposes are—

(a) remedying the breach by making any development comply with the terms (including conditions and limitations) of any planning permission which has been granted in respect of the land, by discontinuing any use of the land or by restoring the land to its condition before the breach took place; or

(b) remedying any injury to amenity which has been caused by the breach.

(5) An enforcement notice may, for example, require—

(a) the alteration or removal of any buildings or works;

(b) the carrying out of any building or other operations;

(c) any activity on the land not to be carried on except to the extent specified in the notice; or

(d) the contour of a deposit of refuse or waste materials on land to be modified by altering the gradient or gradients of its sides.

(6) Where an enforcement notice is issued in respect of a breach of planning control consisting of demolition of a building, the notice may require the construction of a building (in this section referred to as a "replacement building") which, subject to subsection (7), is as similar as possible to the demolished building.

(7) A replacement building—

(a) must comply with any requirement imposed by any enactment applicable to the construction of buildings;

(b) may differ from the demolished building in any respect which, if the demolished building had been altered in that respect, would not have constituted a breach of planning control;

(c) must comply with any regulations made for the purposes of this subsection (including regulations modifying paragraphs (a) and (b)).

(8) An enforcement notice shall specify the date on which it is to take effect and, subject to sections 175(4) and 289(4A), shall take effect on that date.

(9) An enforcement notice shall specify the period at the end of which any steps are required to have been taken or any activities are required to have ceased and may specify different periods for different steps or activities; and, where different periods apply to different steps or activities, references in this Part to the period for compliance with an enforcement notice, in relation to any step or activity, are to the period at the end of which the step is required to have been taken or the activity is required to have ceased.

(10) An enforcement notice shall specify such additional matters as may be prescribed, and regulations may require every copy of an enforcement notice served under section 172 to be accompanied by an explanatory note giving prescribed information as to the right of appeal under section 174.

(11) Where—

(a) an enforcement notice in respect of any breach of planning control could have required any buildings or works to be removed or any activity to cease, but does not do so; and

(b) all the requirements of the notice have been complied with,

then, so far as the notice did not so require, planning permission shall be treated as having been granted by virtue of section 73A in respect of development consisting of the construction of the buildings or works or, as the case may be, the carrying out of the activities.

(12) Where—

(a) an enforcement notice requires the construction of a replacement building; and

(b) all the requirements of the notice with respect to that construction have been complied with,

planning permission shall be treated as having been granted by virtue of section 73A in respect of development consisting of that construction.

173A Variation and withdrawal of enforcement notices

(1) The local planning authority may—

(a) withdraw an enforcement notice issued by them; or

(b) waive or relax any requirement of such a notice and, in particular, may extend any period specified in accordance with section 173(9).

(2) The powers conferred by subsection (1) may be exercised whether or not the notice has taken effect.

(3) The local planning authority shall, immediately after exercising the powers conferred by subsection (1), give notice of the exercise to every person who has been served with a copy of the enforcement notice or would, if the notice were re-issued, be served with a copy of it.

(4) The withdrawal of an enforcement notice does not affect the power of the local planning authority to issue a further enforcement notice.

174 Appeal against enforcement notice

(1) A person having an interest in the land to which an enforcement notice relates or a relevant occupier may appeal to the Secretary of State against the notice, whether or not a copy of it has been served on him.

(2) An appeal may be brought on any of the following grounds—

(a) that, in respect of any breach of planning control which may be constituted by the matters stated in the notice, planning permission ought to be granted or, as the case may be, the condition or limitation concerned ought to be discharged;

(b) that those matters have not occurred;

(c) that those matters (if they occurred) do not constitute a breach of planning control;

(d) that, at the date when the notice was issued, no enforcement action could be taken in respect of any breach of planning control which may be constituted by those matters;

(e) that copies of the enforcement notice were not served as required by section 172;

(f) that the steps required by the notice to be taken, or the activities required by the notice to cease, exceed what is necessary to remedy any breach of planning control which may be constituted by those matters or, as the case may be, to remedy any injury to amenity which has been caused by any such breach;

(g) that any period specified in the notice in accordance with section 173(9) falls short of what should reasonably be allowed.

(3) An appeal under this section shall be made. . .—

(a) by giving written notice of the appeal to the Secretary of State before the date specified in the enforcement notice as the date on which it is to take effect; or

(b) by sending such notice to him in a properly addressed and pre-paid letter posted to him at such time that, in the ordinary course of post, it would be delivered to him before that date[; or

(c) by sending such notice to him using electronic communications at such time that, in the ordinary course of transmission, it would be delivered to him before that date].]

(4) A person who gives notice under subsection (3) shall submit to the Secretary of State, either when giving the notice or within the prescribed time, a statement in writing—

(a) specifying the grounds on which he is appealing against the enforcement notice; and

(b) giving such further information as may be prescribed.

(5) If, where more than one ground is specified in that statement, the appellant does not give information required under subsection (4)(b) in relation to each of those grounds within the prescribed time, the Secretary of

State may determine the appeal without considering any ground as to which the appellant has failed to give such information within that time.

(6) In this section "relevant occupier" means a person who—

(a) on the date on which the enforcement notice is issued occupies the land to which the notice relates by virtue of a licence . . . ; and

(b) continues so to occupy the land when the appeal is brought.

175 Appeals: supplementary provisions

(1) The Secretary of State may by regulations prescribe the procedure which is to be followed on appeals under section 174 and, in particular, but without prejudice to the generality of this subsection, may—

(a) require the local planning authority to submit, within such time as may be prescribed, a statement indicating the submissions which they propose to put forward on the appeal;

(b) specify the matters to be included in such a statement;

(c) require the authority or the appellant to give such notice of such an appeal as may be prescribed;

(d) require the authority to send to the Secretary of State, within such period from the date of the bringing of the appeal as may be prescribed, a copy of the enforcement notice and a list of the persons served with copies of it.

(2) The notice to be prescribed under subsection (1)(c) shall be such notice as in the opinion of the Secretary of State is likely to bring the appeal to the attention of persons in the locality in which the land to which the enforcement notice relates is situated.

(3) Subject to section 176(4), the Secretary of State shall, if either the appellant or the local planning authority so desire, give each of them an opportunity of appearing before and being heard by a person appointed by the Secretary of State for the purpose.
[(3A) Subsection (3) does not apply to an appeal against an enforcement notice issued by a local planning authority in England.]

(4) Where an appeal is brought under section 174 the enforcement notice shall [subject to any order under section 289(4A)] be of no effect pending the final determination or the withdrawal of the appeal.

(5) Where any person has appealed to the Secretary of State against an enforcement notice, no person shall be entitled, in any other proceedings instituted after the making of the appeal, to claim that the notice was not duly served on the person who appealed.

(6) Schedule 6 applies to appeals under section 174, including appeals under that section as applied by regulations under any other provisions of this Act.

[(7) Subsection (5) of section 250 of the Local Government Act 1972 (which authorises a Minister holding an inquiry under that section to make orders with respect to the costs of the parties) shall apply in relation to any proceedings before the Secretary of State on an appeal under section 174 as if those proceedings were an inquiry held by the Secretary of State under section 250.]

176 General provisions relating to determination of appeals

[(1) On an appeal under section 174 the Secretary of State may—

(a) correct any defect, error or misdescription in the enforcement notice; or

(b) vary the terms of the enforcement notice,

if he is satisfied that the correction or variation will not cause injustice to the appellant or the local planning authority.

(2) Where the Secretary of State determines to allow the appeal, he may quash the notice.

(2A) The Secretary of State shall give any directions necessary to give effect to his determination on the appeal.]

(3) The Secretary of State—

(a) may dismiss an appeal if the appellant fails to comply with section 174(4) within the prescribed time; and

(b) may allow an appeal and quash the enforcement notice if the local planning authority fail to comply with any requirement of regulations made by virtue of paragraph (a), (b), or (d) of section 175(1) within the prescribed period.

(4) If [section 175(3) would otherwise apply and] the Secretary of State proposes to dismiss an appeal under paragraph (a) of subsection (3) [of this section] or to allow an appeal and quash the enforcement notice under paragraph (b) of that subsection, he need not comply with section 175(3).

(5) Where it would otherwise be a ground for determining an appeal under section 174 in favour of the appellant that a person required to be served with a copy of the enforcement notice was not served, the Secretary of State may disregard that fact if neither the appellant nor that person has been substantially prejudiced by the failure to serve him.

