

## Bath and North East Somerset Council

MEETING: **Development Control Committee**

AGENDA

MEETING DATE: **5<sup>th</sup> January 2012**

ITEM NO:

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

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

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

DATE PREPARED: **20<sup>th</sup> 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
<b>TITLE: Report - Land at Formers Fullers Earth Works, Fosseway, Combe Hay, Bath</b>
<b>WARD : Bathavon West</b>

## **1.0 PURPOSE OF REPORT**

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

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

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

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

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

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

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

## **2.0 BACKGROUND**

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

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

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

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

- A new driveway;
- Fences and gates;

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

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

### **Planning history**

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

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

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

- In 2005 planning permission was refused for the demolition of existing buildings and silos of 1555m<sup>3</sup> and the erection of a triple pitched steel framed industrial building of 2250m<sup>3</sup> (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 13<sup>th</sup> December 2010. A further application to discharge conditions was then submitted (11/01516/COND) and approved.

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

- 3.01 The 2006 CLEU application introduced a map describing various Areas of the land as Areas A – E. Whilst different maps have been used to describe more recent activities, the CLEU plan has become familiar to most people in dealing with this site and is therefore used here as a basis for describing the activities there.
- 3.02 A number of visits into the site (which can be seen from the main road) have been undertaken. A further site visit has recently taken place, on 7 December 2011 with the co-operation of the landowner. The general descriptions of uses taking place are set out above but it is necessary to look at how those uses are distributed across the site, the degree of relationship between them in terms of function as well as who operates them.



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

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

- 3.04 In 2006 Gazelle Properties Ltd submitted an application for a Certificate of lawfulness of existing use ("CLEU"). The application related to the whole of the site A-E and sought to establish on the balance of probability that the use of the whole of that site for B2 (General Industrial) use was lawful as having begun prior to 31 December 1963. The evidence submitted in support of that application did not consider the aerial photographs which were not available at that time but which are considered below.
- 3.05 The Application was withdrawn prior to determination but the evidence that was submitted in support provides useful background in assessing the lawful use of the site. In addition, the reports of the Planning Inspector and the Secretary of State in considering the called in Planning Application 00/02417/FUL assist in clarifying matters and are considered below.
- 3.06 The application for the Certificate was accompanied by the following evidence;
- (i) A Statement submitted by the Applicants agent;
  - (ii) Statutory Declaration of Mr Andy Ridings, who was at that time the Company secretary of Gazelle Properties Limited;
  - (iii) Statutory Declaration of Mr Albert Upshall, a former employee of the site; and
  - (iv) Documentary evidence

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

The Council's position.

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

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

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

The Inspectors findings.

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

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

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

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

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

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

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

3.014 At paragraph 432 the Inspector commented;

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

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

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

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

Evidence submitted with the CLEU Application.

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

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

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

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

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

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

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

3.020 The statutory declaration of Andy Ridings comments

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

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

## Other Documentary Evidence

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

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

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

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

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

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

### **Photographs.**

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

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

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

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



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

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

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

### **Further Representations.**

#### **Gazelle Properties and site operators**

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

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

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

(f) Beechwood Environmental Logistic Limited

(g) Aggsales

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

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

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

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

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

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

### **Waste Recycling @ Bath Ltd**

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

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

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

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

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

### **Stonecraft of Bath Ltd**

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

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

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

### **Maple Scaffolding.**

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

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

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

### **Protect Bath/Victims of Fullers Earth**

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

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

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

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

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

3.052 Full representations can be found at

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

## **Conclusions**

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

#### **Area B**

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

#### **Area C**

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

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

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

#### **4.0 EXPEDIENCY OF TAKING ENFORCEMENT ACTION**

##### **HIGH COURT JUDGMENT**

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

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

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

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

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

- 4.07 On the first issue, the Committee should be aware that the Council has had discussions with agents acting on behalf of the owners of the site. These discussions have been to pursue the implementation of the Council's Policies set out in the JWCS. In particular the discussions have been in relation to the implementation of Policy 5 of the JWCS. This indicates that planning permission for a residual waste treatment facility will be granted on this site, as identified in the allocation plan attached, subject to development management policies.
- 4.08 The discussions have included national waste treatment operators. Advice has been provided in respect of the process of bringing a planning application forward and early officer opinions have been given in relation to possible technologies that would be appropriate for waste treatment at the site. It is fair to say that these discussions are at a very early stage but they do offer an indication that there is interest in bringing forward a proposal which will deliver a facility required in the JWCS. The owner's agents and operators have indicated that these discussions should remain confidential at this stage. This is quite understandable and indeed not unusual given the commercial nature of aspects of the discussion.
- 4.09 It should also be stated that these discussions have been instrumental and helpful in facilitating the recent inspection of the site. This in turn has facilitated the preparation of this report. It is clear from these discussions that the owners of the site are clearly interested in actively investigating the prospect of a proposal which would implement the Council's adopted policy for the site. Council officers will continue to provide support and advice to assist in bringing a suitable proposal forward for consideration.
- 4.010 These discussions are considered to be a material consideration in the assessment expediency of taking enforcement action.

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

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

### **Development Plan policies**

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

#### **Other material Considerations – emerging Local Policy**

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

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

#### **Other material Considerations – National Policy**

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

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

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

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

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

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

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

#### **Other material considerations – representations received**

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

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

Other concerns are:

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

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

### **Application of development plan and other material considerations**

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

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

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

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

4.035 The main issues to consider in assessing this are:

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

***Green Belt, countryside and setting of the WHS***

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

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

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

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

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

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

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

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

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

#### ***Residential living conditions***

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

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



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

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

### ***Impacts upon highway safety***

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

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

### ***Nature Conservation***

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

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

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

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

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

### ***Environmental Impact Assessment.***

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

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

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

4.054 The screening opinion considered the following potential environmental effects;

*(i) Traffic*

4.055 There is a regular flow of HGVs to and from the site on a daily basis as part of the lawful B2 use of the site. The stonemasons and scaffolding uses are likely to lead to a few traffic movements per day taking materials and equipment to and from sites where they are utilised, and in addition there is likely to be a short term increase in traffic in order to import 55,000m<sup>3</sup> 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.*