177 Grant or modification of planning permission on appeals against enforcement notices

(1) On the determination of an appeal under section 174, the Secretary of State may—

(a) grant planning permission in respect of the matters stated in the enforcement notice as constituting a breach of planning control, whether in relation to the whole or any part of those matters or in relation to the whole or any part of the land to which the notice relates;]

(b) discharge any condition or limitation subject to which planning permission was granted;

(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.

(1A) The provisions of sections 191 to 194 mentioned in subsection (1B) shall apply for the purposes of subsection (1)(c) as they apply for the purposes of section 191, but as if—

(a) any reference to an application for a certificate were a reference to the appeal and any reference to the date of such an application were a reference to the date on which the appeal is made; and

(b) references to the local planning authority were references to the Secretary of State.

(1B) Those provisions are: sections 191(5) to (7), 193(4) (so far as it relates to the form of the certificate), (6) and (7) and 194].

(2) In considering whether to grant planning permission under subsection (1), the Secretary of State shall have regard to the provisions of the development plan, so far as material to the subject matter of the enforcement notice, and to any other material considerations.

[(3) The planning permission that may be granted under subsection (1) is any planning permission that might be granted on an application under Part III.]

(4) Where under subsection (1) the Secretary of State discharges a condition or limitation, he may substitute another condition or limitation for it, whether more or less onerous.

(5) Where an appeal against an enforcement notice is brought under section 174, the appellant shall be deemed to have made an application for planning permission [in respect of the matters stated in the enforcement notice as constituting a breach of planning control].

(5A) Where—

(a) the statement under subsection (4) of section 174 specifies the ground mentioned in subsection (2)(a) of that section;

(b) any fee is payable under regulations made by virtue of section 303 in respect of the application deemed to be made by virtue of the appeal; and

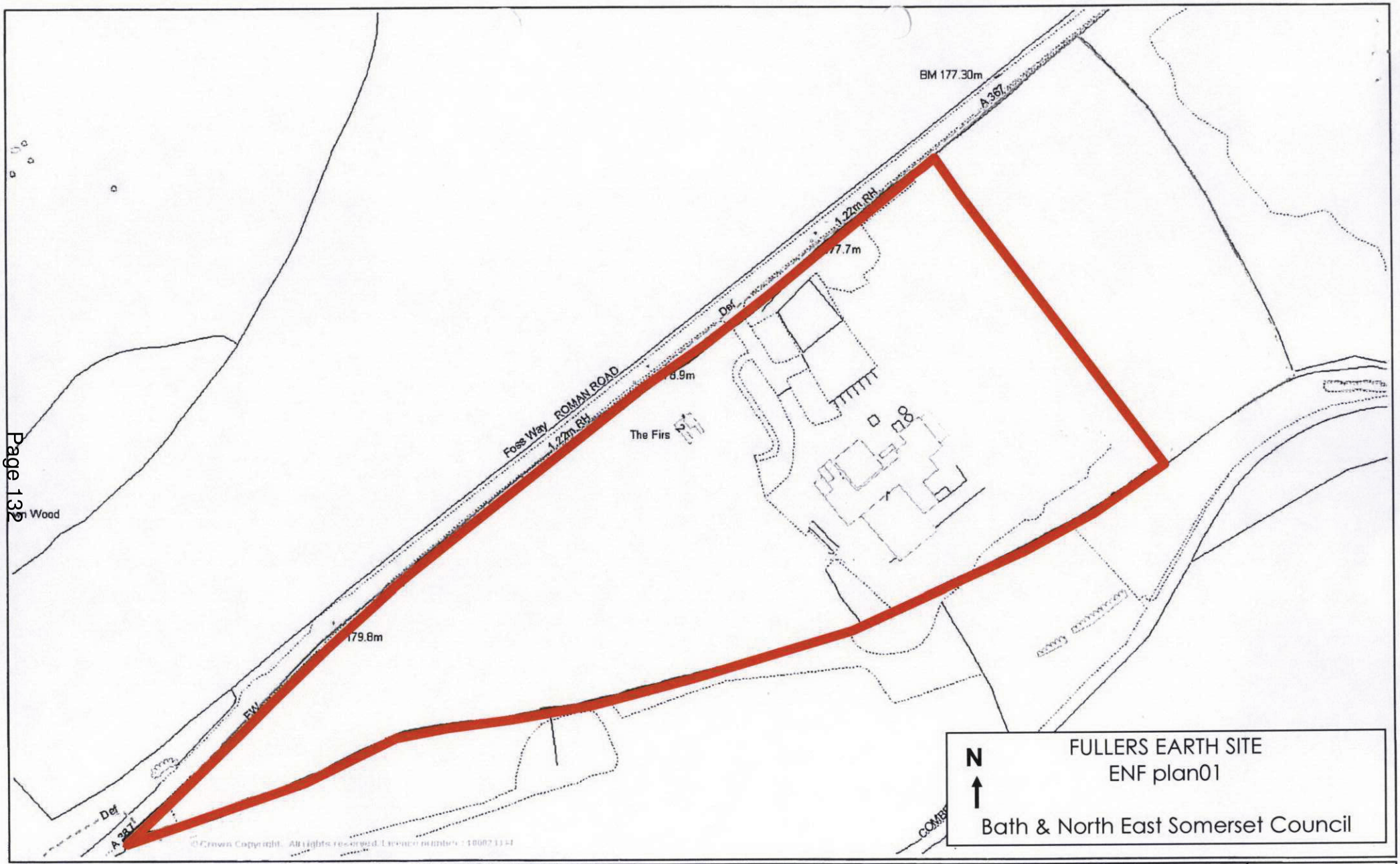
(c) the Secretary of State gives notice in writing to the appellant specifying the period within which the fee must be paid,

then, if that fee is not paid within that period, the appeal, so far as brought on that ground, and the application shall lapse at the end of that period.]

(6) Any planning permission granted under subsection (1) on an appeal shall be treated as granted on the application deemed to have been made by the appellant.

(7) In relation to a grant of planning permission or a determination under subsection (1) the Secretary of State's decision shall be final.

(8) For the purposes of section 69 the Secretary of State's decision shall be treated as having been given by him in dealing with an application for planning permission made to the local planning authority.



Land Adjacent to the A367 Fosse Way, Odd Down, Bath

Bath & North East Somerset Council, Planning Services,
Trimbridge House, Trim Street, Bath BA1 2DP

Scale 1/2500

Centre = 372835 E 161211 N

Date 5/11/2007

Drawn by:

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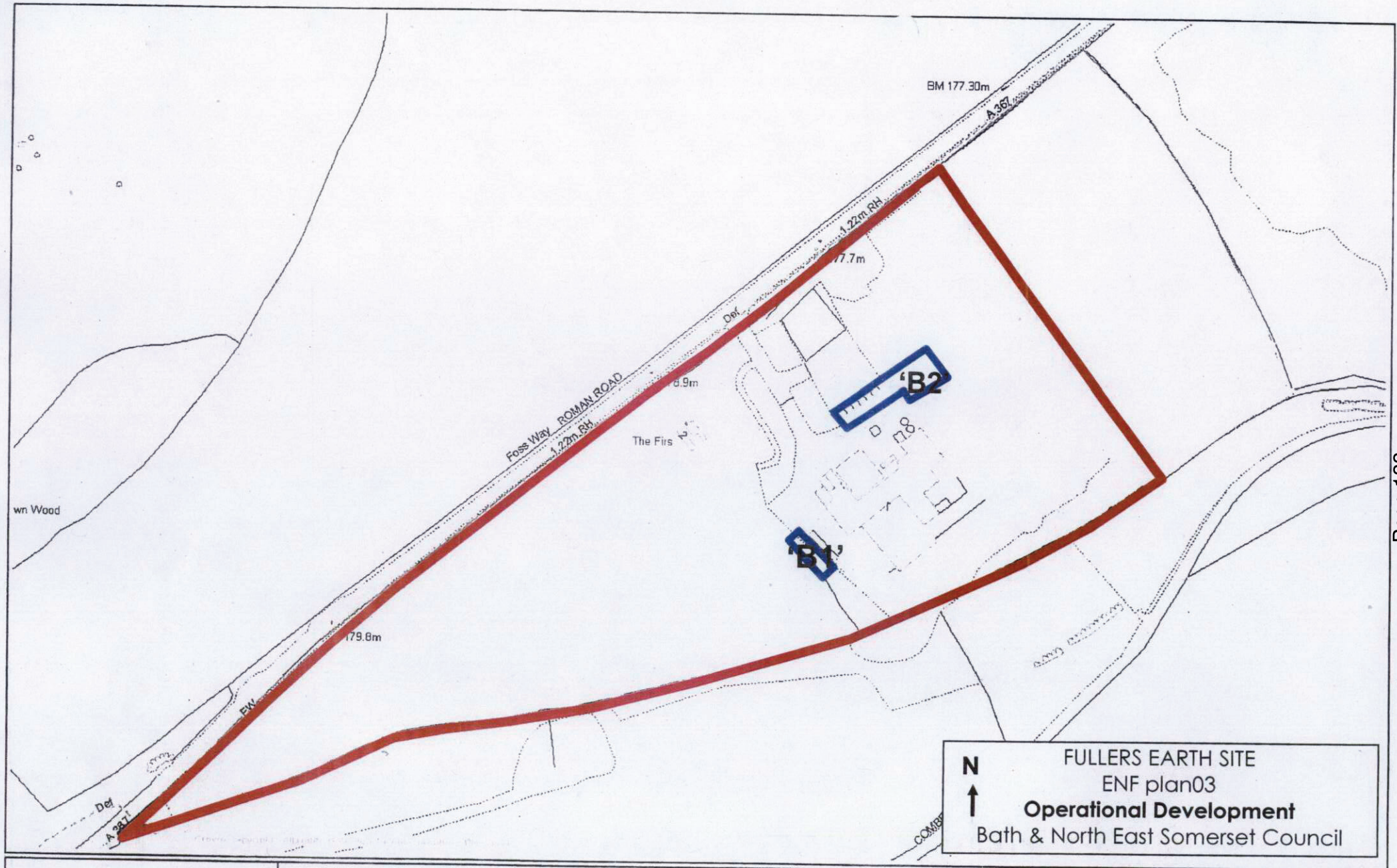

Land Adjacent to the A367 Fosse Way, Odd Down, Bath

Bath & North East Somerset Council, Planning Services,
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N
W E
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Scale 1/2500

Centre = 372835 E 161211 N

Date 5/11/2007
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SCANNED SCANN

IMPORTANT - THIS COMMUNICATION AFFECTS YOUR PROPERTY

TOWN AND COUNTRY PLANNING ACT 1990
(as amended by the Planning and Compensation Act 1991)

ENFORCEMENT NOTICE

ISSUED BY BATH AND NORTH EAST SOMERSET COUNCIL

1. **THIS NOTICE** is issued by the Council because it appears to them that there has been a breach of planning control, within paragraph (a) of Section 171A(1) of the above Act, at the land described below. They consider that it is expedient to issue this Notice, having regard to the provisions of the development plan and to other material planning considerations. The Explanatory Note at the end of the notice and the enclosures to which it refers contain important additional information.

2. **THE LAND TO WHICH THE NOTICE RELATES:**

Land at the Former Fullers Earth Works, Fosseway, Combe Hay, Bath, BA2 8PD shown edged red on attached 'ENF plan01'.

3. **THE MATTERS WHICH APPEAR TO CONSTITUTE THE BREACH OF PLANNING CONTROL:**
Without planning permission, the change of use of the land from agriculture, residential use (of the dwellings and land at 1 & 2 The Firs) and general industrial use (B2) to the mixed use of the site including the following activities:
   - Agriculture;
   - Residential use of the dwellings and land at 1 & 2 The Firs;
   - Waste processing (within use class B2) including waste storage;
   - Concrete production and batching (within use class B2) including aggregate storage;
   - Green-waste storage (including plant material and wood);
   - Skip hire and storage;
   - Scaffolding storage and repair;
   - As a building/engineering/stone mason contractor's yard;
   - Siting and use of a hot-food take-away trailer; and
   - the storage of an advert trailer, metal cages and other scrap items.

4. **REASONS FOR ISSUING THIS NOTICE**
   i) It appears to the Council that the breach of planning control has occurred within the last ten years.
   ii) The encroachment of industrial uses, beyond the extent of the historical general industrial use of the site [hatched green on 'ENFplan02' (attached)], along with the associated structures, has an adverse impact upon the character and appearance of the rural green belt area which is important for the setting of Bath, a World Heritage Site. The development is therefore contrary to policies NE.1, NE.4,

GB.2 and BH.1 of the Bath and North East Somerset Local Plan (including minerals and waste policies) adopted October 2007, to Planning Policy Statement 7 "Sustainable Development in Rural Areas" (PPS7).

iii) The extended industrial area, beyond the extent of the historical general industrial use of the site [hatched green on 'ENF plan02' (attached)], along with the associated structures are inappropriate development within the green belt which reduce the openness of the area and no very special circumstances have been brought to the Council's attention that clearly outweigh this harm. The development is therefore contrary to policy GB.1 of the Bath and North East Somerset Local Plan (including minerals and waste policies) adopted October 2007 as well as Planning Policy Guidance note 2 "Green Belts" (PPG2).

iv) The operation of the hot-food trailer brings about unsafe conditions within the site due to potential conflicts between commercial vehicles and the vehicles of other customers. This is contrary to policy T24 of the Bath and North East Somerset Local Plan (including minerals and waste policies) adopted October 2007.

v) The encroachment of the mixed use for the various businesses close to the residential properties at 1 and 2 The Firs if allowed to continue would have a harmful impact upon the living conditions at those properties contrary to policy D2 of the Bath and North East Somerset Local Plan (including minerals and waste policies) adopted October 2007.

vi) The agricultural use of the site is considered to be acceptable.

vii) The continued residential use of the dwellings and land at 1 and 2 The Firs as well as the general industrial use (within use-class B2) of the area hatched in green on 'ENF Plan 02' are considered acceptable due to very special circumstances which outweigh the harm to the character and appearance of the rural area and the green belt as well as conflict with policies within the Bath and North East Somerset Local Plan (including minerals and waste policies) adopted October 2007, PPG2 and PPS7.

5. WHAT YOU ARE REQUIRED TO DO:

i) Permanently cease using the land hatched blue on 'ENF plan02' (attached) for:
   a. Waste processing (within use class B2) including waste storage;
   b. Concrete production and batching (within use class B2) including aggregate storage;
   c. Green-waste storage;
   d. Skip hire and storage;
   e. Scaffolding storage and repair;
   f. As a building/engineering/stone mason contractor's yard;
   g. Siting and use of a hot-food take-away trailer;
   h. and the storage of an advert trailer, metal cages and other scrap items.

ii) Permanently cease using the land hatched green on 'ENF plan02' (attached) for:

a. Green-waste storage;
b. Skip hire and storage other than where ancillary to waste processing;
c. Scaffolding storage and repair;
d. As a building/engineering/stone mason contractor's yard;
e. Siting and use of a hot-food take-away trailer other than for ancillary purposes to the general industrial use of the land hatched green on 'ENF plan 02' (attached);
f. and the storage of an advert trailer, metal cages and other scrap items.

iii) Permanently remove from the land hatched blue on 'ENF plan02' all sands, aggregates, green-waste and waste awaiting processing including hard-core, rubble, road-scalpings, timber, pallets, plastic, window and door frames.

iv) In relation to the approximate area marked 'X', outlined with a dotted red-line on 'ENF plan02':
a. Permanently remove from the land all storage containers, skips, scaffolding, racking, metal-sheeting, gas-bottles, site-fencing, stone, pallets and road cones;
b. Excavate the concrete hard-surfaces including hard-core sub-bases;
c. Demolish all metal fencing, aggregate storage bays including the excavation of all footings;
d. Remove all materials and rubble from the site which results from steps a, b and c;
e. Restore the land to its condition before the breach took place by levelling with top-soil to match the level of the adjoining land.

v) Permanently remove the hot-food trailer from the land hatched blue on 'ENF plan02' and currently in the approximate position mark 'HF' on that plan.

vi) Excavate the compacted hard-surfaced and built-up areas indicated as 'CP1' and 'CP2' shown in the approximate area outlined by blue dotted lines on 'ENF plan02', level to the height of the immediately adjoining land to the west, remove all materials from the site, restore the land to its condition before the breach took place and level with top-soil.

vii) Demolish the bund along the north-east boundary of the site in the approximate position indicated by the black-red dashed line, reduce to the level of the adjoining land, remove all materials from the site, restore the land to its condition before the breach took place and level with top-soil.

viii) Permanently remove the advert trailer, metal cages and other scrap items from the land hatched blue on 'ENF plan02' which are currently in the approximate position mark 'Y' on that plan.

6. TIME FOR COMPLIANCE

Within 6 months from the date this Notice takes effect.

7. **WHEN THIS NOTICE TAKES EFFECT**
This notice takes effect on **22 April 2009** unless an appeal is made against it beforehand.

Dated 25/02/09 Signed .....

David Trigwell
Divisional Director of Planning and Transport

On behalf of Bath and North East Somerset Council
Trimbridge House
Trim Street
Bath
BA1 2DP

Served on:-

Company Secretary
Gazelle Properties Limited
Lilliput House
Fosseway
Midsomer Norton
Radstock
BA3 4BB

SVENSKA HANDELSBANKEN
Trinity Tower
9 Thomas More Street
London
E1W 1WY

Company Secretary
Waste Recycling @ Bath Limited
Lilliput House
Fosseway
Midsomer Norton
Radstock
BA3 4BB

Company Secretary
Bath Recycling Skips Limited
The Shop
16 Old Street
Clevedon
North Somerset
BS21 6ND

Company Secretary
Beechwood Environmental Logistics Limited
16 Old Street
Clevedon
North Somerset
BS21 6ND

Maple Skip Hire
29 Banwell Road
Bath
BA2 2UJ

Company Secretary
Stonecraft of Bath Ltd
34A Wellsway
Bath
BA2 2AA

Company Secretary
Hanson Quarry Products Europe Limited
Hanson House
14 Castle Hill
Maidenhead
SL6 4JJ

Company Secretary
Maple Scaffolding Limited
46 Hillside View
Peasedown St John
Bath
BA2 8ET

Mr Paul Derek
1 The Firs
Fosseway
Englishcombe
Bath
BA2 8PD

Simon Bishop
2 The Firs
Fosseway
Englishcombe
Bath
BA2 8PD

Susan Ridings
Winsbury House
Bath Road
Marksbury
Bath
BA2 9HF

Mr A Ridings
c/o Former Fullers Earth Works
Fosseway
Combe Hay
Bath
BA2 8PD

Mr Barry Williams
c/o Former Fullers Earth Works
Fosseway
Combe Hay
Bath
BA2 8PD

AND

"The Occupier – To Who It May Concern"
Former Fullers Earth Works
Fosseway
Combe Hay
Bath
BA2 8PD

EXPLANATORY NOTE

YOUR RIGHT OF APPEAL

There is a right of appeal to the Secretary of State (at the Planning Inspectorate) against this Enforcement Notice.

If you appeal against this Notice, any appeal must be received or posted in time to be received by the Secretary of State BEFORE the date this Notice take effect as specified in Paragraph 7 of the Notice.

Unless an appeal is made, as described below, the Enforcement Notice will take effect on 22 April 2009 and you must then ensure that the required steps, for which you may be held responsible, are taken within the period(s) specified in the Notice.

Lodging your appeal

Any appeal to the Secretary of State must be made in writing. I also enclose information sheet from the Planning Inspectorate which provides further information on how to obtain appeal forms and lodge an appeal.

As mentioned above, the appeal must be submitted in good time so that it is received by the Secretary of State **BEFORE** the date on which the Enforcement Notice takes effect.

Grounds of appeal

Under section 174 of the Town and Country Planning Act 1990 (as amended) you may appeal on one or more of the following grounds:-

(a) That planning permission should be granted for what is alleged in the notice.
(b) That the breach of control alleged in the enforcement notice has not occurred as a matter of fact.
(c) That there has not been a breach of planning control
(d) That, at the time the enforcement notice was issued, it was too late to take enforcement action against the matters stated in the notice.
(e) The notice was not properly served on everyone with an interest in the land.
(f) The steps required to comply with the requirements of the notice are excessive, and lesser steps would overcome the objections.
(g) The time given to comply with the notice is too short.

Not all of these grounds may be relevant to you.

When you submit your appeal, you should state in writing the ground(s) on which you are appealing against the Enforcement Notice and you should also state briefly the facts upon which you intend to rely in support of each of those grounds of appeal. If you do not do this when you make your appeal, the Secretary of State will send you a notice requiring you to do so within 14 days.

Deemed planning application fee

If you appeal under Ground (a) above, this is the equivalent of applying for planning permission for the development detailed in the Enforcement Notice and you will have to pay a fee of £670. You should pay half of the fee to Bath and North East Somerset Council (payable to Bath and North East Somerset Council) and the other half of the fee to the Planning Inspectorate (made payable to the Department for Communities and Local Government). Joint appellants need only pay one set of fees.

Additional Information

For your information, Sections 171A, 171B, and 172 – 177 of the Town and Country Planning Act 1990 (as amended) are set out in the Annex overleaf.

ANNEX

171A Expressions used in connection with enforcement

(1) For the purposes of this Act—

(a) carrying out development without the required planning permission; or

(b) failing to comply with any condition or limitation subject to which planning permission has been granted,

constitutes a breach of planning control.

(2) For the purposes of this Act—

(a) the issue of an enforcement notice (defined in section 172); or

(b) the service of a breach of condition notice (defined in section 187A),

constitutes taking enforcement action.

(3) In this Part "planning permission" includes permission under Part III of the 1947 Act, of the 1962 Act or of the 1971 Act.

171B Time limits

(1) Where there has been a breach of planning control consisting in the carrying out without planning permission of building, engineering, mining or other operations in, on, over or under land, no enforcement action may be taken after the end of the period of four years beginning with the date on which the operations were substantially completed.

(2) Where there has been a breach of planning control consisting in the change of use of any building to use as a single dwellinghouse, no enforcement action may be taken after the end of the period of four years beginning with the date of the breach.

(3) In the case of any other breach of planning control, no enforcement action may be taken after the end of the period of ten years beginning with the date of the breach.

(4) The preceding subsections do not prevent—

(a) the service of a breach of condition notice in respect of any breach of planning control if an enforcement notice in respect of the breach is in effect; or

(b) taking further enforcement action in respect of any breach of planning control if, during the period of four years ending with that action being taken, the local planning authority have taken or purported to take enforcement action in respect of that breach.

172 Issue of enforcement notice

(1) The local planning authority may issue a notice (in this Act referred to as an "enforcement notice") where it appears to them—

(a) that there has been a breach of planning control; and

(b) that it is expedient to issue the notice, having regard to the provisions of the development plan and to any other material considerations.

(2) A copy of an enforcement notice shall be served—

(a) on the owner and on the occupier of the land to which it relates; and

(b) on any other person having an interest in the land, being an interest which, in the opinion of the authority, is materially affected by the notice.

(3) The service of the notice shall take place—

(a) not more than twenty-eight days after its date of issue; and

(b) not less than twenty-eight days before the date specified in it as the date on which it is to take effect.

173 Contents and effect of notice

(1) An enforcement notice shall state—

(a) the matters which appear to the local planning authority to constitute the breach of planning control; and

(b) the paragraph of section 171A(1) within which, in the opinion of the authority, the breach falls.

(2) A notice complies with subsection (1)(a) if it enables any person on whom a copy of it is served to know what those matters are.

(3) An enforcement notice shall specify the steps which the authority require to be taken, or the activities which the authority require to cease, in order to achieve, wholly or partly, any of the following purposes.

(4) Those purposes are—

(a) remedying the breach by making any development comply with the terms (including conditions and limitations) of any planning permission which has been granted in respect of the land, by discontinuing any use of the land or by restoring the land to its condition before the breach took place; or

(b) remedying any injury to amenity which has been caused by the breach.

(5) An enforcement notice may, for example, require—

(a) the alteration or removal of any buildings or works;

(b) the carrying out of any building or other operations;

(c) any activity on the land not to be carried on except to the extent specified in the notice; or

(d) the contour of a deposit of refuse or waste materials on land to be modified by altering the gradient or gradients of its sides.

(6) Where an enforcement notice is issued in respect of a breach of planning control consisting of demolition of a building, the notice may require the construction of a building (in this section referred to as a "replacement building") which, subject to subsection (7), is as similar as possible to the demolished building.

(7) A replacement building—

(a) must comply with any requirement imposed by any enactment applicable to the construction of buildings;

(b) may differ from the demolished building in any respect which, if the demolished building had been altered in that respect, would not have constituted a breach of planning control;

(c) must comply with any regulations made for the purposes of this subsection (including regulations modifying paragraphs (a) and (b)).

(8) An enforcement notice shall specify the date on which it is to take effect and, subject to sections 175(4) and 289(4A), shall take effect on that date.

(9) An enforcement notice shall specify the period at the end of which any steps are required to have been taken or any activities are required to have ceased and may specify different periods for different steps or activities; and, where different periods apply to different steps or activities, references in this Part to the period for compliance with an enforcement notice, in relation to any step or activity, are to the period at the end of which the step is required to have been taken or the activity is required to have ceased.

(10) An enforcement notice shall specify such additional matters as may be prescribed, and regulations may require every copy of an enforcement notice served under section 172 to be accompanied by an explanatory note giving prescribed information as to the right of appeal under section 174.

(11) Where—

(a) an enforcement notice in respect of any breach of planning control could have required any buildings or works to be removed or any activity to cease, but does not do so; and

(b) all the requirements of the notice have been complied with,

then, so far as the notice did not so require, planning permission shall be treated as having been granted by virtue of section 73A in respect of development consisting of the construction of the buildings or works or, as the case may be, the carrying out of the activities.

(12) Where—

(a) an enforcement notice requires the construction of a replacement building; and

(b) all the requirements of the notice with respect to that construction have been complied with,

planning permission shall be treated as having been granted by virtue of section 73A in respect of development consisting of that construction.

173A Variation and withdrawal of enforcement notices

(1) The local planning authority may—

(a) withdraw an enforcement notice issued by them; or

(b) waive or relax any requirement of such a notice and, in particular, may extend any period specified in accordance with section 173(9).

(2) The powers conferred by subsection (1) may be exercised whether or not the notice has taken effect.

(3) The local planning authority shall, immediately after exercising the powers conferred by subsection (1), give notice of the exercise to every person who has been served with a copy of the enforcement notice or would, if the notice were re-issued, be served with a copy of it.

(4) The withdrawal of an enforcement notice does not affect the power of the local planning authority to issue a further enforcement notice.

174 Appeal against enforcement notice

(1) A person having an interest in the land to which an enforcement notice relates or a relevant occupier may appeal to the Secretary of State against the notice, whether or not a copy of it has been served on him.

(2) An appeal may be brought on any of the following grounds—

(a) that, in respect of any breach of planning control which may be constituted by the matters stated in the notice, planning permission ought to be granted or, as the case may be, the condition or limitation concerned ought to be discharged;

(b) that those matters have not occurred;

(c) that those matters (if they occurred) do not constitute a breach of planning control;

(d) that, at the date when the notice was issued, no enforcement action could be taken in respect of any breach of planning control which may be constituted by those matters;

(e) that copies of the enforcement notice were not served as required by section 172;

(f) that the steps required by the notice to be taken, or the activities required by the notice to cease, exceed what is necessary to remedy any breach of planning control which may be constituted by those matters or, as the case may be, to remedy any injury to amenity which has been caused by any such breach;

(g) that any period specified in the notice in accordance with section 173(9) falls short of what should reasonably be allowed.

(3) An appeal under this section shall be made. . .—

(a) by giving written notice of the appeal to the Secretary of State before the date specified in the enforcement notice as the date on which it is to take effect; or

(b) by sending such notice to him in a properly addressed and pre-paid letter posted to him at such time that, in the ordinary course of post, it would be delivered to him before that date[; or

(c) by sending such notice to him using electronic communications at such time that, in the ordinary course of transmission, it would be delivered to him before that date].]

(4) A person who gives notice under subsection (3) shall submit to the Secretary of State, either when giving the notice or within the prescribed time, a statement in writing—

(a) specifying the grounds on which he is appealing against the enforcement notice; and

(b) giving such further information as may be prescribed.

(5) If, where more than one ground is specified in that statement, the appellant does not give information required under subsection (4)(b) in relation to each of those grounds within the prescribed time, the Secretary of

State may determine the appeal without considering any ground as to which the appellant has failed to give such information within that time.

(6) In this section "relevant occupier" means a person who—

(a) on the date on which the enforcement notice is issued occupies the land to which the notice relates by virtue of a licence . . . ; and

(b) continues so to occupy the land when the appeal is brought.

175 Appeals: supplementary provisions

(1) The Secretary of State may by regulations prescribe the procedure which is to be followed on appeals under section 174 and, in particular, but without prejudice to the generality of this subsection, may—

(a) require the local planning authority to submit, within such time as may be prescribed, a statement indicating the submissions which they propose to put forward on the appeal;

(b) specify the matters to be included in such a statement;

(c) require the authority or the appellant to give such notice of such an appeal as may be prescribed;

(d) require the authority to send to the Secretary of State, within such period from the date of the bringing of the appeal as may be prescribed, a copy of the enforcement notice and a list of the persons served with copies of it.

(2) The notice to be prescribed under subsection (1)(c) shall be such notice as in the opinion of the Secretary of State is likely to bring the appeal to the attention of persons in the locality in which the land to which the enforcement notice relates is situated.

(3) Subject to section 176(4), the Secretary of State shall, if either the appellant or the local planning authority so desire, give each of them an opportunity of appearing before and being heard by a person appointed by the Secretary of State for the purpose.
[(3A) Subsection (3) does not apply to an appeal against an enforcement notice issued by a local planning authority in England.]

(4) Where an appeal is brought under section 174 the enforcement notice shall [subject to any order under section 289(4A)] be of no effect pending the final determination or the withdrawal of the appeal.

(5) Where any person has appealed to the Secretary of State against an enforcement notice, no person shall be entitled, in any other proceedings instituted after the making of the appeal, to claim that the notice was not duly served on the person who appealed.

(6) Schedule 6 applies to appeals under section 174, including appeals under that section as applied by regulations under any other provisions of this Act.

[(7) Subsection (5) of section 250 of the Local Government Act 1972 (which authorises a Minister holding an inquiry under that section to make orders with respect to the costs of the parties) shall apply in relation to any proceedings before the Secretary of State on an appeal under section 174 as if those proceedings were an inquiry held by the Secretary of State under section 250.]

176 General provisions relating to determination of appeals

[(1) On an appeal under section 174 the Secretary of State may—

(a) correct any defect, error or misdescription in the enforcement notice; or

(b) vary the terms of the enforcement notice,

if he is satisfied that the correction or variation will not cause injustice to the appellant or the local planning authority.

(2) Where the Secretary of State determines to allow the appeal, he may quash the notice.

(2A) The Secretary of State shall give any directions necessary to give effect to his determination on the appeal.]

(3) The Secretary of State—

(a) may dismiss an appeal if the appellant fails to comply with section 174(4) within the prescribed time; and

(b) may allow an appeal and quash the enforcement notice if the local planning authority fail to comply with any requirement of regulations made by virtue of paragraph (a), (b), or (d) of section 175(1) within the prescribed period.

(4) If [section 175(3) would otherwise apply and] the Secretary of State proposes to dismiss an appeal under paragraph (a) of subsection (3) [of this section] or to allow an appeal and quash the enforcement notice under paragraph (b) of that subsection, he need not comply with section 175(3).

(5) Where it would otherwise be a ground for determining an appeal under section 174 in favour of the appellant that a person required to be served with a copy of the enforcement notice was not served, the Secretary of State may disregard that fact if neither the appellant nor that person has been substantially prejudiced by the failure to serve him.

177 Grant or modification of planning permission on appeals against enforcement notices

(1) On the determination of an appeal under section 174, the Secretary of State may—

(a) grant planning permission in respect of the matters stated in the enforcement notice as constituting a breach of planning control, whether in relation to the whole or any part of those matters or in relation to the whole or any part of the land to which the notice relates;]

(b) discharge any condition or limitation subject to which planning permission was granted;

(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.

(1A) The provisions of sections 191 to 194 mentioned in subsection (1B) shall apply for the purposes of subsection (1)(c) as they apply for the purposes of section 191, but as if—

(a) any reference to an application for a certificate were a reference to the appeal and any reference to the date of such an application were a reference to the date on which the appeal is made; and

(b) references to the local planning authority were references to the Secretary of State.

(1B) Those provisions are: sections 191(5) to (7), 193(4) (so far as it relates to the form of the certificate), (6) and (7) and 194].

(2) In considering whether to grant planning permission under subsection (1), the Secretary of State shall have regard to the provisions of the development plan, so far as material to the subject matter of the enforcement notice, and to any other material considerations.

[(3) The planning permission that may be granted under subsection (1) is any planning permission that might be granted on an application under Part III.]

(4) Where under subsection (1) the Secretary of State discharges a condition or limitation, he may substitute another condition or limitation for it, whether more or less onerous.

(5) Where an appeal against an enforcement notice is brought under section 174, the appellant shall be deemed to have made an application for planning permission [in respect of the matters stated in the enforcement notice as constituting a breach of planning control].

(5A) Where—

(a) the statement under subsection (4) of section 174 specifies the ground mentioned in subsection (2)(a) of that section;

(b) any fee is payable under regulations made by virtue of section 303 in respect of the application deemed to be made by virtue of the appeal; and

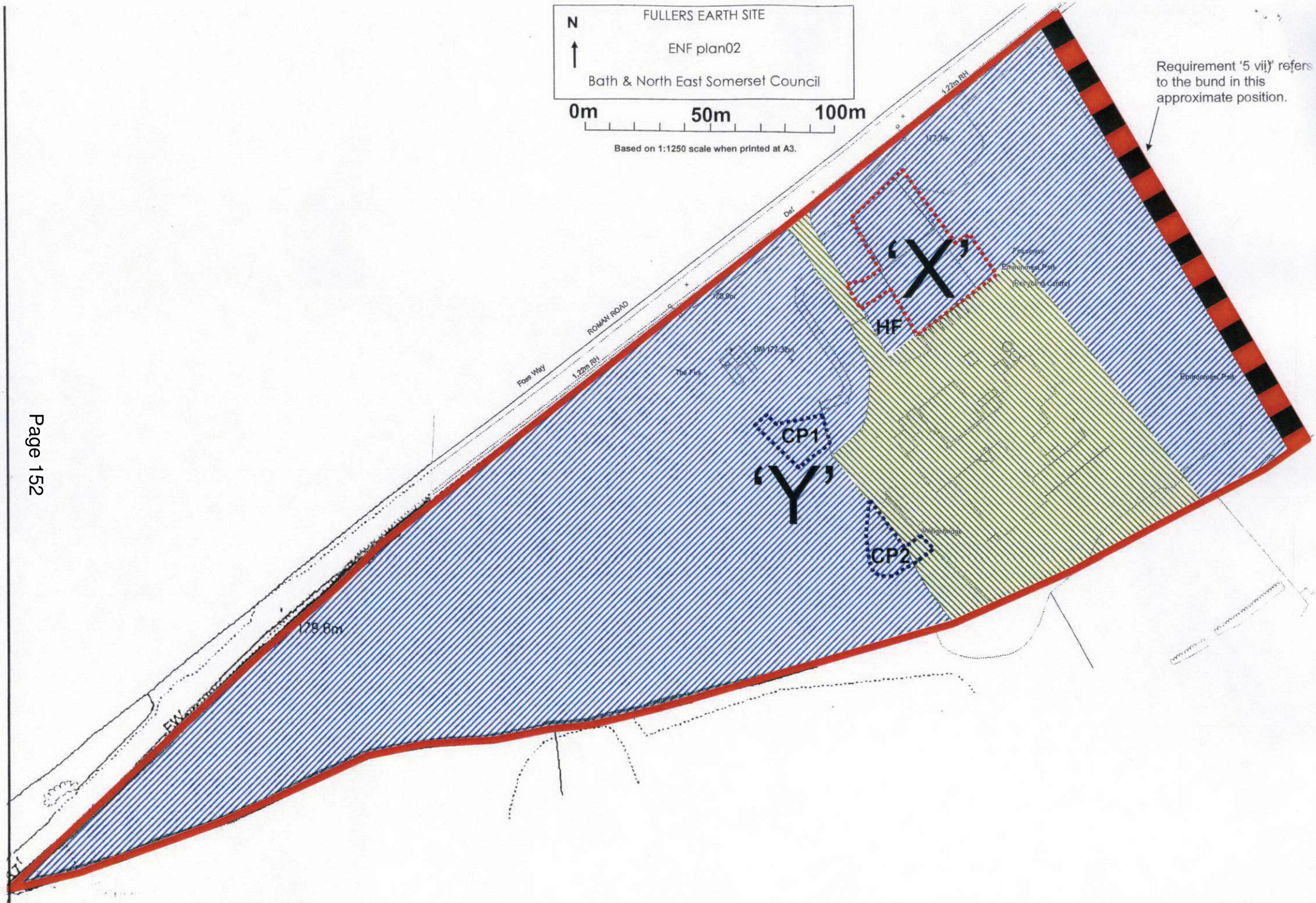
(c) the Secretary of State gives notice in writing to the appellant specifying the period within which the fee must be paid,

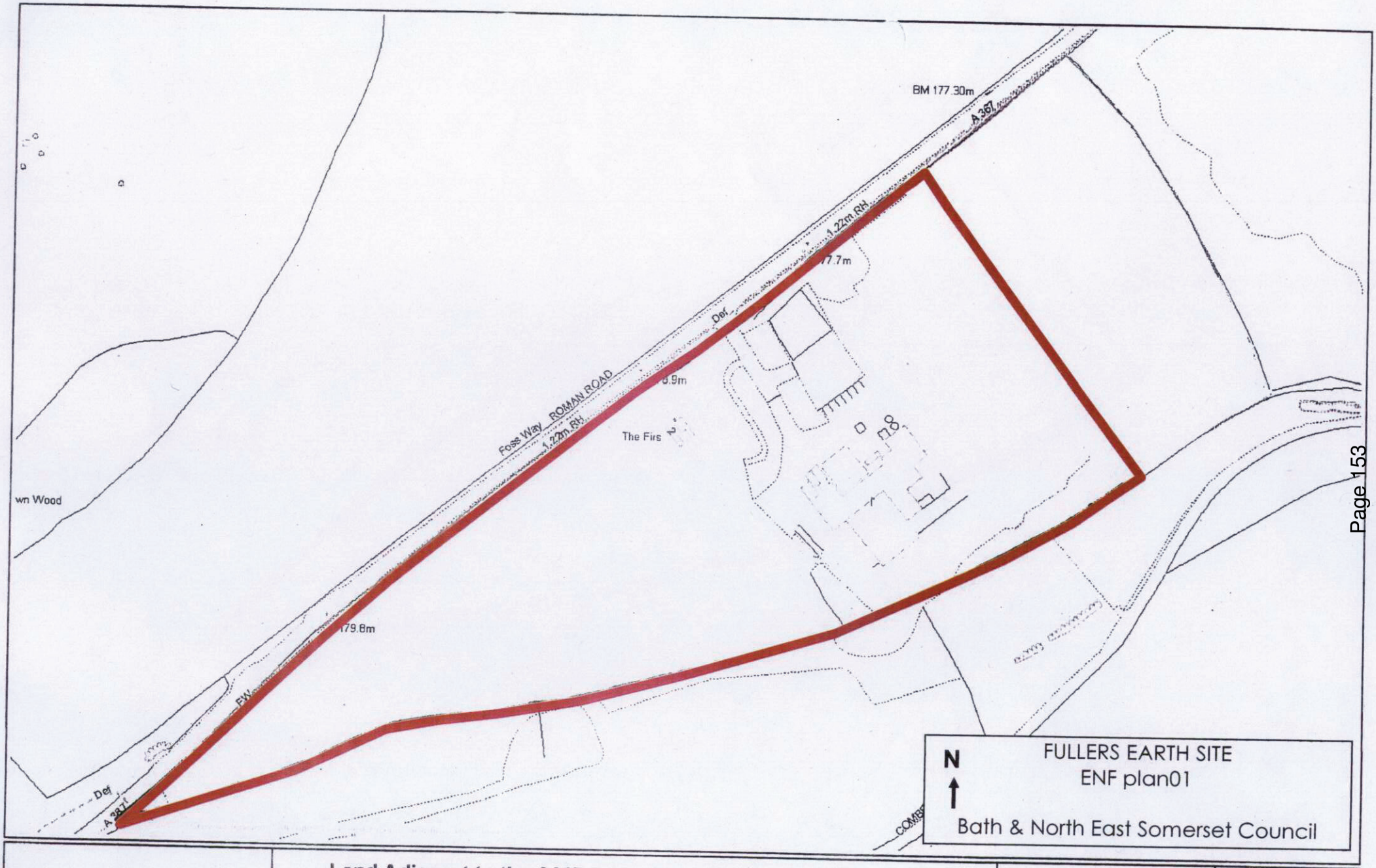
then, if that fee is not paid within that period, the appeal, so far as brought on that ground, and the application shall lapse at the end of that period.]

(6) Any planning permission granted under subsection (1) on an appeal shall be treated as granted on the application deemed to have been made by the appellant.

(7) In relation to a grant of planning permission or a determination under subsection (1) the Secretary of State's decision shall be final.

(8) For the purposes of section 69 the Secretary of State's decision shall be treated as having been given by him in dealing with an application for planning permission made to the local planning authority.


N
FULLERS EARTH SITE
ENF plan02
Bath & North East Somerset Council
0m
50m
100m
Based on 1:1250 scale when printed at A3.
Requirement '5 vii)' refers to the bund in this approximate position.
'X'
HF
CP1
'Y'
CP2
ROMAN ROAD
Foss Way
1.22m RH
178.8m
177.3m
BH 177.32m
The Firs
Weighbridge
Environment Park
(Recycling Centre)
Environment Park



Land Adjacent to the A367 Fosse Way, Odd Down, Bath

Bath & North East Somerset Council, Planning Services,
Trimbridge House, Trim Street, Bath BA1 2DP

N
W E
S

Scale 1/2500

Centre = 372835 E 161211 N

Date 5/11/2007
Drawn by:

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EIA SCREENING OPINION
Unauthorised Industrial use of the former Fullers Earth Works

This report should be read in conjunction with the completed screening assessment pro-forma.

Introduction and Purpose of Report

The Council is currently considering the expediency of enforcement action at this site in a separate report.

For the purposes of EIA screening, it is considered necessary to establish what the permitted baseline for the site is and then to consider the likelihood of significant effects arising from the unauthorised activities both in isolation and in combination with the permitted activities for the site.

Permitted Baseline

The permitted baseline for the former fullers earth works site (outlined in red on ENF Plan 01) is

- Agricultural land with permission for an agricultural improvement scheme involving the importation of soils;
- Residential at 1 and 2 The Firs; and
- Historical general industrial use (B2) on the area hatched green on ENF Plan 02.

The Unauthorised Development

The unauthorised development is the encroachment of industrial uses and associated structures beyond the extent of the historical general industrial use of the site, including:

- A mixed general industrial and storage and distribution use including the historic central part of the site as well as extended areas into surrounding land;
- The use of separate areas for the storage, distribution and repair of scaffolding as well as another unit as a stonemasons' yard

The unauthorised development on the site is considered to fall within paragraph 10 of Schedule 2 of the EIA regulations and the applicable threshold for the need for a screening opinion for development in this category is o.5ha. The site is 6.25ha which is above the indicative threshold of 0.5 ha.

Setting aside the part of the site used in the past for agriculture, residential and green waste storage, the remaining industrial part of the site also exceeds the 0.5ha indicative threshold. This, in the view of the Council, is in use in part for mixed use purposes including waste processing use, scaffolding storage/repair, the stone masons contractor's yard as well as areas connected to these uses. The compound areas are similar in character to an industrial estate and the large area used primarily for waste processing utilises some buildings from the previous fullers earth use along with a large storage area with piles of material.

Circular 2/99 indicates in annex A at para A16, that "industrial and manufacturing development" may well require EIA if the site is more than 10 hectares although smaller developments are more likely to require EIA if the are expected to give rise to significant discharges of waste, emission or pollutants or operational noise. In relation to "Industrial Estates", paragraph A17 states that EIA is more likely to be required if the site area is more than 20ha. In determining whether significant effects are likely, traffic, emissions and noise should be given particular consideration.

Consideration of Potential Environmental Effects

Traffic

The Council has undertaken a traffic count of the current activities on the site which recorded 157 two way movements over the 12 hour period 0700 to 1900. Each of the uses within the compound leads to HGV traffic as does the waste processing use. The stonemasons and scaffolding uses are only responsible for a limited number of traffic movements per day taking materials and equipment to and from sites where they are utilised. The skip hire use within the compound has a more steady flow of traffic through the day.

The waste processing use leads to a regular flow of HGVs throughout the day.

There are also a number of private vehicles regularly on site which appear to be related to all of the uses.

The agricultural improvements will require a short term increase in traffic to import 55,000m^3 of material however, following that this aspect of the use is only likely to require some limited agricultural traffic.

However the site has good direct access on to the A367 which has approximately 15,000 two way traffic movements between 0700 and 1900.

The increased numbers of vehicles from the unauthorised activities are not considered to be so noticeable or substantial either in isolation or in combination with the permitted activities as to have significant impacts.

Air Quality and Noise

Although there are two dwellings within the site, it is otherwise remote from residential areas. The site has a background history for some industry and this context is relevant to be taken into account because those dwellings would be affected by the historic use. The former use may have led to dust within the air and noise from machinery.

The uses on the site are not, from what we know about them, obviously substantial polluters in terms of gaseous emissions or smells. The industrial processes within the compounds may lead to some temporary dust emissions for example when stone is being cut or dressed but this will have a local impact within the site. The waste processing use appears to involve largely inert material which is sorted and moved around. Although there have been some incidents of fires on the site, the circumstances of these are not precisely known but they do not appear to form a normal part of the waste processing operations.

Within the compound, the industrial uses may require the use of hand-tools for stone-cutting and other maintenance but at the time of site visits by officers, these noises are not generally distinguishable from background noise levels.

The waste processing use is the main source of noise on the site. The use requires the operation of large utility vehicles with hydraulic systems and they are the source of banging and clattering noises. These are very noticeable locally within the site but whilst audible are not overbearing outside of the site given that the main concentration of activity is in a central position within the site and much of it takes place under cover. The buildings help to reduce the impacts and the close proximity of the busy A367 provides a high level of background noise in this area.

Water

The site is not subject to designations relating to water source protection or hot springs protection. It is not within an indicative flood plain or overland flood paths.

Most of the materials on site appear to be inert with little potential for harmful leaching into the ground waters. There may be some local impacts due to spillages and leaking of fuel and oil from machinery and vehicles.

No significant impacts on the water environment are therefore considered likely as a result of the unauthorised activities either in isolation or in combination with the permitted uses for the site.

Ecology

There are local policies relating to the site being designated as a site of nature conservation importance. This is a local designation and no information is available on the value of the site prior to the unauthorised activities. It is however likely that some harm has occurred to the potential for nature conservation at the site due to the removal of grassland and some other semi-natural features which have been replaced by hard-surfacing, fencing and the piles of stored material are. Because this is an unauthorised development,

there has been no opportunity for the Council to request ecological surveys. The impacts on such sensitivities will have already occurred. Much of the hard-surfacing of the "compound" areas will make any possible impacts difficult to reverse. The non-hard-surfaced areas are also heavily used by vehicles and are used for storing skips and materials such as gravel and hard-core.

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

However having regard to the local nature of the designation no significant impacts on ecology are considered likely to have occurred as a result of the unauthorised activities either in isolation or in combination with the permitted activities.

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

Landscape/Visual

The site is within the Green Belt and within the forest of Avon area (where LP policy NE.5 applies seeking to respect the developing woodland setting not conflicting with objectives of the forest plan). It adjoins an Area of Outstanding Natural Beauty.

The compound areas create local visual impacts. The piles of stored material are obvious from the main road but there have been large buildings in the centre of the site for many years and prior to the occupancy by current operators. This includes high buildings that can be seen from outside of the site.

These impacts are significant in terms of the expediency of taking enforcement action and there has been a change in character of the site. There have been extensions to the buildings in the centre of the site but overall it is considered that these impacts are not significant with respects to the EIA regulations.

Geology

The site is designated as a Regionally Important Geological Site within the Local Plan (policy NE.9). The activities and developments are on the surface of the land apart from perhaps some footings where buildings have been extended. However, there are no obvious significant irreversible impacts.

Cultural Heritage

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

Cumulative Impacts

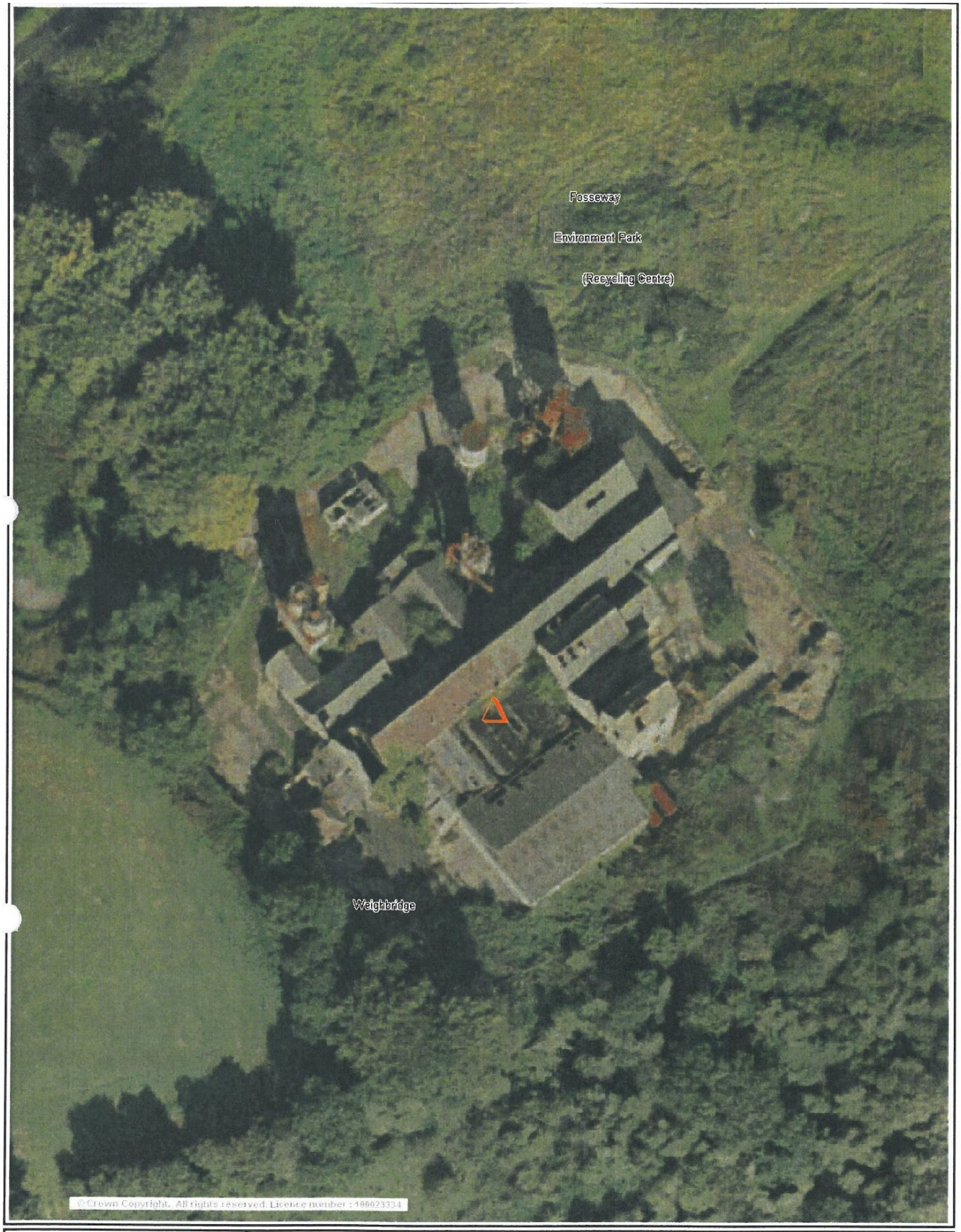
The above sections consider the environmental effects of the unauthorised development both in isolation and in combination with the permitted uses for the site and no significant cumulative impacts have been identified.

<u>Summary and Conclusion</u>

Although the site is not within a "sensitive area", the current use of the site is considered to fall within part 10 within the first column of schedule 2 to the EIA regulations (infrastructure projects) and exceeds the relevant thresholds in column 2. I therefore consider this requires screening for EIA.

Overall, the environmental effects from the unauthorised activities on the site both in isolation and in combination with the existing permitted uses appear to be local in impact and do not have significant effects on the environment. EIA is not therefore required.

APPENDIX 1



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Bath BA1 2DP

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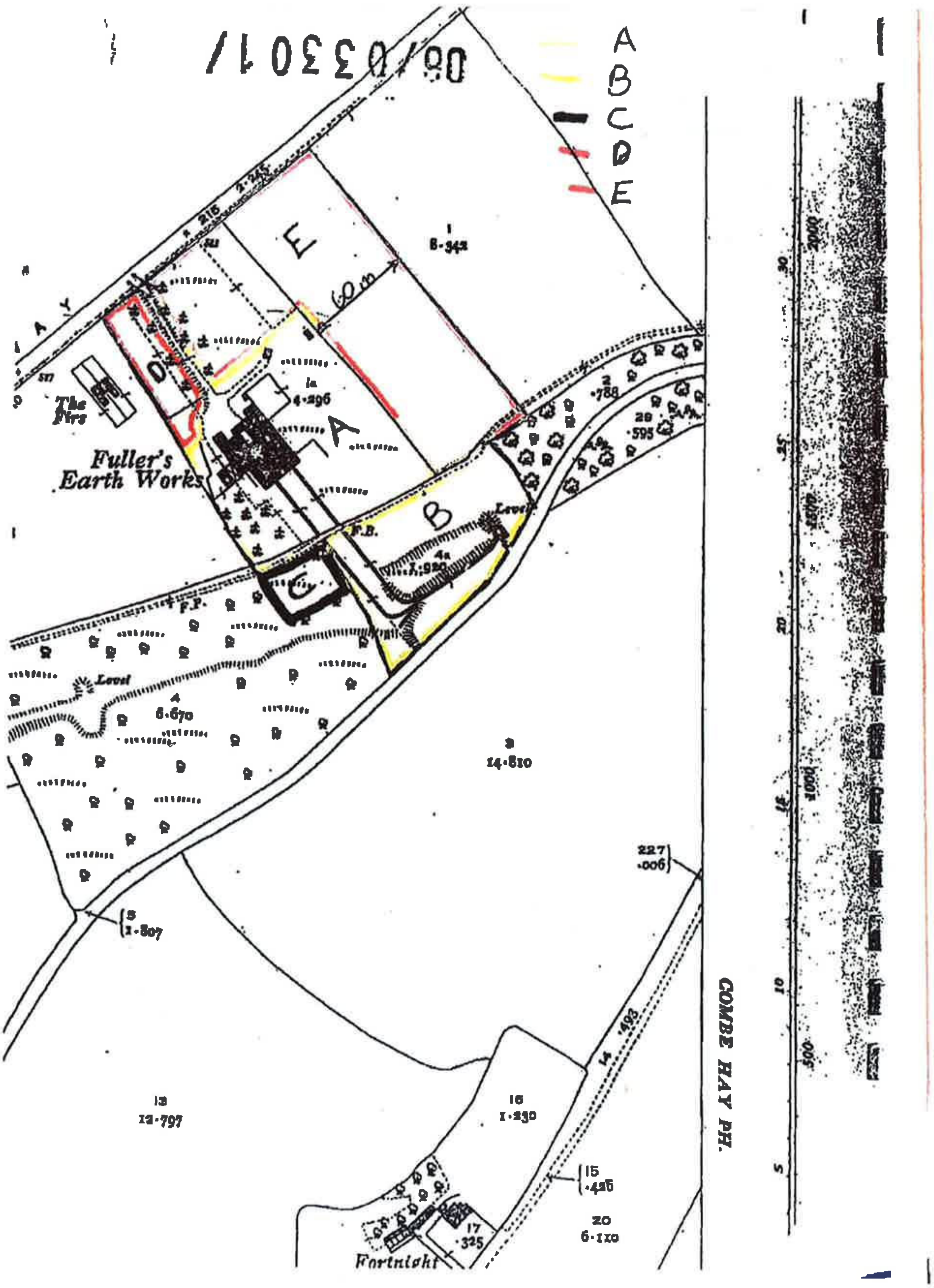
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